

Approved: 4-29-99
Date

MINUTES OF THE HOUSE COMMITTEE ON ENVIRONMENT.

The meeting was called to order by Chairperson Joann Freeborn at 3:30 p.m. on March 16, 1999 in Room 423-S of the Capitol.

All members were present except:

Committee staff present: Raney Gilliland, Legislative Research Department
Emalene Correll, Legislative Research Department
Mary Torrence, Revisor of Statutes
Mary Ann Graham, Committee Secretary

Conferees appearing before the committee: John Peck, Law Professor, Kansas University Law School, Green Hall, Lawrence, KS 66045
Derenda Mitchell, Assistant General Counsel, KS Dept. of Agriculture, 901 S Kansas, Topeka, KS 66612-1280
Connie Owen, 11201 W 116th Street, Overland Park, KS 66210
Wayne Bossert, Board of Directors, NW Kansas GW Management District #4
Charles Benjamin, KS Natural Resources Council & Sierra Club KS Chapter, 935 S Kansas Ave., Suite 200, Topeka, KS 66612
Chris Wilson, Kansas Agriculture Aviation Association, 4210 Wamteaw, Wamego, KS 66547
Mary Jane Stattelmann, Assistant Secretary, KS Dept. of Agriculture, 901 S Kansas, Topeka, KS 66612-1280
Gerald Blain, Kansas Water Authority, 455 N. Main, Wichita, KS 67202
Bob Hooper, Solomon River Basin Advisory Committee, Box 3, Bogue, KS 67625
Richard Wenstrom, Water PACK, RR 1, Box 107, Kinsley, KS 67547
Bob Gilbert, Lower Republican Water Association, RR 2, Box 96, Belleville, KS 66935
Sharon Falk, Manager, Big Bend GW Management District #5
Terry Nelson, RR 2, Box 18, Long Island, KS 67647

Others attending: See attached list

Chairperson Joann Freeborn called the meeting to order at 3:30 p.m. in room 519-S. She introduced visiting legislators in the audience, Rep. Cindy Hermes, Rep. Ward Lloyd and Senator Stan Clark. She reviewed the committee meeting agenda for Thursday, March 18, there will be hearings on **HB2387** and **HB2484**, also possible action on bills previously heard. She announced there would be no action taken today on bills previously heard.

The Chairperson opened public hearing on **HB2518**:

HB2518: An act concerning appropriation of water for beneficial use; relating to issuing certificates of appropriation; amending K.S.A. 82a-714 and repealing the existing section.

Raney Gilliland, Legislative Research Department explained the bill.

The Chairperson welcomed the first guest, John Peck, Law Professor, Kansas University Law School. He addressed the committee at the request of Rep. Laura McClure and gave his opinions on a neutral basis on **HB2518** and **SB287**. He believes the problems with **HB2518** might be able to be solved this session. This

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bill would require the chief engineer to certify water rights within one year of receiving the notice and proof of constructing the diversion works and diverting water during the perfection period. If the legislature deems the certification process to be in need of correction, it should correct it. (See attachment 1)

Derenda Mitchell, Assistant General Counsel, Kansas Department of Agriculture, appeared before the committee in support of the bill. (See attachment 2) The Department concurs with the need for reasonable deadlines in certifying water rights, and with a few amendments, look forward to implementation of a schedule that will aid the water right permit holder in planning for the beneficial use of water in Kansas. (See attachment 3)

Chairperson Freeborn welcomed Connie Owen, Overland Park, Kansas. She appeared in opposition to the bill. She was Assistant Legal Counsel for the Chief Engineer of the Division of Water Resources from 1992 to 1996. Today's testimony was her own opinion, based on her experience within the current system of water rights management. She believes **HB2518** basically sets an unreasonably short period of time for the Chief Engineer and his staff to complete the certification process. If the Chief Engineer does not meet this short deadline, then certificates shall be issued for the full amount approved in the initial permit. (See attachment 4)

Wayne Bossert, Manager, Northwest Kansas GW Management District #4, appeared in opposition to the bill. He believes this bill, whether intended or not, will affect SW Kansas for more than any other area of the state since the certification process there lags for behind the rest of the state. The reasons for this stem mostly from the number and complexity of water rights in this area. (See attachment 5)

Charles Benjamin, Legislative Coordinator, KS Chapter of Sierra Club and KS Natural Resource Council, appeared in opposition to the bill. He believes that the provisions of this legislation, if enacted in its current form, would lead to a tremendous increase in water usage. Such an increase in water usage has the potential to more rapidly deplete aquifers in Kansas that are currently in danger of depletion and put more aquifers at risk. (See attachment 6) Questions and discussion followed.

Written testimony only, was provided from Ivan W. Wyatt, President, Kansas Farmers Union, in opposition to the bill (See attachment 7)

The Chairperson closed the hearing on **HB2518**. She opened public hearing on **SB287**:

SB287: An act concerning the chief engineer of the division of water resources of the department of agriculture; relating to powers thereof.

Raney Gilliland, Legislative Research Department, explained the bill. He distributed a copy of Kansas Water Law and History of Authority of the Chief Engineer (See attachment 8); a copy of Report on Kansas Legislative Interim Studies to the 1977 Legislature (See attachment 9); a copy of a flow chart from Rep. Joann Freeborn showing Rules and Regulations and Appeals System, Current and after **SB287** (See attachment 10); a memo from Raney Gilliland, Principal Analyst, regarding Classifies Positions with Rule and Regulation Authority (See attachment 11); and a memo from Mary Torrence, Assistant Revisor of Statutes, regarding Appeals to District Court from Administrative Decisions of Departmental Divisions (See attachment 12)

The Chairperson welcomed Chris Wilson, Executive Director of Kansas Agricultural Aviation Association, to the committee. She appeared in a neutral position to the bill. KAAA is the association of aerial applicators of crop protection chemicals in the state and are not regulated by the Division of Water Resources. They are, however, regulated by other programs within the Department of Agriculture, and were involved in discussions at the time the Department was established. Because of that involvement, she was asked to provide the committee her recollection of the discussions held at that time relative to this bill. (See attachment 13).

John Peck, Law Professor, Kansas University Law School, Lawrence, KS was welcomed back to the committee. He appeared in a neutral position to the bill. He does not understand how the legislature could

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be ready to pass this bill without further study. As a Kansan, he would like to see good, fair, unbiased legislation that benefits all interests and all water users in the state of Kansas. In short, he believes that a better approach to the current issues involving the chief engineer is to study the matter prior to amending current law. (See attachment 1)

Mary Jane Stattelman, Assistant Secretary, Kansas Department of Agriculture, addressed the committee on a neutral basis and discussed the concepts expressed in the bill. She believes even though the bill is rather lengthy, there are two main concepts that it addresses, first, places rule and regulation authority with the secretary and second, establishes a uniform hearing procedure for all appeals dealing with water issues that are regulated by KDA. (See attachment 14) She presented amendments to the bill. (See attachment 15)

The Chairperson welcomed Gerald Blain, City of Wichita, to the committee. He appeared in opposition to the bill. He believes there is no need to rush through legislation this year that could have dramatic impacts on the State's most vital resource. If there are problems with the current system, prudence would dictate that there should be a cautious, thorough, review of all of the issues before there is any legislative action. (See attachment 16)

Bob Hooper, Solomon River Basin Advisory Committee, Bogue, Kansas, was welcomed to the committee. He appeared in opposition to the bill. He believes there has been a quick flurry of water proposals in the House and Senate in the last few months and that most would overturn statutory provisions and powers in place since 1945, and diminish the authority and independence of the Division of Water Resources, especially that of the Chief Engineer. (See attachment 17)

Richard Wenstrom, Director, Board of the Water Protection Association of Central Kansas (Water PACK), was welcomed to the committee. He appeared in opposition to the bill on behalf of Water PACK. The farmers who comprise the Board of Directors, respectfully request that the bill be sent to interim committee for further study or the Legislature adopt a resolution to establish a 23 member task force to review water law administration in Kansas. (See attachment 18)

Wayne Bossert, Manager, Northwest Kansas GW Management District #4, was welcomed. He appeared in opposition to the bill on behalf of the Board of Directors. They feel there are clearly too many unanswered questions and too many unforeseeable possibilities to be making decisions this late in the session. They ask that these issues be sent to interim session for more complete consideration. (See attachment 19) He also submitted a statement by the Western Kansas GW Management District #1, in opposition to the bill. (See attachment 20)

Written testimony only was distributed to the committee from Michael T. Dealy, Manager, Equus Beds GW Management District #2, in opposition to the bill. (See attachment 21)

The Chairperson welcomed Bob Gilbert, Lower Republican Water Association, Belleville, KS, to the committee. He presented testimony in opposition to the bill on behalf of the Association, they fear that the shift of power from the chief engineer to the secretary of agriculture will politicize the administration of Kansas Water Law. They feel that there needs to be continuity in the administration of Kansas Water Law. They recognize there are problems with the present system, but rather than make spontaneous changes, suggest that this issue be studied by an interim legislative committee. (See attachment 22) Questions and discussion followed.

Connie Owen, Overland Park, Kansas, was welcomed back to the committee. She appeared in opposition to the bill. She believes this bill transfers the many regulatory roles of the Chief Engineer to the Secretary of Agriculture. It also imposes the mechanics of the Administrative Procedure Act onto the decisions of the Chief Engineer, making his decisions appealable to the Secretary. She listed and reviewed the reasons she believes the bill is ill advised. (See attachment 4)

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MINUTES OF THE HOUSE COMMITTEE ON ENVIRONMENT, Room 423-S Statehouse, at 3:30 p.m. on March 16, 1999.

Sharon Falk, Manager, Kansas Groundwater Management District #5, was welcomed to the committee. She appeared in opposition to the bill and requests the committee consider the bill for further study in the interim legislative session. She feels this will give the legislature and the people of the state the necessary time to determine the impact of changing laws that affect each and every citizen in the State of Kansas. (See attachment 23)

A letter to the Governor from Kansas Groundwater Management Districts Association, Stafford, Kansas, was distributed. The Association is in opposition to the bill and listed a number of other water bills, which they urge the House leadership to consider hearing in an interim legislative session. (See attachment 24)

Chairperson Freeborn welcomed Terry Nelson, Long Island, Kansas, to the committee. He appeared in support of the bill. He feels this bill is a statute that has outstanding concepts that will help all water users in the state of Kansas help preserve and protect their rights and their water. This bill and the high probability that the committee will see a water banking bill in front of them next year gives him great hope that we are on the right path in water legislation. (See attachment 25) Questions and discussion followed.

Written testimony only was distributed from Mike Brzon, Courtland, Kansas, in opposition to the bill (See attachment 26); Southwest Kansas Groundwater Management District, Garden City, Kansas, in opposition to the bill (See attachment 27); Ronald E. Westervelt, President, Kansas Soybean Association, Topeka, Kansas, in opposition to the bill (See attachment 28); Henry Gillan, Jr., President, The Associated Ditches of Kansas, Garden City, in opposition to the bill (See attachment 29); David A. Brenn and Randy L. Hayzlett, The State of Kansas Compact Members of the Kansas-Colorado Arkansas River Compact Administration, in opposition to the bill (See attachment 30); Terry R. Fuller, Attorney at Law, Kinsley, Kansas, comments regarding Proposed Division of Water Resources Legislation (See attachment 31).

Information from David Pope, Chief Engineer, Division of Water Resources, Kansas Department of Agriculture, which had been requested by the committee on March 10, 1999, was distributed. (See attachment 32)

Two memorandums from Alice A. Devine, Secretary of Agriculture, Department of Agriculture, regarding Authority of Western States water regulators to adopt rules and regulations (See attachment 33) and Information regarding Western States water regulators and Legislative history of the Water Appropriation Act of 1945 (See attachment 34), were distributed, also a chart showing Rule and Regulations authority of other states. (See attachment 35)

Chairperson Freeborn announced that the hearing on **SB287** would continue on Thursday, March 18.

The meeting adjourned at 6:35

The next meeting is scheduled for March 18, 1999.

HOUSE ENVIRONMENT COMMITTEE GUEST LIST

DATE: March 16, 1999

NAME	REPRESENTING
Edward Rowe	LEAGUE OF WOMAN VOTERS / KS
Harry Sisson	Kearney Law Office
Bob Gilbert	Lower Republican Water Association
Matt Scherer	Konza Natural Resources, Inc.
David L. Pope	KS Department of Agriculture
Ernestine Walla	Stofford Co.
Tom Bogner	Dodge City, KS GMD #3
Chris Wilson	GMD 3
Granne Bogner	Oklahoma State University
John C. Peck	KLU LAW School
Connie Owen	myself
Bill Fuller	Kansas Farm Bureau
Ron Gaches	KSPE
Mike Beam	Ks. LVSTK. ASSN.
Allie Devine	Ks. Dept. of Agriculture
Mary Jane Stattelman	KS Dept of Agriculture
Derenda Mitchell	Ks. Dept. of Agriculture
Jamie Clover Adams	Governor's Office
Chris McKenzie	League of Kansas Municipalities

HOUSE ENVIRONMENT COMMITTEE GUEST LIST

DATE: March 16, 1999

NAME	REPRESENTING
Tom Bruno	Allen Assoc.
Alan Steppat	Water PACK
Bob Hooper	INDIVIDUAL
Dianne Hooper	" "
Sharon Falk	GMD #5
Clare Mann	GMD #4
WAYNE BOSSERT	GMD #4
Lon Frahm	GMD #4
Mary Fund	Ks. Rural Center
Howard Parr	INDIVIDUAL
MICHAEL W. BERRY	"
Kent Moore	Kansas Citizen
Terry Nelson	Long Island Ks
RICHARD WESTMAN	WATER PACK
Richard Antonio	Water PACK
Dennis Hall	Water PACK
Don McClure	Water PACK
Nancy Sargent	League Women Voters of Ks
Janet Stubbs	Ks. Bldg. Ind. Assn.

Senate Bill 287; House Bill 2518

John C. Peck

Professor of Law, University of Kansas School of Law

I am here at the request of Representative McClure to give my opinions on H.B. 2518 and S.B. 287. I am appearing on a neutral basis on these bills. By being neutral, I mean that I come here at the request of one of your committee members and not on my own, that I am not a lobbyist and do not represent any particular interest, and that I come to offer my assistance based on my experience and background in representing the whole range of interests in Kansas water law and in writing about Kansas water law issues. Although the goals of both bills may be laudable, I believe that both bills have problems. The problems with H.B. 2518 might be able to be solved this session. But with respect to S.B. 287, I do not understand how the legislature could be ready to pass this bill without further study. As a Kansan, I want to see good, fair, unbiased legislation that benefits all interests and all water users in the state of Kansas. Moreover, the legislation must be perceived as benefitting all of the various interests, not just one.

In my opinion, the need for corrective legislation for the water appropriation act has historically fallen into two general categories. The first is the relatively minor, corrective legislation that is not of major public policy importance, fixes a section or two of the statutes, and is relatively uncontroversial. The second category of legislation is the major policy shift, in which a way of doing things is changed radically. In Kansas, the legislature has typically not made such major policy shifts in water law without first having the benefit of a careful, objective, and unbiased study done either by or for the legislature.

I believe that the two bills before you today represent each of these two categories. H.B. 2518 calls for a change in the way the chief engineer certifies water rights. This bill represents legislation that can be enacted, in my opinion, without long and complicated legal and policy studies. In contrast, S.B. 287 makes a major change in the way the chief engineer promulgates regulations and makes decisions. This bill fits in the second category--it represents major shifts of policy that should not be made without considerable study and analysis of the current situation, alternatives, and the repercussions of changing to an alternative.

H.B. 2518 would require the chief engineer to certify water rights within one year of receiving the notice and proof of constructing the diversion works and diverting water during the perfection period. If the legislature deems the certification process to be in need of correction, it should correct it. I see several potential problems in the bill as currently written, however. First, requiring the chief engineer to handle the backlog of uncertified water rights in a short period of time, while a laudable goal, may present a real financial and personnel burden on that office, and I hope the committee would insure that this bill does not do so. It is my understanding that the number of rights eligible for certification under the bill is around 3,500. The bill requires DWR staff to complete these in the next 5 months. Is this realistic if the staff is to do its job correctly? Second, the bill is unclear on several matters. To what amounts of water is this right that is "deemed to be certified" entitled to? I guess it is certified to the amounts in the permit, but the bill is not clear on this point. Or is the quantity based on the amount in the application, rather than the permit? What is the triggering date for the one year period? Third, if these "deemed to be certified" rights receive the quantity and rate in the application or permit by virtue of the chief engineer's inability to provide information to various permit holders on a timely basis, the result may be that many water rights will be certified for larger amounts of water than were actually perfected, which could endanger and devalue other existing certified water rights and will result in other people not being able to obtain new water permits in the future. In short, I think the bill needs some work even if the committee believes the objectives are good.

S.B. 287 seems to have two general goals: to subject all of the chief engineer's proposed regulations to approval by the secretary of agriculture; and to make decisions of the chief engineer regarding permit applications, abandonment of water rights, formation of intensive groundwater use control areas (IGUCA's), and other matters subject to review by the secretary of agriculture before becoming final and eligible for judicial review. Suddenly, if this bill is passed, the focus of attention in water rights and water related regulation in Kansas shifts from an independent chief engineer with scientific expertise to the secretary of agriculture.

Under new Section 1. (a) and Section 11, the chief engineer would no longer have the power to adopt

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regulations independently from the secretary of agriculture. Indeed, under Section 11, which amends K.S.A. 82a-706a, the chief engineer could no longer adopt regulations under the appropriation act--only the secretary of agriculture could adopt them; the chief engineer would enforce them. This represents a major change in policy, a policy that has been in effect for 22 years. Because it is a major change in policy, I do not think the legislature should act quickly. I believe that this session of the legislature should follow the wise lead of earlier legislative sessions in water policy. In the past 55 years, almost every time there have been major legislative initiatives in water in Kansas, they have been preceded by and recommended by independent studies and reports. For example:

- The 1944 governor's task force study resulted in passage of the 1945 water appropriation act
- The 1957 study by KU Law Professor Shurtz resulted in amendments to the act
- The 1976 interim committee headed by Senator Droge resulted in amendments to the act, including specifically taking away from the secretary of agriculture the power to approve chief engineer regulations
- The late 1970's governor's task force report by lieutenant governor Smith resulted in amendments to the act
- The 1989 study of the Kansas Water Transfer Act (K.S.A. §§ 82a-1501, et seq.) done by me and one of my students, resulted in amendments to the transfer act

This bill is a very sweeping piece of legislation. It does not just make the chief engineer's regulations reviewable by the department of agriculture, as was the case between 1955 and 1977. It substitutes the secretary of agriculture for the chief engineer as the entity to adopt regulations under the water appropriation act, which covers all water users in the state of Kansas. K.S.A. 74-576, enacted in 1996, would seem to create a potential conflict of interest for the secretary: It charges the secretary of agriculture with the specific power and duty to "foster and promote the development and economic welfare of the agricultural industry of the state."

If the legislature were to request a study, who should study the water laws and recommend changes? Current legislation charges the Kansas Water Authority with studying water laws and recommending amendments. Alternatives to the water authority would be an interim committee of the legislature like the one in 1977, a special governor's task force like the ones appointed in 1944 and the 1970's, or a privately commissioned study like the one a student and I did in 1989 on the water transfer act. In addition, I suggest the possibility of using the services of students from the KU law school's Public Policy Clinic, run by Professor Richard Levy.

Recognizing that Kansas is one of the 17 contiguous Western States that have enacted the prior appropriation doctrine for water resources, the study group could ask: Are those states now having the same types of problems and questions we now face regarding the delicate balance between accountability and independence of the state's chief water administrator? How do their water rights administrators differ from ours? How do they protect all the diverse interests using water in their state? Are there improvements we could make to solve our current problems based on their experiences? Can we learn from their successes and failures? Could we learn from federal government experience about entities that must be independent, but still accountable, such as the federal reserve board, the federal trade commission, and the national labor relations board?

Whatever amendments the legislature makes, either now or in the future, should be built around the concept that has guided Kansas since 1945--that the chief engineer should be an independent, neutral, scientific expert who serves all the people of the state of Kansas. If it is concluded after a study that the chief engineer needs to be more accountable, then the question is, to whom? And, how can we best achieve the goal of accountability, while balancing that worthy goal with the need for neutral, scientific expertise, in which the decisions are removed from political maneuvering and special interest groups. Lastly, what result is recommended and adopted must not only be fair, but must also be perceived as being fair to all types of water users in the state. Perceptions here can be as important as reality.

In short, I believe that a better approach to the current issues involving the chief engineer is to study the matter prior to amending current law.

STATE OF KANSAS

BILL GRAVES, GOVERNOR
Alice A. Devine, Secretary of Agriculture
901 S. Kansas Avenue
Topeka, Kansas 66612-1280
(913) 296-3558
FAX: (913) 296-8389



KANSAS DEPARTMENT OF AGRICULTURE

TESTIMONY
BEFORE THE
HOUSE ENVIRONMENT COMMITTEE
ON
HOUSE BILL 2518
BY
DERENDA J. MITCHELL,
ASSISTANT GENERAL COUNSEL
KANSAS DEPARTMENT OF AGRICULTURE
March 16, 1999

On behalf of Secretary Devine, the Kansas Department of Agriculture thanks the committee for the opportunity to appear in support of the concepts addressed in House Bill 2518. We concur in the need for reasonable deadlines in certifying water rights, and with a few amendments, we look forward to implementation of a schedule that will aid the water right permit holder in planning for the beneficial use of water in the Kansas.

First, before presenting our proposed amendments, we want to outline the present system and give the committee an idea of the numbers of permits the legislation impacts. While this outline is somewhat of an oversimplification, it is intended to serve as an example of the water rights certification process. Each water permit application is evaluated on its own independent merits. As the committee is aware, when anyone wants to use water in this state, the water user must use the water beneficially so that the public interest is served. To that end, the Division of Water Resources issues a permit when an individual or business successfully demonstrates that

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they have a plan to use water beneficially. The permit identifies two deadlines; one, the time to complete the diversion works or in other words, the time to construct the well, the pump, the power unit, and the power source that will divert the water; and two, the time to demonstrate that water has been applied to beneficial use in accordance with the terms, conditions and limitations of the permit. These two time periods together constitute the perfection period. The time to complete the perfection period is identified in each permit that is issued. Extensions of time are routinely granted upon a showing of good cause.

When the time allowed on the permit has passed, DWR then begins its evaluation of how much water can be certified under the water right. DWR's evaluation is extensive and generally entails onsite inspections, a review of water use reports, a pump test, and analysis of other relevant information to determine how much water has been applied to beneficial use in accordance with the terms, conditions, and limitations of the permit during the perfection period. When DWR determines the appropriate information, DWR certifies the amount of the right perfected under the permit.

The attached graph shows the number of permits certified in each fiscal year. Recently, DWR picked up the pace and implemented Project Zero-Out. With Project Zero-Out, DWR tackles the certification backlog and schedules the certification process to accomplish a turn-around time on a five year schedule. Given the numbers of certificates DWR must process, a five year schedule is a realistic deadline, and one DWR plans to accomplish. DWR already has issued about 23,500 certificates. An additional 3,500 permits are ripe for certification or dismissal. We hope to be able to process approximately 1,200 certifications each year. The 1,200 number includes 700 certificates in the backlog and 500 permits that will "come due" each

year.

In other words, we ask that House Bill 2518 be amended to allow five years, instead of one year, for the evaluation period and analysis of the water use. We propose that the five year period be implemented on both new permits referred to in subsection (a) of the bill and on the backlog in subsection (b) of the bill. We also ask that the bill be amended to provide that the chief engineer notify the permit holder by certified mail 60 days *prior* to the conclusion of the perfection period, not after the perfection period as proposed in the current bill. Prior notice before the lapse of the perfection period will alert the permit holder to seek an extension if more time is needed to demonstrate the amount or nature of the water use. Prior notice enables the permit holder to correct problems before the perfection period expires and the right is certified. Notice after the lapse of time identified in the permit, and as currently proposed in the bill, will not enable the permit holder to alter the plan. Also attached to this testimony is suggested language for an amendment.

Thank you for your consideration. I am happy to respond to questions.

HOUSE BILL No. 2518

By Committee on Appropriations

2-17

9 AN ACT concerning appropriation of water for beneficial use; relating
10 to issuing certificates of appropriation; amending K.S.A. 82a-714 and
11 repealing the existing section.
12

13 *Be it enacted by the Legislature of the State of Kansas:*

14 Section 1. K.S.A. 82a-714 is hereby amended to read as follows: 82a-
15 714. (a) Upon the completion of the construction of the works and the
16 actual application of water to the proposed beneficial use within the time
17 allowed, the applicant shall notify the chief engineer to that effect. The
18 chief engineer or the chief engineer's duly authorized representative shall
19 then examine and inspect the appropriation diversion works and, if it is
20 determined that the appropriation diversion works have been completed
21 and the appropriation right perfected in conformity with the approved
22 application and plans, the chief engineer shall issue a certificate of ap-
23 propriation in duplicate. The original of such certificate shall be sent to
24 the owner and shall be recorded with the register of deeds in the county
25 or counties wherein the point of diversion is located, as are other instru-
26 ments affecting real estate, and the duplicate shall be made a matter of
27 record in the office of the chief engineer. *It is the duty of the chief en-*
28 *gineer to certify an appropriation not later than ~~one year~~ after the date* _____ *five years*
29 *of notification from the applicant of the completion of the construction of*
30 *the works and the actual application of water to the proposed beneficial*

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31 use within the time allowed. ~~(On and after the effective date of this act,~~
 32 ~~when the chief engineer receives a notice of the completion of the con-~~
 33 ~~struction of the works and the actual application of water to the proposed~~
 34 ~~beneficial use has occurred, the chief engineer shall give written notice to~~
 35 ~~the applicant, within 30 days of receipt of the notice from the applicant,~~
 36 ~~of the existence of any reason why the certificate of appropriation should~~
 37 ~~not be issued in accordance with the application and the plans. On and~~
 38 ~~after the effective date of this act, if the chief engineer does not give written~~
 39 ~~notice to the applicant, within 30 days of receipt of the notice from the~~
 40 ~~applicant, of a reason why the certificate of appropriation should not be~~
 41 ~~issued in accordance with the application and the plans, then the chief~~
 42 ~~engineer shall issue a certificate pursuant to this section.~~
 43 ~~(b) If an applicant has notified the chief engineer prior to the effective~~

Not later than 60 days prior to the lapse of the time allowed in the permit to complete the construction of the works and actually apply water to the proposed beneficial use, the chief engineer shall notify the permit holder by certified mail that any extensions of time to perfect the use must be filed with the chief engineer before the expiration of the time allowed in the permit.

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~~1 date of this act that the completion of the construction of the works and~~
 2 ~~the actual application of water to the proposed beneficial use has occurred~~
 3 ~~within the time allowed, more than one year has elapsed since the chief~~
 4 ~~engineer was notified, and a certificate of appropriation for the water~~
 5 ~~right has not been issued, then a certificate of appropriation for the water~~
 6 ~~right shall be deemed to have been issued as of July 1, 2000. On July 1,~~
 7 ~~2000, if a certificate of appropriation for the water right is deemed to~~
 8 ~~have been issued under this subsection, the chief engineer shall immedi-~~
 9 ~~ately send to the applicant a certificate of appropriation in duplicate as~~
 10 ~~required under subsection (a). On or before September 1, 1999, the chief~~
 11 ~~engineer shall give written notice to each applicant, who notified the chief~~
 12 ~~engineer in accordance with this section prior to the effective date of this~~
 13 ~~act and who has a pending application under this section, of the existence~~
 14 ~~of any reason why the certificate of appropriation should not be issued~~

(b) The chief engineer shall certify an appropriation by July 1, 2004 if the time allowed in the permit expired prior to July 1, 1999. If the chief engineer fails to issue the certificate of appropriation in accordance with subsections (a) and (b) of this statute, the chief engineer shall issue a certificate of appropriation for a water right for no less than the amount authorized by the permit.

~~15 in accordance with the application and the plans. In any such case in
16 which the chief engineer does not give written notice to the applicant of
17 a reason why the certificate of appropriation should not be issued in
18 accordance with the application and the plans, then the chief engineer
19 shall issue a certificate pursuant to this section on or before September 1,
20 1999.~~

21 (b) (c) Except for works constructed to appropriate water for do-
22 mestic use, each notification to the chief engineer under subsection (a)
23 shall be accompanied by a field inspection fee of \$200. Failure to pay the
24 field inspection fee, after reasonable notice by the chief engineer of such
25 failure, shall result in the permit to appropriate water being revoked,
26 forfeiture of the priority date and revocation of any appropriation right
27 that may exist. All fees collected by the chief engineer pursuant to this
28 section shall be remitted to the state treasurer as provided in K.S.A. 82a-
29 731 and amendments thereto.

30 (e) (d) A request for an extension of time to: (1) Complete the di-
31 version works; or (2) perfect the water right, shall be accompanied by a
32 fee of \$50.

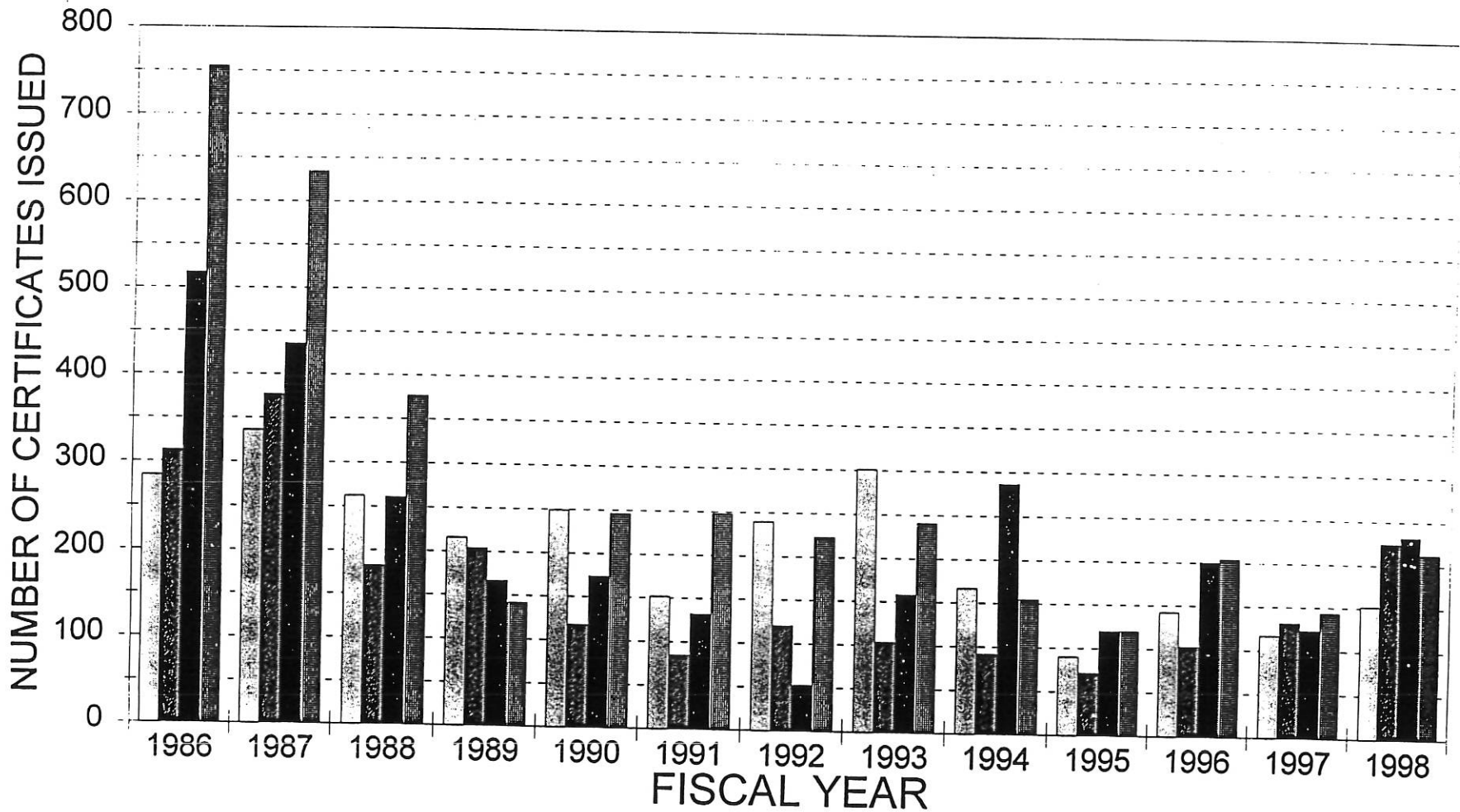
33 (d) (e) A request to reinstate a water right or a permit to appropriate
34 water which has been dismissed shall be filed with the chief engineer
35 within 60 days of the date dismissed and shall be accompanied by a fee
36 of \$100.

37 Sec. 2. K.S.A. 82a-714 is hereby repealed.

38 Sec. 3. This act shall take effect and be in force from and after its
39 publication in the statute book.

CERTIFICATES ISSUED

23



1st Quarter 2nd Quarter 3rd Quarter 4th Quarter

**TESTIMONY OF CONSTANCE C. OWEN
BEFORE THE HOUSE ENVIRONMENT COMMITTEE
IN OPPOSITION TO SB 287 AND HB 2518
March 16, 1999**

First, let me thank the Chairwoman and this committee for allowing me time to speak today. First, I will briefly introduce myself and then explain why SB 287 and HB 2518 are not in the best interests of Kansas.

I am a stay-at-home mother. Previously, I was Assistant Legal Counsel for the Chief Engineer of the Division of Water Resources from 1992 to 1996. My testimony today is my opinion, based on my experience within the current system of water rights management.

SB 287

This bill transfers the many regulatory roles of the Chief Engineer to the Secretary of Agriculture. It also imposes the mechanics of the Administrative Procedure Act onto the decisions of the Chief Engineer, making his decisions appealable to the Secretary. Currently, the Chief Engineer is a classified, autonomous position with the authority to make the final decisions in many areas of water use. Regarding water rights, the Chief Engineer is bound by the Water Appropriation Act. That Act sets forth 2 basic criteria for whether any use of water may be approved: (1) is there enough water to go around and (2) will the proposed use harm anyone with a previously existing right? These questions call for scientific geological expertise.

Why is this bill ill-advised?

(1) It will weaken the stability necessary to preserve Kansas' water supplies. Right now, in Kansas, there is not enough water to go around. More water is being used than the system can support. The supply is being depleted. This state's only hope for sustaining current uses of water is a geologically sound long-term management strategy. Such measures are unlikely should the decision-maker be a political appointee subject to a change in administration every 4 to 8 years.

(2) Under SB 287, decisions about the use of water would no longer be based in science, but in politics. Under the current system, the decision-maker is a fair-minded well-qualified engineer who is protected from political pressures by virtue of being a classified employee. A political appointee serving at the will of a Governor is not so protected. In other words, current water rights decisions are not made based on who is asking.

(3) Someone wants something they aren't getting. Someone wants to use more water, knowing it won't be allowed by the Chief Engineer. Someone wants to be greedy and jeopardize the long-term life of the water supply for their short-term benefit.

(4) Adding KAPA to the water right permitting process is not, of itself, a problem as long as additional staff is provided to prevent a backlog. KAPA adds procedures, notices, hearings, etc., which will slow the permitting process tremendously if not adequately staffed. However, **the KAPA process should not inject the Secretary as the final decision-maker.** SB 287 would have the Secretary review appeals of the Chief Engineer's decisions. This is ill-advised for the reasons given above.

[Please note that currently, the Chief Engineer's decisions are appealable directly to district court. If the Secretary upholds the Chief Engineer's decisions, then KAPA will simply have added another layer of time and expense for the aggrieved party. Also, when a district court reviews agency decisions, it must give great deference to the final decision to come out of the agency. Therefore, under SB 287, the court could not freely reweigh the evidence and decide whether the Chief Engineer or the Secretary made the better decision.]

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What SB 287 will NOT do:

(1) **Accountability.** This bill will not make the Chief Engineer more accountable to the public. Some may voice concern that the Secretary can hire the Chief Engineer, but not fire him. This is simply untrue. Unless being a classified employee means having a life term, this notion is unfounded. The Chief Engineer may be fired for cause, particularly for cause based in not practicing good science. This bill would allow the Chief Engineer to be fired for no cause at all, or, perhaps because he practices good science.

(2) **Openness.** This bill will not open up the process of water decisions. In my years at the Division of Water Resources, I advised the Chief Engineer on many water rights decisions. I knew the complicated issues and observed the process by which decisions were made. The Chief Engineer's door was open to everyone. In planning management strategies, he sought input from many sources and highly valued that input. Accessibility is an essential component of his decision-making process. Just as importantly, public accountability is a hallmark of the Chief Engineer's actions. For example, immediately after issuing an order creating an Intensive Groundwater Use Control Area in central Kansas (limiting certain water right holders' use of water), the Chief Engineer personally appeared at a public meeting in that area to explain his decision. There is no secrecy or subterfuge in the actions taken by David Pope. He is always willing to be persuaded, within the parameters of sound science and the public interest.

To the contrary, I suspect SB 287 would close the process, rather than open it. One needs only to look at the less-than-visible method by which this bill has been prepared and presented.

HB 2518

This bill may be called the Great Water Giveaway. It basically sets an unreasonably short period of time for the Chief Engineer and his staff to complete the certification process. If the Chief Engineer does not meet this short deadline, then certificates shall be issued for the full amount approved in the initial permit.

(1) **This bill undermines a fundamental principle of Western Water Law.** Under the prior appropriation doctrine, which Kansas and all the western states follow, a water right is obtained ("perfected") by the actual use of water as allowed by the permitting process. (The perfection time shows how much water is actually needed for the proposed project.) HB 2518 removes the need to actually use water to gain a water right. Rather, it creates a water right by default.

(2) **Without additional staff and resources, this bill will result in inflated water rights and advanced depletion of water supplies.** The Chief Engineer's staff is already burdened with a tremendous backlog in certification of water rights, especially for Southwest Kansas. Current staff could not possibly meet the time demands of HB 2518. Additional staff must be provided to meet the bill's deadlines. If significant additional staffing is not planned or forthcoming, the bill can only result in water rights being certified for more water than was actually used. In areas where water levels are already dropping, such as Southwest Kansas, this means greater use. Greater use means the supply will run out more quickly.

In summary, please recognize the wisdom of the existing water management system and defeat SB 287 and HB 2518. In the alternative, please refer this most important topic to a well-qualified task force for study, rather than make changes that may prove to be very costly.

A final thought: If SB 287 is passed and my concerns prove true, the damage will be virtually irreversible. One cannot then legislate water back into the ground.

Thank you. I would be happy to answer any questions.

C. Owen, 11201 W. 116th Street, Overland Park, KS 66210 (913-696-0423).

WRITTEN TESTIMONY FOR HOUSE ENVIRONMENTAL COMMITTEE

SB 2518

Presented by Wayne Bossert, Manager, Northwest Kansas Groundwater Management District 4
on behalf of the board of Directors. Testimony given March 16, 1999.

House Environmental Committee Chair and Members:

HB 2518, whether intended or not, will affect SW Kansas far more than any other area of the state since the certification process there lags far behind the rest of the state. The reasons for this stem mostly from the number and complexity of water rights in this area and the lack of Legislative support to DWR in manpower and budget to effectively accomplish the job.

By automatically certifying water rights for the full rate and amount and acreage per HB 2518 simply insures that SW Kansas will obtain significant additional water rights that no other area of the state has had or will have access to.

What will the water table do in this region when all of this water not having been pumped, but certified, starts getting pumped through water sales, water banking, or change applications?

Furthermore, the fact that the Legislature could affect the Chief Engineer's ability to conduct this work through budgeting controls makes this an even shakier idea. What if the Legislature chooses to reduce the DWR budget to purposely slow down this process?

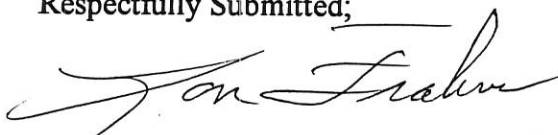
And if SB 64 or HB 2253 passes, not only can the Legislature control the Chief Engineer's activity level, but the Secretary of Agriculture will have even more direct control over how much or how little effort is expended. This seems a sure recipe for unfairness and legal questions.

Not-with-standing these reasons, allowing for the certification of water rights that have not been used through actual beneficial use simply compromises the fundamental basis of the western prior appropriation doctrine. This will have ramifications that no one has thought of yet.

We have long been proponents of a timely water appropriation act, as long delays in the system, including the certification process, works to no one's advantage. In this regard we agree with the intent of this bill - to catch up the certification of water rights. However, for the above reasons we must oppose this method for achieving the goal.

We could support HB 2518 only if DWR were also given the manpower and budget to accomplish this task under the framework of the current water appropriation act, without influence from outside entities. This is only fair to every other water right owner in the state who actually developed a water right through beneficial use.

Respectfully Submitted;



Lon Frahm

President, Northwest Kansas Groundwater Management District 4

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Tetimony re: H.B. 2518
Committee on the Environment
Kansas House of Representatives
March 16, 1999

Charles M. Benjamin, Ph.D., J.D.
Attorney at Law
Legislative Coordinator
Kansas Chapter of Sierra Club
Kansas Natural Resource Council
935 S. Kansas Ave., Suite 200
Topeka, Kansas 66612
(785) 232-1555

Madam Chair, members of the Committee, thank you for allowing me to testify on behalf of the Kansas Chapter of the Sierra Club and the Kansas Natural Resource Council in opposition to H.B. 2518

Our opposition to this bill is straight forward. We believe that the provisions of this legislation, if enacted in its current form, would lead to a tremendous increase in water usage. Such an increase in water usage has the potential to more rapidly deplete aquifers in Kansas that are currently in danger of depletion and put more aquifers at risk.

Specifically the first part of H.B. 2518 would set deadlines for the chief engineer to approve new certificates of appropriations. The problem is that the deadlines called for in the bill are simply too short to allow for the perfection of new permits. The chief engineer would be placed in the position of either having to notify persons that there was a problem with their certificates or they would have to issue the certificates. The chief engineer and his staff are simply not given sufficient time in this legislation to do the necessary fact-finding. Since the certificate determines the water right, the net effect of H.B. 2518 is that people will end up with certificates of appropriation for water that has not been put to beneficial use.

The second part of H.B. 2518 takes all the existing permits, for which applicants have notified the chief engineer's office that they have completed their works for the diversion of water, and automatically grants them a certificate if the chief engineer has not processed their application within one year. The resultant certificate would set the full amount of the permit. For example if the applicant had only perfected 300 acre feet, but the original permit was for 500 acre feet, that applicant would automatically get the full 500 acre feet. The result would be a much bigger water right than would normally occur.

We think H.B. 2518 is ill advised and we respectfully request that the Committee not pass it. Thank you for your time and attention.

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STATEMENT
OF

IVAN W. WYATT, PRESIDENT
KANSAS FARMERS UNION

ON
HB-2518

BEFORE THE

HOUSE COMMITTEE ON ENVIRONMENT

MADAM CHAIRPERSON, MEMBERS OF THE COMMITTEE:

NO ONE WOULD DISAGREE THAT THE TIMELY CERTIFICATION OF A
WATER APPROPRIATION IS IMPORTANT. HOWEVER, THIS PROPOSED
LEGISLATION COULD SET THE STATE UP FOR THE VIRTUAL GIVE AWAY
UNAPPROVED WATER DIVERSION RIGHTS.

IN PAST YEARS THERE WERE TIMES, BECAUSE OF A FLOOD OF
APPLICATIONS, TIMELY INSPECTIONS WERE IMPOSSIBLE.

LEGISLATION SUCH AS THIS COULD CAUSE ALL SORTS OF
PROBLEMS IF THE LEGISLATURE SHOULD FAIL TO PROPERLY FUND THE
DIVISION.

IF SB-287 SHOULD BECOME LAW, IT COULD ALLOW A FUTURE
SECRETARY OF AGRICULTURE TO PLAY ALL SORTS OF POLITICAL FAVORS

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FOR THE POLITICALLY POWERFUL AND INFLUENTIAL BY DETERRING A
WATER RESOURCE ENGINEER FROM CARRYING OUT HIS DUTIES.

AS A STATE WE SHOULD BE WARY OF MAKING MAJOR CHANGES IN
THE MANAGEMENT OF OUR WATER RESOURCES THAT HAS WORKED WELL
FOR THE PEOPLE OF KANSAS. REMEMBER MANY A BLOODY WAR HAS
BEEN FOUGHT OVER WATER. LET US NOT START ONE IN KANSAS.

March 15, 1999

To: House Environment Committee
From: Raney Gilliland, Principal Analyst
Re: Kansas Water Law and History of Authority of the Chief Engineer

The following memorandum was prepared in response to Committee members' questions with respect to the rule and regulation authority of the Chief Engineer of the Division of Water Resources, Kansas Department of Agriculture.

Water Rights and the Law

The Kansas statutes which establish a procedure under which a protected right to the use of water may be established, K.S.A. 82a-701 *et seq.*, represent an evolution of the law relating to water rights in Kansas.

The earliest Kansas law concerning water rights was the English common law which generally based water rights on the ownership of land contiguous to a stream or on the ownership of land overlying a groundwater aquifer. Under the common law riparian doctrine, all owners of land contiguous to a stream had an equal right to the streamflow except as the quantity might be diminished by domestic or livestock use. Groundwater was considered as belonging to the landowner in the same way as the land itself. Therefore, the landowner could take and use such water without regard to the effect of such use on adjoining landowners.

As early as 1866, the Kansas Legislature began to modify the common law to reflect the statutory doctrine of prior appropriation which was developed in the western states. The prior appropriation doctrine is based on the actual beneficial use of water and the time such use begins without regard to the ownership of contiguous or overlying land. Under this doctrine, a water right is the right to use water from a specific source of supply, not ownership of the water itself. In numerous statutes which were enacted over a period of years, the Legislature authorized the appropriation and diversion of water. Kansas statutes also recognized a priority of rights based on the time beneficial use of water is initiated.

Such legislation was not completely successful in superceding the common law since Kansas courts continued to uphold the common law doctrine in some cases involving the use of water. In a 1903 case, the Kansas Supreme Court noted that the doctrine of prior appropriation and the common law riparian doctrine may exist in the same state. In 1944, the Kansas Supreme Court held that the Chief Engineer of the Division of Water Resources did not have authority to act on applications for a permit to appropriate water and held the 1917 statute granting such authority ineffective. The Court also reaffirmed that the common law continued to exist in regard to water rights. Left without an effective statutory procedure for the appropriation of water, the 1945 Legislature enacted the water appropriation statutes which,

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along with extensive 1957 amendments, appear as K.S.A. 82a-701 *et seq.* The constitutionality of the 1945 act was upheld by the Kansas Supreme Court in 1949 and by the federal courts in 1956.

Under present law, all water in the state is dedicated to the use of the people of the state, subject to control and regulation by the state. All water may be appropriated for beneficial use subject to vested rights—those rights which exist by virtue of beneficial use of water prior to June 28, 1945. The use of water for domestic purposes constitutes an appropriation right without the necessity of making application for it.

As provided in K.S.A. 82a-701 *et seq.*, no person may acquire an appropriation right to the use of water for other than domestic purposes without first filing an application for a permit to appropriate water with the Chief Engineer of the Division of Water Resources. If the Chief Engineer finds that the proposed use of water meets the criteria established by statute, the Chief Engineer must approve the application for a permit. Approval of an application constitutes a permit for the applicant to proceed with construction of diversion works and to take other steps necessary to put the amount of water specified in the application to the beneficial use specified in the application. If the applicant actually puts such water to beneficial use within the time specified, the person notifies the Chief Engineer who, after inspection and a determination that the water use is in conformity with the application, issues a certificate of appropriation. Such certificate is required to be recorded with the register of deeds in the county or counties where the point of diversion of water is located. The Chief Engineer also may modify or deny an application for a permit to appropriate water.

An appropriation right is a right granted by the state to divert a specified amount of water from a definite water supply at a specified rate of diversion and to apply such water to a specified beneficial use or uses. An appropriation right, however, is subject to all vested or prior appropriation rights to divert and use water from the same source of supply, *i.e.*, prior rights must be satisfied before water may be diverted from the source of supply. The priority of an appropriation right is based on the time of filing an application for a permit to appropriate water.

A water right (a vested right or an appropriation right) is a real property right appurtenant to and severable from the land on or in connection with which the water is used. Such rights, unless severed, pass with conveyance of the land.

Under present Kansas law, a water right is considered abandoned and is to be terminated if no lawful beneficial use of water takes place under such right for three successive years without a showing of good cause for such nonuse.

The 1945 act which established the prior appropriation doctrine as the basic Kansas law governing the right to use water did not make the holding of a vested right, appropriation right, or a permit to appropriate water a condition which must be met prior to the diversion and use of water from surface or groundwater sources. Thus, the individual water user determines whether he wishes the protection which a water right affords him.

The act does make it unlawful to prevent water from moving to a person who has a valid prior right to use the water. The Chief Engineer may direct any person making such unlawful diversion to take measures to insure that the rights of the holder of a water right are satisfied.

The statutes also authorize the holder of a water right or a permit to appropriate water to restrain or enjoin diversion by a common-law claimant not having a vested right. A prior appropriator also has the right to enjoin an appropriator with a later right.

Governing Bodies and the Chief Engineer

Responsibility for the first oversight of water law in Kansas was given to a Water Commission established by the Legislature in 1917. An administrative procedure was established whereby surface or underground water of the state could be appropriated upon an application to the Commission in accordance with rules and regulations it prescribed. The Commission also was directed to "work out a systematic general plan for the complete development of each watershed in the state."

In 1919, the Legislature created a state agency designated as the Division of Irrigation within the State Board of Agriculture under the control of a State Irrigation Commissioner. The new Division was to deal primarily with gathering and tabulating information relating to the water supplies of the state and the use of water on farm crops.

In 1927 the Kansas Legislature amended the law to confer the powers, authority, and duties of the Kansas Water Commission and the State Irrigation Commissioner to the Division of Water Resources, which was created in the legislation. The Division was to be under the control, administration, and supervision of the State Board of Agriculture. The Kansas Water Commission and the Division of Irrigation were abolished. The legislation authorized the State Board of Agriculture to employ such expert assistance, clerical, and other help, as may be necessary to properly carry out the provisions of the act. The first statutory reference to authority of the State Board of Agriculture to employ a Chief Engineer is found in *1933 Session Laws*, Chapter 271. Strangely, the reference to the Chief Engineer was deleted in legislation adopted by the 1937 Legislature, although responsibilities continued to be given to the Chief Engineer after that year. The State Board of Agriculture did continue to have authority to hire necessary personnel. It appears that not until 1965 did the statutory creation of a Chief Engineer reappear.

As was noted earlier in this memorandum, the Legislature, over time, began a process to modify the common law to reflect the statutory doctrine of prior appropriation of water. The Legislature made significant statutory changes in 1945 when the appropriation doctrine was adopted through enactment of the Water Appropriation Act. That doctrine, still in place, dedicates all of the water of the state to the use of the people, subject to certain limitations. Under this doctrine, all water may be appropriated for beneficial use, subject to vested rights or those water rights in place prior to June 28, 1945. The 1945 Kansas Water Appropriation Act was clearly a defining moment in the direction of water policy in the state. The 1945 legislation continued to delegate administrative responsibility for and regulatory oversight of water directly to the Chief Engineer of the Division of Water Resources. Unlike earlier laws that concerned irrigation and other agriculturally related water responsibilities, the right to appropriate water concerns municipalities, industry, individual users, and others whose rights to make beneficial use of water are equal under the law.

The 1957 Legislature adopted what was probably the most significant expansion and development of the basic water law of the state—the addition of a definition of water right to

the laws of the state. This definition made a water right a real property right. Statutes added in 1957 conferred added powers and duties on the Chief Engineer, giving the Chief Engineer the authority and duty to protect water rights and to require the conservation of water. The 1957 legislation established a procedure for appealing decisions and orders of the Chief Engineer and authorized the courts to refer issues of fact in water rights litigation to the Chief Engineer for investigation.

Under current law, the Chief Engineer and the Division of Water Resources are responsible for the administration of many regulatory functions. Those include:

- Construction of flood control works by cities. (K.S.A. 12-635 through 638, as amended 1996 Supp.)
- Zoning of floodplains by cities and counties. (K.S.A. 12-766)
- Obstruction of flow of surface water. (K.S.A. 24-105)
- Construction, repair, and maintenance of levees. (K.S.A. 24-126)
- Organization and operation of certain drainage districts. (K.S.A. 24-656 through 668)
- Organization and operation of watershed districts. (K.S.A. 24-1201 through 1233, as amended 1996 Supp.)
- Organization and operation of irrigation districts. (K.S.A. 42-701 through 730)
- Placing of car bodies along or in a stream for purposes of bank stabilization and soil erosion control. (K.S.A. 68-2201 through 2215)
- Investigation of proposed irrigation plans. (K.S.A. 74-509)
- Chief Engineer is a nonvoting, ex-officio member of the Kansas Water Authority. (K.S.A. 74-2622, as amended by 1996 Supp.)
- Construction of dams, placing of obstruction in streams, and changing the course, current, or cross section of a stream. (K.S.A. 82-301 through 305a)
- Establishing of bank line as boundaries within which counties may clean and maintain stream channels. (K.S.A. 82a-307a through 311.)
- Exemption of taxes on land where dams are built to create reservoirs for the storage of water. (K.S.A. 82a-405 through 410 and K.S.A. 79-201g)
- Construction of dams built under a federal agriculture program. (K.S.A. 82a312 through 314)

- Water Projects Environmental Coordination Act. (K.S.A. 82a325 through 327)
- Administration of the Kansas-Nebraska-Colorado Republican River Compact. (K.S.A. 82a-518)
- Administration of the Kansas-Colorado Arkansas River Compact. (K.S.A. 82a-520)
- Administration of the Kansas-Oklahoma Arkansas River Compact. (K.S.A. 82a-528)
- Administration of the Kansas-Nebraska Big Blue River Compact. (K.S.A. 82a-529)
- Organization of rural water supply districts. (K.S.A. 82a-601 through 611)
- Organization and operation of rural water districts. (K.S.A. 82a-612 through 637)
- State Rural Water District Grant Program. (K.S.A. 82a-638)
- Appropriation of water and establishment of water rights (Kansas Water Appropriation Act). (K.S.A. 82a-701 *et seq.*, as amended 1996 Supp. and K.S.A. 42-313)
- Organization and operation of groundwater management districts, including authority to create intensive groundwater use control areas. (K.S.A. 82a-1020 through 1040, as amended 1996 Supp.)
- Acquisition of a water reservation right for diversion and storage of water in the conservation storage water supply reservoirs (State Water Plan Storage Act). (K.S.A. 82a-1301 through 1320, as amended 1996 Supp.)
- Water Transfer Act. (K.S.A. 82a-1501 through 1506, as amended 1996 Supp.)
- Water Assurance Program Act. (K.S.A. 82a-1330 through 1348)
- Water Protection Fee. (K.S.A. 82a-954)

Background to Rules and Regulations

The first statutory reference to rule and regulation authority with respect to water law appears to be that given to the Kansas Water Commission in 1917. In that law the Commission was given permissive authority to prescribe rules and regulations to use as a guide for the appropriation of surface or underground water of the state.

The first reference to giving rule and regulation authority to the Chief Engineer appears to be in 1933. At that time, the authority was given to the Division of Water Resources of the State Board of Agriculture, under the direction of the Chief Engineer and other officers and legislation employees, to distribute the water in any natural stream, according to the rights of each as adjudicated by court decree. The 1933 statute states:

The chief engineer of the division of water resources, with the approval of said division and of said board, shall have the power to adopt and promulgate such rules and regulations as he shall find helpful to carry out this act and such decrees of court. Such rules and regulations shall take effect upon their publication in the official state paper.

In 1957, the Legislature gave the Chief Engineer the following authority:

The chief engineer, subject to the approval of the state board of agriculture, shall adopt, amend, promulgate, and enforce such reasonable rules, regulations, and standards as he shall deem necessary for the discharge of his duties and for the achievement of the purpose of this act pertaining to the control, conservation, regulation, allotment, and distribution of the water resources of the state.

The 1976 interim Special Committee on Energy and Natural Resources, in its review of the water appropriations laws, made a finding that:

The laws relating to water rights are complex and not readily understood by those affected by such laws. The development and adoption of rules and regulations which clarify and interpret such laws would assist those who are subject to their provisions and would provide guidance to those who administer the laws.

The 1976 interim committee directed the Chief Engineer to "proceed as rapidly as possible with the development of rules and regulations as authorized by K.S.A. 82a-707a." (A copy of the *Report of the Special Committee on Energy and Natural Resources on Proposal No. 17*, is attached.)

In addition, the interim committee made another recommendation, which was to delete the phrase in K.S.A. 82a-706a that required the State Board of Agriculture to approve rules and regulations adopted by the Chief Engineer relating to the water appropriation statute. The interim committee report contained the following comment on the change:

The act, which appears as 82a-701 *et seq.*, places all responsibility for administration of the act with the Chief Engineer without reference to the State Board of Agriculture. The amendment makes K.S.A. 82a-706a consistent with the rest of the act.

The Governor's Task Force on Water Resources (the Task Force was established by Bennett Executive Order No. 77-21) also took note of the need for rules and regulations by the

Division of Water Resources. In the interim report of that Task Force, published in December of 1977, the Task Force proposed that the Legislature direct the Chief Engineer to define in greater detail the categories of beneficial use of water through rules and regulations of the Chief Engineer. The issue of concern was whether or not the definition of "domestic use" in the water appropriation law included large-scale livestock feeding operations. This issue led the Task Force to suggest that the Chief Engineer clarify the law in rules and regulations. In the *Final Report of the Task Force*, it was noted that H.C.R. 5073 had been adopted by the 1978 Legislature which modified and approved the Chief Engineer's rules and regulations. Those rules and regulations identified categories of beneficial use of water to be used by the Chief Engineer in processing water rights applications. Pursuant to the revised rules and regulations approved by H.C.R. 5073, the Chief Engineer recognized seven beneficial uses of water: domestic, stockwatering, municipal, irrigation, industrial, recreational, water power, and artificial recharge. The adoption of the Chief Engineer's rules and regulations identifying water for feedlot operations as "stockwatering" addressed the issue of whether water for large-scale livestock feeding operations was "domestic use."

REPORT ON KANSAS
LEGISLATIVE INTERIM STUDIES

to the

1977 LEGISLATURE

PART I
(of 2 Parts)

SPECIAL COMMITTEES

Filed With the Legislative Coordinating Council

December, 1976

*House Environment
3-16-99
Attachment 9*

RE: PROPOSAL NO. 17 - REVIEW OF WATER APPROPRIATION LAWS*

Scope of Study

Under the direction of Proposal No. 17, the Special Committee on Energy and Natural Resources studied the Kansas statutes which provide for the appropriation of water for beneficial use. Pursuant to the specific directives of the proposal, the members reviewed the administration of such laws, heard recommendations for statutory change, and reviewed the program audit submitted by the Legislative Division of Post Audit to the Legislative Post Audit Committee on December 8, 1975.

The Committee heard the recommendations of the Chief Engineer, Division of Water Resources, State Board of Agriculture; the executive director, Kansas Water Resources Board; staff, Legislative Division of Post Audit; the executive director, Western Kansas Groundwater Management District No. 1; the manager, Southwest Kansas Groundwater Management District No. 3; the president of the Kansas Irrigation and Water Resources Association; staff, Kansas Geological Survey; representatives, Kansas Farmers Union; and Extension Irrigation Engineer, Kansas State University. The Division of Environment, State Department of Health and Environment, submitted a written statement. Conferees also presented information relating to water use, water problems and the administration of the Kansas laws governing the appropriation of water.

Water Rights and the Law

The Kansas statutes which establish a procedure under which a protected right to the use of water may be established, K.S.A. 82a-701 et seq., represent an evolution of the law relating to water rights in Kansas.

The earliest Kansas law concerning water rights was the English common law which generally based water rights on the ownership of land contiguous to a stream or on the ownership of land overlying a groundwater aquifer. Under the common law riparian doctrine, all owners of land contiguous to a stream had an equal right to the streamflow except as the

* Senate Bill No. 4 accompanies this report.

quantity might be diminished by domestic or livestock use. Groundwater was considered as belonging to the landowner in the same way as the land itself. Therefore, the landowner could take and use such water without regard to the effect of such use on adjoining landowners.

As early as 1866, the Kansas Legislature began to modify the common law to reflect the statutory doctrine of prior appropriation which was developed in the western states. The prior appropriation doctrine is based on the actual beneficial use of water and the time such use begins without regard to the ownership of contiguous or overlying land. Under this doctrine, a water right is the right to use water from a specific source of supply, not ownership of the water itself. In numerous statutes which were enacted over a period of years, the Legislature authorized the appropriation and diversion of water. Kansas statutes also recognized a priority of rights based on the time beneficial use of water is initiated.

Such legislation was not completely successful in superseding the common law since Kansas courts continued to uphold the common law doctrine in some cases involving the use of water. In a 1903 case, the Kansas Supreme Court noted that the doctrine of prior appropriation and the common law riparian doctrine may exist in the same state. In 1944, the Kansas Supreme Court held that the Chief Engineer of the Division of Water Resources did not have authority to act on applications for a permit to appropriate water and held the 1917 statute granting such authority ineffective. The court also reaffirmed that the common law continued to exist in regard to water rights. Left without an effective statutory procedure for the appropriation of water, the 1945 Legislature enacted the water appropriation statutes which, along with extensive 1957 amendments, appear as K.S.A. 82a-701 et seq. The constitutionality of the 1945 act was upheld by the Kansas Supreme Court in 1949 and by the federal court in 1956.

Under present law, all water in the state is dedicated to the use of the people of the state, subject to control and regulation by the state. All water may be appropriated for beneficial use subject to vested rights -- those rights which exist by virtue of beneficial use of water prior to June 28, 1945. The use of water for domestic purposes constitutes an appropriation right without the necessity of making application therefor.

As provided in K.S.A. 82a-701 et seq., no person may acquire an appropriation right to the use of water for other than domestic purposes without first filing an application for a permit to appropriate water with the Chief Engineer of the Division of Water Resources. If the Chief Engineer finds that the proposed use of water meets the criteria established by statute, he must approve the application for a permit. Approval of an application constitutes a permit for the applicant to proceed with construction of diversion works and to take other steps necessary to put the amount of water specified in the application to the beneficial use specified in the application. If the applicant actually puts such water to beneficial use within the time specified, he notifies the Chief Engineer who, after inspection and a determination that the water use is in conformity with the application, issues a certificate of appropriation. Such certificate is required to be recorded with the register of deeds in the county or counties where the point of diversion of water is located. The Chief Engineer may also modify or deny an application for a permit to appropriate water.

An appropriation right is a right granted by the state to divert a specified amount of water from a definite water supply at a specified rate of diversion and to apply such water to a specified beneficial use or uses. An appropriation right, however, is subject to all vested or prior appropriation rights to divert and use water from the same source of supply, i.e., prior rights must be satisfied before water may be diverted from the source of supply. The priority of an appropriation right is based on the time of filing an application for a permit to appropriate water.

A water right (a vested right or an appropriation right) is a real property right appurtenant to and severable from the land on or in connection with which the water is used. Such rights, unless severed, pass with conveyance of the land.

Under present Kansas law, a water right is considered abandoned and is to be terminated if no lawful beneficial use of water takes place under such right for three successive years without a showing of good cause for such nonuse.

The 1945 act which established the prior appropriation doctrine as the basic Kansas law governing the right to use water did not make the holding of a vested right, appropriation right or a permit to appropriate water a condition which must be met prior to the diversion and use of water

from surface or groundwater sources. Thus, the individual water user determines whether he wishes the protection which a water right affords him.

The act does make it unlawful to prevent water from moving to a person who has a valid prior right to use the water. The Chief Engineer may direct any person making such unlawful diversion to take measures to insure that the rights of the holder of a water right are satisfied. The statutes also authorize the holder of a water right or a permit to appropriate water to restrain or enjoin diversion by a common-law claimant not having a vested right. A prior appropriator also has the right to enjoin an appropriator with a later right.

Committee Findings

Water Use. Groundwater is being used in some areas of the state at rates which are far in excess of recharge. This is particularly true in those areas where there is extensive groundwater irrigation. The rate of decline in the water table in areas of intensive irrigation generally varies from one to three feet a year. In a few isolated areas, the decline may be from one to five feet annually. Five groundwater management districts have been formed pursuant to K.S.A. 82a-1020 et seq. Such districts have broad powers to develop and implement groundwater management programs and conservation programs within the district. Representatives of the groundwater management districts believe that changes in the laws governing water use are necessary if they are to be able to take effective action to slow the depletion of groundwater supplies.

Rules and Regulations. The laws relating to water rights are complex and not readily understood by those affected by such laws. The development and adoption of rules and regulations which clarify and interpret such laws would assist those who are subject to their provisions and would provide guidance to those who administer the laws.

Workload. The number of applications for permits to appropriate water has increased dramatically in the past several years. From January 1, 1976, through September 17, 1976, the Division of Water Resources received 2,070 applications for permits to appropriate water. The number of applications received in the first eight and a half months of 1976 exceeds the number of applications received during

all of calendar year 1975, the previous record year. The Division has a backlog of applications to be processed and perfected rights to be inspected and certified.

Records. Records relating to water rights, permits to appropriate water and reported water use are kept manually. The present records system requires a manual search of numerous files when an application for a permit to appropriate water is processed in order to identify those rights which might be affected by such application. Water use reported annually by water rights and permit holders must be entered on the records by hand. Such water use data are of value in the administration of water rights, in planning for water resources and economic development and in assessing conservation efforts, but the data cannot be readily retrieved nor correlated with other water resource data under the present records system.

Uncontrolled Use. Under the present laws of Kansas, water may be diverted and used legally without the prior approval of the Chief Engineer of the Division of Water Resources. No notice of such use is required to be furnished the Chief Engineer.

Also under present law, a water user may legally construct diversion works prior to making application to the Chief Engineer for a permit to appropriate water. Practically, this negates the authority of the Chief Engineer to modify such applications.

While the Chief Engineer has authority to limit the quantity of water use allocated under an appropriation right, it is not unlawful to use water in excess of such appropriation right.

In summary, K.S.A. 82a-706 provides that the Chief Engineer is to enforce the laws of the state relating to beneficial use and is to "control, conserve, regulate, allot and aid in the distribution of the water resources of the state." However, the Chief Engineer cannot fulfill these responsibilities if water can be used legally without his prior approval or knowledge.

Administrative Procedure. The Chief Engineer is to be commended for advising persons who are holders of water rights covering wells located within a half mile of a proposed diversion that an application to appropriate water has been filed and for giving such persons an opportunity to

comment or submit information relating to the application. If a request for a hearing is received, the Chief Engineer holds a hearing to give interested persons a chance to show cause why an application should not be approved. These notice and hearing procedures are not required by law.

The Committee believes that the Chief Engineer should consider extending such administrative procedures to the processing of applications for permits to appropriate water from surface sources.

Legal Structure. Over the years the laws of Kansas relating to the right to use water have evolved in response to changing circumstances and changing needs. Testimony presented to the Committee indicates substantial support for further change. Those who met with the Committee were unanimous in recommending that the Kansas laws concerning the right to use water be changed to require prior approval by the Chief Engineer of the Division of Water Resources before any diversion or use of water, other than domestic use, takes place.

This recommendation represents a major policy change. Under present laws, the decision to seek prior approval is made by the individual and is based on his concern for protecting his right to use water. The proposed change would mandate prior approval based on the need to determine whether additional water use is in the best interest of the people of the state.

Conferees cited diminishing water supplies in some areas of the state, increased water use, the need to know actual use when a decision about further development is to be made, and the need to conserve water as factors which give rise to the need for mandatory prior state approval of proposed water use.

Recommendations

The Committee is making two recommendations relating to administration of the Kansas laws relating to the appropriation of water, two recommendations for future legislative study, and is recommending major policy changes relating to the right to use water which are incorporated in S.B. 4.

The Committee recommends that the Legislature appropriate funds for a study of the feasibility of computerizing

the records of the water rights section of the Division of Water Resources. This study should include consideration of the use of such records in the administration of water rights and their potential for use as a part of a comprehensive water resources data system.

The Committee also recommends that the Chief Engineer proceed as rapidly as possible with the development of rules and regulations as authorized by K.S.A. 82a-706a.

It is recommended that a future interim study of other laws administered by the Division of Water Resources be directed by the Legislative Coordinating Council.

The Committee further recommends that a special committee be established by the Legislative Coordinating Council to conduct a study of the applicability of the prior appropriation doctrine of water rights to the changing conditions of water use and water supplies in Kansas. Such study should include consideration of the modifications of the appropriation doctrine which have been made in other states and consideration of the validity of continuing to base the priority of a right to use water on the time when beneficial use is first made of such water.

The Committee has prepared legislation which would bring about a major policy change in the statutory provisions which relate to the right to use water in Kansas. The recommended policy change is incorporated in S.B. 4 which is summarized below.

Recommended Legislation

S.B. 4, prepared by the Special Committee on Energy and Natural Resources in conjunction with Proposal No. 17, would add new statutes to those which provide for the appropriation of water for beneficial use. The bill also amends K.S.A. 82a-701, 82a-706a and 82a-709.

New Section 1. This section authorizes the Chief Engineer of the Division of Water Resources, State Board of Agriculture, to grant a temporary permit to appropriate water for a period not to exceed six months. The proposed new statute would make any such temporary permit subject to existing water rights (vested rights and appropriation rights).

Under the new section, the Chief Engineer would be required to establish procedures to be followed in making application for and granting a temporary permit through the adoption of rules and regulations.

Comment. The first section of S.B. 4 reflects the Committee's recognition that certain water uses are temporary in nature. It further reflects the belief that no purpose would be served by making such temporary diversion and use of water subject to all the statutory and administrative procedures prescribed for obtaining a water right. Thus, under the provisions of New Section 1, persons who wish to divert and use water for such temporary purposes as road construction or the drilling of oil and gas wells could make application for a temporary permit pursuant to procedures established by the Chief Engineer.

New Section 2. The second new section of S.B. 4 makes it unlawful for any person to appropriate or threaten to appropriate any water, except for those uses specified in the section, without first making application for a permit to appropriate water. Those proposed uses for which an application for a permit to appropriate water would not be required under this section are domestic use; the use of water impounded by dams which are not in excess of ten feet high, which do not impound more than 15 acre feet of water and which are built on private streams; and the use of salt water in excess of 5,000 milligrams per liter chlorides in oil and gas injection operations approved by the Corporation Commission pursuant to K.S.A. 55-901.

Comment. New Section 2 carries out the Committee's recommendation that all water users, other than those proposing to use water for exempted uses, be required to receive the approval of the Chief Engineer prior to diverting and using water. Because New Section 1 is made a part of and supplemental to the existing water appropriation statutes by another section of the bill, a temporary permit issued pursuant to New Section 1 would satisfy the requirements of New Section 2.

Section 3. K.S.A. 82a-701 is amended by Section 3 of S.B. 4 to provide that "domestic uses" as defined in the statute include the irrigation of not more than two acres of land used for the growing for gardens, orchards and lawns.

Comment. The definition of "domestic uses" which appears in K.S.A. 82a-701 includes the use of water for: (1) household purposes, or (2) the watering of livestock, poultry, farm and domestic animals used in operating a farm, and (3) the irrigation of not more than one acre of land used for gardens, orchards and lawns. The definitional change to include the irrigation of two acres reflects current domestic land use.

Section 4. K.S.A. 82a-706a is amended by Section 4 of S.B. 4 to delete the requirement that the State Board of Agriculture approve rules and regulations relating to the water appropriation statutes adopted by the Chief Engineer of the Division of Water Resources.

Comment. The act which appears as 82a-701 et seq. places all responsibility for administration of the act with the Chief Engineer without reference to the State Board of Agriculture. The amendment makes K.S.A. 82a-706a consistent with the rest of the act.

Section 5. This section of S.B. 4 amends K.S.A. 82a-709 by deleting language which authorizes persons to make an application for a permit to appropriate water after they have already initiated action to divert water.

Comment. The amendment to K.S.A. 82a-709 makes the statute consistent with the requirement that persons have the prior approval of the Chief Engineer before diverting and using water.

New Sections 6 and 7, Sections 8 and 9. These are technical sections.

Comment. New Section 6 makes the new statutes created by New Sections 1, 2 and 7 a part of the existing act relating to the appropriation of water.

The Committee recommends that the 1977 Legislature consider the status of vested water rights as they are treated in S.B. 4 and, after such consideration and any amendment relating thereto, enact S.B. 4.

17-10

Respectfully submitted,

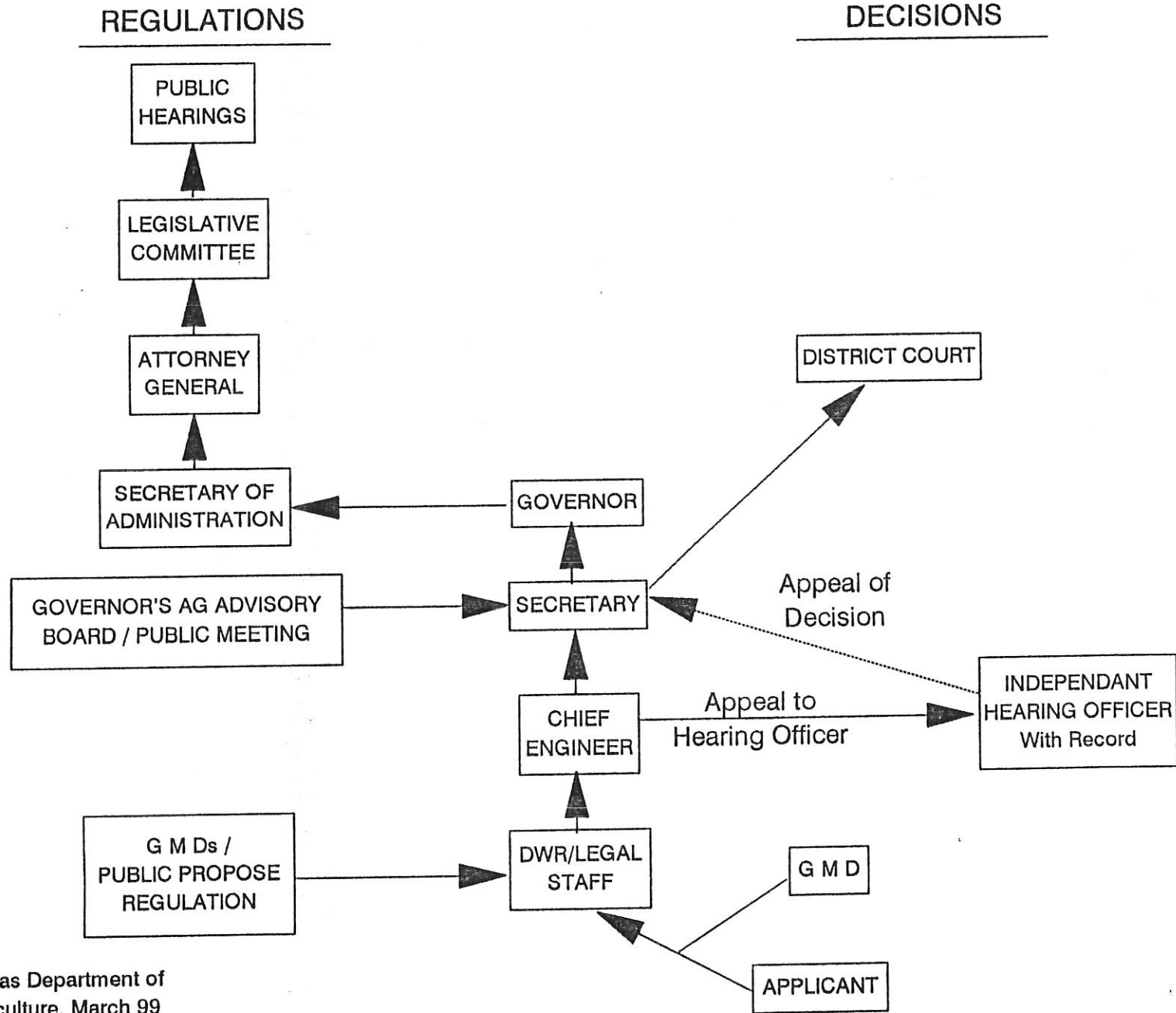
December 8, 1976

Senator Leslie Droge, Chairman
Special Committee on Energy and
Natural Resources

Rep. William S. Southern,
Vice-Chairman
Sen. Bud Burke
Rep. Arden Dierdorff
Rep. Gus Bogina

Rep. W. Edgar Moore
Rep. Ralph E. Bussman
Rep. Paul Feleciano, Jr.
Rep. Anita Niles

S.B. 287

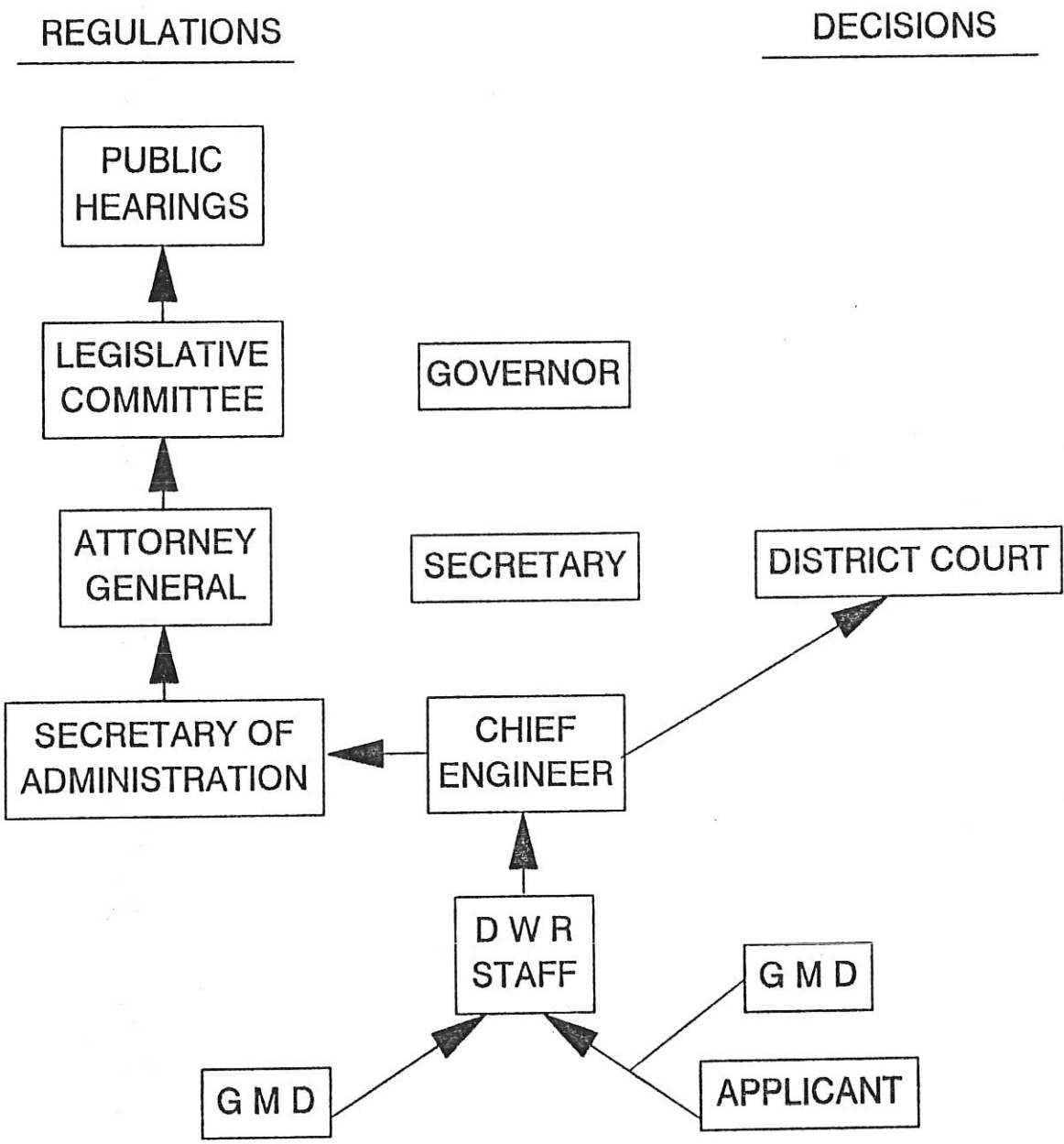


Kansas Department of
Agriculture, March 99

*House Environment
3-16-99
Attachment 10*

CURRENT SYSTEM

10-2



KANSAS LEGISLATIVE RESEARCH DEPARTMENT

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March 12, 1999

To: House Committee on Environment
From: Raney Gilliland, Principal Analyst
Re: Classified Positions with Rule and Regulation Authority

During a meeting last week, Representative Sloan asked if there were any other classified employees in state government who had rule and regulation promulgation authority other than the Chief Engineer of the Department of Agriculture. In order to answer this question, Mary Torrence of the Revisor's Office and I did a search on the Kansas statutes. This search produced no references to any other classified employees with this authority. If you are interested in the methodology which we used to accomplish this search, please let me know. I also contacted Julene Miller of the Attorney General's Office and Faith Loretto of the Department of Administration for their input into searching for such authority. These two individuals routinely review many of the rules and regulations promulgated.

RG/mkl

#27179.01(3/15/99(9:50AM))

*House Environment
3-16-99
Attachment II*

Office of Revisor of Statutes

300 S.W. 10th Avenue
Suite 322, Statehouse
Topeka, Kansas 66612-1592
Telephone 785-296-2321 FAX 785-296-6668

MEMORANDUM

To: House Committee on Environment
From: Mary Torrence, Assistant Revisor of Statutes
Date: March 16, 1999
Subject: Appeals to District Court from Administrative Decisions of Departmental Divisions

The following statutes provide for direct appeals to the district court from decisions of divisions or directors of divisions of administrative agencies:

K.S.A. 1998 Supp. 8-259(a): Division of Vehicles; cancellation, suspension, revocation or denial of driver's license; subject to review under the Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA); review by trial de novo

K.S.A. 1998 8-2410(e): Director of Vehicles; suspension, revocation or denial of license under vehicle dealers and manufacturers licensing act; subject to review under KJRA.

K.S.A. 8-2411(c): Director of Vehicles; administrative penalty under vehicle dealers and manufacturers licensing act; subject to review under KJRA.

K.S.A. 1998 Supp. 44-510(a)(13): Director of Workers Compensation; administrative penalty; subject to review under KJRA.

K.S.A. 58-4211(f): Director of Vehicles; denial, suspension or revocation of license under Kansas manufactured housing act; subject to review under KJRA.

K.S.A. 74-719: Director of Workers Compensation; assessments to fund administration of workers compensation law; subject to review under KJRA.

Both the Director of Workers Compensation of the Department of Human Resources (K.S.A. 75-5708) and the Director of Vehicles of the Department of Revenue (K.S.A. 75-5110) are unclassified.

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Attachment 12*

STATEMENT OF
KANSAS AGRICULTURAL AVIATION ASSOCIATION
TO THE HOUSE ENVIRONMENT COMMITTEE
REGARDING S.B. 287

March 16, 1999

Madam Chair and Members of the Committee, I am Chris Wilson, Executive Director of Kansas Agricultural Aviation Association (KAAA). KAAA is the association of aerial applicators of crop protection chemicals in the state. KAAA members are not regulated by the Division of Water Resources, and therefore we have not taken a position on this legislation. Our members, however, are regulated by other programs within the Department of Agriculture, and we were thus involved in discussions at the time the Department was established. Because of that involvement, I have been asked to provide to you my recollection of the discussions held at that time relative to this bill before you.

It is my recollection that, at the time the Legislature was considering how to address the decision in Hellebust v. Brownback, holding the state board of agriculture unconstitutional, our Association considered several possible approaches to reorganization. We were not unhappy with the old board of agriculture system and believed it could be altered to be constitutional. However, the Governor, some agriculture committee members and some producer groups advocated the establishment of a department of agriculture with an appointed secretary. We believed that would also be a workable option, and along with other agribusiness organizations, suggested that if this were done, the division managers should be appointed as well and all rule and regulation authority should rest with the secretary. The reason for this position was simply because of consistency with other governmental agencies and the view that a state agency should be organized in such a manner. Also, our thinking was that policy level managers should be accountable to the head of the agency and share the goals of the secretary, and in the case of an appointed secretary, the governor. In addition, we have a strong policy that there should be public input in decisionmaking to the extent practicable and possible. We have historically

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avored measures which require greater public input and opposed policymaking through internal documents which doesn't follow administrative procedures and involve processes for formal and informal public input.

However, it is my recollection that the producers groups involved wanted to address the structure of a department versus a board only and not make further changes. It was thought that there was enough controversy and challenge in coming to the point of establishing a department that a lot of additional changes to the existing system should not be made. In other words, developing the legislation to establish the department was time consuming in itself and encompassed a number of issues (such as whether there would still be a board of agriculture, whether it would be strictly advisory, how it would be selected, what it's advisory role would be, what meetings of the board would be required, and so on), so the thinking was, let's not get into these other issues. There was some sense of urgency to come to compromise and pass legislation establishing the department of agriculture, thereby remedying the constitutional problem as quickly as possible, so that the court wouldn't do it instead of the Legislature. As a result, issues concerning the classification of division managers and changes in existing rule and regulation authority were not focused on or considered at that time.

I hope that this helps in some way to answer questions about the history of the statutes being considered in S.B. 287.

STATE OF KANSAS

BILL GRAVES, GOVERNOR
Alice A. Devine, Secretary of Agriculture
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KANSAS DEPARTMENT OF AGRICULTURE

TESTIMONY

TO THE

HOUSE ENVIRONMENT COMMITTEE

By

Mary Jane Stattelman, Assistant Secretary

Kansas Department of Agriculture

March 16, 1999

SB 287

Chair Freeborn and members of the House Environment Committee, thank you for giving me the opportunity to discuss the concepts expressed in SB 287.

Even though the bill is rather lengthy, there are two main concepts that this bill addresses: 1) places rule and regulation authority with the secretary and 2) establishes a uniform hearing procedure for all appeals dealing with water issues that are regulated by KDA. KDA appears before you in support of this bill and these concepts.

Before I explain the concepts in this bill, it is important to clarify a couple of ideas or misconceptions about this bill. The bill does not declassify the chief engineer or any of the program managers within KDA and this bill retains the chief engineer's ability to make all initial decisions regarding water issues so that the technical expertise of the chief engineer is utilized.

The intention of this bill is to clarify the process regarding how decisions are made so that everyone has an understanding of the processes surrounding water issues. Since KDA functions in a regulatory role, we owe it to the public to ensure that they understand the process because “the essence of democracy is not primarily the outcomes it produces but the process by which those outcomes are reached and legitimated.” Foreign Affairs, Vol. 78, No. 2 (March/April 99)

Years ago, when the board was elected by agricultural groups and the secretary was appointed by this board, it was probably appropriate for the chief engineer to be autonomous. This is especially true in light of the Hellebust case in which the court ruled that “the chief engineer controls not only farm and agricultural water uses but also water rights held by cities, utilities and individuals connected with agriculture.” Hellebust v. Brownback, 42 F.3d 1331 (1994) Recall that the legislature, in 1995 responding to the Hellebust lawsuit, passed legislation to reorganize the department. The legislation created a cabinet level department and placed regulatory authority with the secretary, who is appointed by the Governor and confirmed by the Senate. This bill is further refining the open processes and accountability demanded by the Hellebust lawsuit.

Some people have raised concerns about the issue of placing the authority to adopt rule and regulations with a “political person”. The statutes and the courts have been very clear and definite that rules and regulations cannot “contravene or nullify a controlling statutory enactment”. Kaufman v. Dept. of SRS, 248 Kan. 951, 959 (1991). Therefore, any decision maker that has rule and regulation authority must follow the parameters of the law that you, the legislative body, enact.

Some individuals have made the statement that since water is so important to our state, the person should be insulated from any form of political pressure. I would request that you

think about this issue from a different perspective. First, since we all agree that water is important, is it appropriate to allow a single person to enact regulations about water issues, make decisions about water applications and be the decision maker about water issues without any substantive oversight except the courts. Where is the checks and balances? Is it fair to the public--an individual applicant--for the only review to be the court system? Does the cost of litigation preclude opportunities for appeal?

As the head of an agency, it is imperative that the rules and regulations that the public is expected to follow be adopted with the knowledge and support of the secretary and Governor. However, under the current statute, the chief engineer can adopt rules and regulations without input or approval of the secretary or Governor.

However, in light of the concerns that have been raised and in a desire to respond to these concerns, KDA is proposing an amendment to SB 287. The proposed amendment creates a water appropriation and water structures commission. The amendment authorizes the chief engineer to propose regulations to the commission. The commission is structured similar to the water quality commission. The commission has 7 members, who are appointed by the governor and possess experience in various disciplines. The commission would review and make recommendations to the secretary about the proposed regulations. This process should alleviate anyone's concerns that a secretary may consider political reasons when adopting rules and regulations. This process is also compatible with other western water states where the rule and regulation authority is placed with boards and commissions.

The main part of the bill outlines an appeal process that must occur under the Kansas Administrative Procedure Act (KAPA). Currently, only the abandonment cases are under KAPA. The abandonment statute was originally enacted in 1945. In 1988, the abandonment

statute (K.S.A. 82a-718) was amended to provide that “before any water right shall be declared abandoned and terminated the chief engineer shall conduct a hearing thereon in accordance with the provisions of the Kansas administrative procedures act.” The legislature made a conscious decision that before water rights could be terminated a hearing should occur under the rules set forth by KAPA. We believe that if the legislature purposefully adopted this process when a water right is abandoned, it is logical that the same process should occur when a person’s water right is denied or the change of use or place of use is denied.

This bill would place the other types of decisions that the chief engineer makes under KAPA. Under the KAPA process, the decision would then be appealed to a hearing officer, then if the person did not like the hearing officer’s decision the person could appeal to the secretary and then ultimately appeal to the district court. By placing all of the regulatory actions taken in regards to water issues dealt with by KDA under KAPA, the public can determine how to appeal an adverse decision and find all of the rules of the process outlined in statute and regulation. This allows the public to know the rules that are applicable when appealing a decision. By establishing a commonly used appeal system, the bill attempts to establish a fair and forthright way of handling appeals. Today--what happens?

Another benefit of this process is that the chief engineer’s judgement and expertise is placed at the beginning of the process in hopes that he will be able to resolve the problems. Currently, the chief engineer is at the end of the process and by that point in time there can be a high level of frustration with the process. Furthermore, under the current system, the chief engineer cannot always intervene and insert his viewpoint because he must remain outside of the process in case the matter is later appealed to him.

We believe it is appropriate to place rule and regulation authority in the secretary, who is

ultimately held responsible for the actions of the agency and as such should know what rules are being promulgated within the agency. We also think having a hearing process established for the people who have received adverse decisions from the agency is fair and what the public expects out of the government. Thank you again for allowing me to present KDA's views on SB 287. I would be glad to stand for any questions.

SENATE BILL No. 287

By Committee on Energy and Natural Resources

2-10

9 AN ACT concerning the chief engineer of the division of water resources
 10 of the department of agriculture; relating to powers thereof; amending
 11 K.S.A. 12-766, 24-126, 42-703, 42-722, 42-722a, 82a-303, 82a-303a,
 12 82a-703b, 82a-704a, 82a-706a, 82a-708b, 82a-711, 82a-718, 82a-724,
 13 82a-727, 82a-954, 82a-1028, 82a-1038, 82a-1345, 82a-1503 and 82a-
 14 1506 and repealing the existing sections.

15
16 *Be it enacted by the Legislature of the State of Kansas:*

17 New Section 1. ~~(a)~~ The chief engineer of the division of water re-
 18 sources of the department of agriculture shall propose such rules and
 19 regulations as necessary to carry out the laws administered by the chief
 20 engineer. ~~After the hearing on a proposed rule and regulation has been~~
 21 ~~held as required by law, the chief engineer shall submit the proposed rule~~
 22 ~~and regulation to the secretary of agriculture who, if the secretary ap-~~
 23 ~~proves it, shall adopt the rule and regulation.~~

24 ~~(b)~~ All rules and regulations of the division of water resources of the
 25 state board of agriculture, the chief engineer of the division of water
 26 resources of the state board of agriculture or the chief engineer of the
 27 division of water resources of the department of agriculture in existence
 28 on the effective date of this act shall continue to be effective and shall be
 29 deemed to be duly adopted rules and regulations of the secretary of ag-
 30 riculture until revised, amended, revoked or nullified pursuant to law.

31 Sec. 2. K.S.A. 12-766 is hereby amended to read as follows: 12-766.

32 (a) The governing body may establish flood plain zones and districts and
 33 restrict the use of land therein and may restrict the application thereof
 34 to lands, adjacent to watercourses, subject to floods of a lesser magnitude
 35 than that having a chance occurrence in any one year of 1%. Any flood
 36 plain regulations shall comply with the minimum requirements of the
 37 national flood insurance act of 1968, as amended (42 U.S.C. §4001 *et*
 38 *seq.*) or any rules and regulations adopted pursuant thereto.

39 (b) Prior to the adoption thereof, the governing body shall submit to
 40 the chief engineer of the division of water resources of the state board
 41 department of agriculture any ordinance, resolution, regulation or plan
 42 that proposes to create or to effect any change in a flood plain zone or
 43 district, or that proposes to regulate or restrict the location and use of

(i)

to the commission

and the department

commission has reviewed and made any necessary recommendation

(j)

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3-16-99
Attachment 15

New Section 1. (a) as used in this section:

(1) "Commission" means the commission on water appropriation and water structure regulations established by this section.

(2) "Department" means the department of agriculture.

(3) "Secretary" means the secretary of agriculture.

(b) There is hereby established the commission on water appropriation and water structure regulations. The commission shall consist of seven members appointed by the governor. Members of the commission shall have experience in one or more of the following areas and disciplines: environmental sciences; civil engineering; business and industry; public finance; public water facilities; agriculture or agribusiness; environmental or water law; aquatic biology; geology; risk assessment; or cost benefit analysis. No member of the commission shall be an officer or employee of the department of agriculture.

(c) The regular term of office of members of the commission shall be four years. Regular terms shall commence on the second Monday in January following appointment of the commission.

(d) Of the members of the commission appointed in the 1999, (1) Four members shall have terms ending on the second Monday in January 2004 and no more than two such members shall be members of the same political party; and (2) three members shall have terms ending on the second Monday in January 2003 and no more than two such members shall be members of the same political party.

(e) Any member appointed subsequent to 1999 shall be appointed for a four-year term, unless such appointment is to fill the unexpired term where a vacancy has occurred on the commission, in which case the member shall be appointed for the remainder of the unexpired term.

(f) The chairperson of the commission shall be appointed by the governor from among the members of the commission. The commission may elect such other officers as the commission determines necessary to carry out the powers and duties of the commission. The commission shall meet on call of the chairperson or a majority of the members of the commission.

(g) The commission shall be attached to the department. All budgeting, purchasing and related management functions of the commission shall be administered under the direction of the secretary. The secretary shall provide office and meeting space and such clerical and other staff as may be necessary to assist the commission in carrying out its powers, duties and functions under this act. All vouchers for expenditures and all payrolls of the commission shall be approved by the chairperson of the commission or a person designated by the chairperson and the secretary or a person designated by the secretary. All expenses of implementing the provisions of this act shall be paid from the general operating budget of the department and no moneys shall be appropriated specifically for that purpose.

(h) The commission shall:

(1) review and make recommendations on any proposed regulations or amendment or revocation of such regulations to the secretary prior to the submissions of such regulations to the department of administration, and;

(2) The commission shall make a report and recommendations to each regular session of the legislature and to the governor as such times as the commission considers advisable concerning matters relating to administration by the department of water laws.

TESTIMONY ON SB 287
CITY OF WICHITA
March 16, 1999
Presented by Gerald T. Blain, P.E.

The City of Wichita wishes to present testimony in opposition to proposed legislation SB 287. I serve as the Superintendent of Water Production and Pumping for the City of Wichita, and in that capacity I am responsible for the administration of the City's water sources, and for the treatment of the City's drinking water supply. I also serve on the Board of Directors of the Equus Beds Groundwater Management District, and I am a member of the Kansas Water Authority.

When the State of Kansas established the Water Appropriation Act in 1945, the legislature had the foresight to recognize that water resources are essential to the development of the State. They also recognized that the appropriation of those resources must be based on scientific fundamentals, and not on political winds. Therefore, they gave the responsibilities for appropriating the State's waters to the Chief Engineer. Since that time the Chief Engineer has acted as the impartial custodian of the State's waters.

The legislation before the committee now would change that impartial administration into a process fraught with political perils.

While I must agree that the Division of Water Resources does have its share, or maybe even more than its share, of bureaucratic red tape, whenever we have had discussions with the Division about water issues, we have noted that the one constant that pervades that division is the protection of the State's water resources. You never doubt the motivation behind any rule or policy.

If there are flaws in the management and operation of the Division of Water Resources, I feel that it is appropriate to address those specific flaws, and seek means to correct them. In fact last week the Committee heard from the Chief Engineer that he has already taken steps to clean up inappropriate policies and practices. However, I doubt that any of those flaws justify completely abandoning the current water management legislation that has been successful for many years. Attention should be given to fixing isolated problems before the entire appropriation system is disrupted.

If the creation of water policy is placed into the political area, it is inevitable that forces other than sound water management will alter water policy. Much as I am here today to ask you to vote for my perspective on this issue, political forces will pressure the Governor and the Secretary of Agriculture to alter water policy, or grant exceptions to policies, to fit their particular needs, even if it is not in the best interests of other water users. This legislation not only gives the Secretary of Agriculture the power to approve new rules and regulations, it will also give them the authority to grant exceptions to existing rules and regulations, an authority now reserved only for the Chief Engineer.

Another reason that the Chief Engineer has been "isolated" is because when they give someone a

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water appropriation, they give them a property right. When someone gets a water right, the value of their property is significantly enhanced, often by tens or hundreds of thousands of dollars. And this is not just a temporary condition, but it will continue indefinitely. Consequently, it is imperative that the entity that grants this property right is insulated from external political pressures to grant water rights. No other State institution has the ability to give someone a property right.

This has been discussed as a "management" issue because the Chief Engineer and the Division of Water Resources are not administered the same as other agencies are administered. I agree that this is true, but hopefully I have demonstrated that the functions of the Chief Engineer are significantly different from other agencies, so it is appropriate to treat them differently.

There is no need rush through legislation this year that could have dramatic impacts on the State's most vital resource. If there are problems with the current system, prudence would dictate that there should be a cautious, thorough, review of all of the issues before there is any legislative action.

The Legislature has given the Kansas Water Authority the responsibility to make recommendations on water planning issues to the Legislature. Obviously, altering the mechanism by which water resources in the State are appropriated has a significant impact on water planning in the State. Therefore, if the Committee feels that there may be some significant problems with the current water appropriation system, it is appropriate that the Legislature charge the Water Authority to review this issue, and return with a recommendation to the Legislature

TESTIMONY TO HOUSE ENVIRONMENT COMMITTEE

March 16, 1999 Topeka KS

Re: Senate Bill 287 and related legislative proposals.

by Bob Hooper

In last Sunday's Hays Daily News, the headline over a State Representative's comments reads "Water proposals aren't political."

Now let's get serious. Mark Twain once advised, "When in doubt, tell the truth; it will confuse your enemies and amaze your friends." In truth then, this whole affair smells like backroom politics, and I'll tell you why.

The last few months have seen a quick flurry of water proposals in House and Senate, SB 287 among them. Most would overturn statutory provisions and powers in place since 1945, and diminish the authority and independence of the Division of Water Resources, especially that of the Chief Engineer. At the same time, they would increase the political powers of the Secretary of Agriculture. Why the rush here?

Supposedly, we have in place a Kansas Water Plan procedure which allows for coordinated deliberation by Basin Advisory Committees who hopefully represent various constituencies of water users. Supposedly we have a system of public hearings. Supposedly, we allow for consideration by the Kansas Water Authority. Supposedly we have a process of careful review and revision by the Kansas Water Office. Out of that, supposedly comes a concensus proposal to the legislature. None of that happened here. Neither the Water Authority nor our Basin Advisory Committee nor the public was "in the loop." The bill whistled through the Senate, and is now in your committee. Why?

I am told that the administration wants this bill (specifically or in substance) "greased through," and the word to Republican legislators is "Shush, don't debate it; just get it done." I leave you to weigh the accuracy of what I've heard in that regard, but personally, I would like to ask Governor Graves, who has been so visible in water quality issues, why he has been so invisible about groundwater mining.

Surely he knows that we have a serious environmental problem in SW Kansas, where through at least 1994, and probably today, Kansas leads the nation in percentage groundwater decline. And surely both he and you know that the hydrology of the resource is complex, and involves surface manifestations of water. A quick glance at Kansas Geological Survey, Public Information Circular 9, illustrates clearly the loss of many miles of perennial stream flow, partly the result of over-pumping of groundwater, not just in SW Kansas, but in western Kansas generally. In speaking of over-pumping, I am not suggesting pumping in excess of appropriation rights (though that happens), but of

a philosophy of planned depletion or so-called safe yield, which in fact is not safe for the resource. I ask you to read that short newsletter.

Geologically and hydrologically speaking, the Ogallala (our chief freshwater aquifer) is perhaps 25 million years old. We will have substantially depleted it within the lifetime of one human being. The depletion continues even as we speak here. I marvel that our rhetoric was so strident against Colorado and Nebraska, and so soft on our own Kansas failings in stewardship. Yet the reason is plain.

We are all aware also that the mining of groundwater has, over the short term, brought much real wealth to the region and to the state. In view of the billions of dollars irrigation and spin-off industries have brought, only the politically innocent would imagine those same billions would not also sprout a vested and determined power structure -- to protect, if not increase, that current flow of dollars earned by exploiting the resource.

But solving this problem requires not dollars, but courage. And the courage to solve it is not likely, I think, to come from those whose livelihoods rest so clearly on the continued mining of water.

The Chief Engineer, especially since 1996 and probably since the Wet Walnut Creek action, has increased efforts to deal with over-pumping of water rights. To see that, I ask the committee to obtain and read from the Division of Water Resources (1) Strategy for Addressing Recurring Over-pumping, (2) Summary of Results and Conclusions for the 1996 Compliance and Enforcement / Rattlesnake Creek Pilot Project, and (3) Compliance and Enforcement Task Force Implementation Proposal for Enhanced Compliance and Enforcement Program. Those documents will help you to understand what is summarized in KGS Circular 9 (previously mentioned) :

"The Division of Water Resources...is attempting to develop a comprehensive management program in areas of Kansas with significant water problems. Working within the framework of existing state laws, this program intends to develop proactive, long term solutions..."

It may strike you as strange coincidence that SB 287 and other water bills in this session have cropped up just now, challenging concepts long in place, just at the moment David Pope has begun to focus on oversight programs. . It may strike you as coincidence that HB 2518, which will be a wholesale giveaway of uncertified water rights is suddenly on your plate. It does not so strike me.

Nor do I think that giving this Secretary of Agriculture or a future gubernatorial appointee a bigger voice in water governance will bring more objectivity to water decisions. In fact, the statutes and the courts already provide adequate recourse to any abuse of law or authority by the Chief Engineer.

In what follows, I do not intend to be malicious. I do not accuse anyone of breaking the law. I do not wish to make anyone angry (though I surely will). Instead, I hope to speak for the stewardship of the resource, on behalf of no special interest but all the citizens of Kansas, now and future. And I hope to make you aware of how political pressures are at work here which provide a case-in-point why the bill should not escape your committee. That requires some specifics.

Three state senators (Morris, Salmans, and Huelskamp) who have figured prominently in support of the bill hold a total of 16 separate irrigation rights in Southwest Kansas. In an AP story, Senator Huelskamp voiced what seemed to be their common sentiment: "It's high time the chief engineer be put in the same line as other bureaucrats. If you have this much power in one person, you have the potential for favoritism." I have to ask: might not these appropriation right holders, or others in that interest sector, have a bias against tougher regulation? Perhaps.

Would the current Secretary of Agriculture be more immune from showing favoritism, or more objective? Well, having asked the rhetorical question, let me venture an answer: I'd be doubtful.

It is my understanding that the Secretary formerly served as a lawyer and/or lobbyist for the Kansas Livestock Association. Would the KLA have an interest in promoting cheap and abundant feed grains and encouraging the production of fat cattle? Does irrigation play a role in feedlot agriculture? Would the current Secretary have any remaining loyalties to the KLA?

Ms. Devine's father has a current application (43, 579) pending for a water right in a township which should be closed to further development because of current safe-yield policies. Is he happy about that? Would the Secretary be more objective in her interpretation or implementation of safe-yield policies where her father is concerned? In fact, what is the present Secretary's view and vision as it relates to the sustainable use of water in Western Kansas? Has she been asked that for the record?

I am told also that another political camp pushing hard for SB 287 and others is a group of home construction interests wishing for more leniency in developing commercial or residential sites in areas which are scenic, but involve flood plains or other risks. You will have to investigate that, I think.

However, perhaps we should all be asking an even more basic question.

The bedrock of Kansas Law 82a-702 dedicates the waters of the State of Kansas to the beneficial use of the people. 82a-707a pointedly declares that an appropriation right does not constitute ownership of water. 82a-706c provides that the Chief Engineer shall administer the laws of the state for the beneficial use of all its inhabitants. Since 1945 the Division of Water Resources has been only a quasi-agricultural agency, and for good reason.

KS Law 82a-707b provides for resolving conflicts in water with six categories in the following order: domestic, municipal, irrigation, industrial, recreational, and power users. We might reasonably wonder why the Secretary of Agriculture should have any special privilege here, given that agriculture falls third in line.

In fact, perhaps water governance would be more wisely and logically placed under a new Department of Environment, charged with genuine stewardship of the resource--with laws in place calling for sustainable use of water and for protection against dewatering rural areas via urban transfers to support distant development.

I am told that present supporters of the bills, having inspired a little more heat than they originally calculated, are now in the backrooms privately suggesting an interim committee may be an acceptable fall-back position, hoping that once scrutiny has diminished, the action can proceed in their favor. You will judge whether that is so. It is my own hope you will kick this bill and others like it in the seat of the pants, and send them packing out the door with other ill-considered notions.

Thank you for the opportunity to speak frankly as a citizen of Kansas and these United States.

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Bob Hooper has served on the Solomon River Basin Advisory Committee since 1984, and was a member of the original BAC steering committee. He serves without pay, and is not reimbursed for related expenses. His address is Box 3 / Bogue, KS 67625. Tel. 785-421-5489 res. -2722 work. E-mail address: celtic@ruraltel.net.



Testimony in Opposition to Senate Bill 287 before the House Environment Committee
Tuesday, March 16, 1999

My name is Richard Wenstrom, and I am a farmer south of Kinsley, Kansas in Edwards County. I am appearing before you as a Director on the Board of the Water Protection Association of Central Kansas (Water PACK), a private, non-profit corporation of about 550 agricultural producers and related agribusinesses organized to work on water issues affecting our membership. The area of the state that we are active in is a 13 county area bounded by the cities of Kinsley, Great Bend, Wichita, Pratt, and Greensburg.

- As water users and water right holders, we have an understanding of the rules, we know our responsibilities, and we know how the rules are enforced under the current system of water administration. Opening this process up to political authority, subject to change every four years is, to us, bad policy.
- Even though we in agriculture do not always agree with the decisions of the Chief Engineer, we feel that the Chief Engineer has been fair to comparative segments of our society who use water: agriculture, municipalities, industry, fish & wildlife, etc. To continue and maintain this fairness, the Chief Engineer needs some protection from political pressure when required to make politically unpopular decisions.
- The Chief Engineer, as a licensed Professional Engineer, makes decisions based on weighing the unique scientific, hydrological facts in each case, blended with an understanding of water user's circumstances. Engineering judgment is often required. In Senate Bill 287 these technical issues can be overridden by someone who may not be qualified in science, hydrology, or water resources management, and moreover, someone who could be subject to political influence.
- Our farmer membership has had a respectful, responsible and open relationship with the Division of Water Resources. We fail to see any advantage to an additional hearing procedure through a hearing officer selected by the Secretary of Agriculture.
- Finally, Senate Bill 287 makes a radical change in authority in the administration of water law, rules and regulations. We, as farmers and water managers, do not know the answers or the impacts of the questions this bill raises. We do know these issues are far too important to us to be decided after a few weeks of debate. We had no idea these bills were coming, nor did our neighbors at home.

Therefore, the farmers who comprise the Board of Directors, on behalf of our membership, respectfully request that this bill be sent to interim committee for further study or the Legislature adopt a resolution to establish a 23 member task force to review water law administration in Kansas.

WRITTEN TESTIMONY FOR HOUSE ENVIRONMENTAL COMMITTEE

SB 287

Presented by Wayne Bossert, Manager, Northwest Kansas Groundwater Management District 4 on behalf of the board of Directors. Testimony given March 16, 1999.

We are amazed that so few state agencies are testifying on this bill. Normally these agencies are the mainstay of committee input because they're the state's most insightful and technically expert inputters. We know that the administration has said these agencies are free to speak, but one has to wonder why they are not doing so. For whatever reason, though, this committee is getting only half of the quality input it normally would receive. We have to believe this is a prime example of policy-making in a formal political system. When the administration wants legislation that appointed staff cannot support, the Legislature gets only the administration's input - right or wrong, good or bad. This situation should certainly raise a few red flags.

We are also amazed that this is the most significant water legislation considered in many, many years, and that it has not been afforded more public discussion. This is very irregular. Our board is concerned that we were not even told by the administration that it was being introduced at all - even though it proposes to amend the Groundwater Management District Act in several ways that need to be looked at more carefully. Again, very irregular as up to now we have worked quite well with the agencies that have failed to inform us of this bill. Moreover, the proposed bill hasn't been introduced to the Kansas Water Authority - that entity created by the Legislature to make certain that every stakeholder in the state has input into water planning and policy issues - and given specific statutory authority to be involved directly. 287 was introduced after they met in January and will likely be completed before they meet again in mid-April. It seems ironic to us that this bill is being touted to be so much more open and stakeholder friendly, yet the process designed to pass this bill has been more restricted and stakeholder unfriendly than normal.

We're also amazed that more people, like water right holders and ag lenders, are not more vocal on this bill. With passage, every administration will have the ability to re-interpret the water appropriation act and adjust any regulations necessary, state or local, to accomplish their new interpretations. With every change in administration,, every water right holder will have to wonder: "What does this administration think my water use means to their vision for the state?" SB 287 will allow the secretary of agriculture to stay any control area order issued by the chief engineer. And can you imagine, for example, how much more difficult it will be for Ag lenders to do business when they typically use a 25-30 year decision horizon while at the same time Kansas water policy will be operating on a 4-8 year decision horizon? There is already enough instability in water in Kansas to drive us all crazy - why superimpose instability of policy on top of the natural instability we have in our year-to-year supplies?

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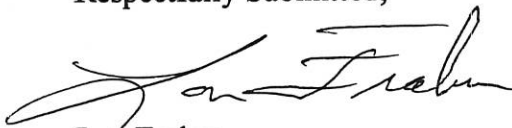
Some say that the new constituent appeal process proposed by 287 will be less costly and more timely. This is true only if the appeal is favorable for the constituent. If it's not favorable, the process will clearly be longer and more costly for everyone because 287 adds one to two more steps before the contested issue goes to court. The only way one could state that the proposal will in fact be more timely and less costly is if they intended before the fact to favorably decide a vast majority of appealed decisions. Are we to assume this will be the case?

Some also say that this new appeal process is protected from abuse by the joint selection of an independent hearing officer by the Secretary of Agriculture and the Chief Engineer. This too, is true - until the Chief Engineer is made an unclassified position and begins serving at the pleasure of the Secretary of Agriculture (SB 64 or HB 2253). Then the rule maker alone picks the hearing officer, and, also becomes the secondary appeal level. In these cases, Governor Graves' own fears are realized - that "...the appeals are heard by the same person who established the process and made the original ruling."

Our board could support the appeals wording of SB 287 as long as: a) the hearing officer is guaranteed to be independently selected, and, b) further appeals do not go through the Secretary of agriculture, who will have made the original ruling, and, c) the bill also insures that the independent hearing officer has sufficient water literacy to make technically correct and consistent decisions. Otherwise, this change will also eventually result in more instability in the water policy arena.

In closing, there are clearly too many unanswered questions and too many unforeseeable possibilities to be making decisions this late in the session. We ask that these issues be sent to interim session for more complete consideration. If they're really good ideas for the state, they'll be good ideas 10 months from now. If not sent to interim session, we oppose SB 287 completely.

Respectfully Submitted;



Lon Frahm

President, Northwest Kansas Groundwater Management District 4

Subject: (no subject)

Date: Fri, 12 Mar 1999 11:37:44 -0600

From: wkgmd1@ruraltel.net (Western KS Groundwater Management Dist. #1)

Organization: wkgmd

To: Wayne Bossert <wbossert@colby.ixks.com>

STATEMENT BY THE WESTERN KANSAS GROUNDWATER MANAGEMENT DISTRICT NO.1

The Western Kansas Groundwater Management No.1 has reviewed HB 287 and has a number of concerns. The primary one is that it appears that this bill is attempting to undo everything that past legislative actions has attempted to establish. By transferring the approval authority to the Secretary of Agriculture, in lieu of the Chief Engineer of the Division of Water Resources, the entire water policy in Kansas will become very politically motivated. It was always our perception that past legislative actions had attempted to keep the actions of the Division of Water Resources more insulated from the political pressures than are being proposed in this legislation.

Another concern is the speed with which these bills appear to be traveling. We were unaware, as were the state water related agencies, of the existence of these bills, prior to being introduced. Because of the effect this bill will have on the District, it certainly would have been nice to have had an earlier knowledge of its existence. We don't feel that there are enough legislators that understand the true effect that this could have on the water policies in Kansas.

We were also under the understanding that the Kansas Water Authority, on which we have representation, should have been aware of these major changes and should have been able to make their recommendations known. Since this agency was established by the legislature for this purpose, this would have been an excellent sounding board for this action.

The last item we would like to comment about are the other water related issues facing the this legislature. These include SB 64, SB 172, HB 2253, HB 2404 and HB 2518. Given the importance of these bills on the water policy in Kansas, we would like to respectfully recommend that these bills be put on hold and reviewed during the interim session this summer.

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TESTIMONY PRESENTED TO THE
HOUSE COMMITTEE ON ENVIRONMENT
CONCERNING SENATE BILL 287

BY
Michael T. Dealy, Manager
EQUUS BEDS GROUNDWATER MANAGEMENT DISTRICT NO. 2
March 16, 1999

On behalf of the Equus Beds Groundwater Management District No. 2, I would like to thank Chairperson Freeborn and committee members for the opportunity to present testimony concerning Senate Bill 287.

In consideration of the bill the Equus Beds Groundwater Management District finds:

1. that the State's water resources were dedicated to the people of the State by the Legislature;
2. the bill represents a significant and fundamental change in the development, direction and administration of water policy by state and local agencies;
3. that the Kansas Water Authority, the State's water planning body, was created by the Legislature to review plans for the development, management and use of the water resources of the state by any state or local agency;
4. that the Authority shall consult with and be advisory to the governor, the legislature and the director of the Kansas Water Office;
5. that the Authority may study such matters as the appropriation of water for beneficial use and the conservation and development of water resources for the purpose of determining the enactment of new or amendatory legislation in the State;
6. further, the Authority has established citizens' advisory committees to study and advise the Authority on such issues contained in Senate Bill 287;
7. that neither the Authority nor the citizens' advisory committees had the opportunity to study the issues contained in Senate Bill 287 and advise the governor, the Legislature or the Director of the Kansas Water Office on such matters;

In summary, the District recommends that no action is taken on Senate Bill 287 until such time as the Kansas Water Authority and the citizen advisory committees can study and make recommendations to the governor and the Legislature on these significant and fundamental changes in the development, direction and administration of water policy by state and local agencies.

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Lower Republican Water Association

Working Together for the Preservation and Conservation of Water
RR 1, Box 42 • Courtland, Kansas 66939 • (913) 335-2524

Chairperson Freeborn and fellow committee members:

My name is Bob Gilbert of Belleville, Kansas. I am presenting testimony today on behalf of the Lower Republican Water Association, a group formed to represent all water users in the lower Republican River basin. The association promotes water conservation and encourages management practices to improve water use efficiency and water quality. The group also monitors the evolution of water policy and water resource allocation in Kansas as well as on the national level.

It's ironic that we are here today to present testimony in opposition to SB 287. In the late 1980's our association was formed primarily because the chief engineer imposed a moratorium on irrigation development in the lower Republican basin. There was also talk about minimum stream flow and the fact that junior water right holders might be forced to quit utilizing their allocations. People were not happy. Our association lobbied the chief engineer and Kansas Water Office. Ultimately, a very productive dialogue was established between the groups. Although there was not always agreement on issues, each side respected the other sides point of view and everyone gained a better understanding of the overall issue.

Today we still have water concerns in our area. Our present system of water allocation and administration is not perfect. Some policies and regulations seem to penalize individuals that try to conserve the resource. If you don't use your appropriation you can lose it or have it reduced. There are other issues, such as water banking, that have merit. There are changes that could be made and not jeopardize the integrity of our water resource.

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While some change is needed, we do not feel that SB 287 is the way to accomplish it. It seems that this bill would politicize the process and that is not acceptable.

Some may argue that our fears of politicization are unfounded. But anytime power shifts from a civil service position to a political position, it seems reasonable that politics could become a factor.

SB 287 indicates that the chief engineer will propose rules and regulations as necessary to carry out the laws administered by the chief engineer. Then it would be adopted only upon approval by the secretary of agriculture. This in itself is not a problem. But subsequent sections of the bill do present problems. In all sections of this bill, the secretary of agriculture is given either direct or indirect authority to review decisions of the chief engineer via the administrative procedures act. Granted, someone would have to appeal a chief engineer decision before this would become a factor. Politics, like it or not, will play a definite role in the process.

We also have concerns about the qualifications of the hearing officer. We feel that it would be difficult to find a person who has the technical and legal background to make informed, intelligent judgements on these appeals.

Another major concern with SB 287 is that there will be a lack of continuity in the administration of Kansas water law. As administrations change, secretary of agriculture personalities will change to reflect the wishes of the administration in power. We can see the possibility that there could be shifts in the way Kansas water law is administered with each changing of the guard.

Kansans cannot afford to politicize the process and lose the continuity of the administration of water law.

Our neighbors to the north are watching this debate with great interest. We predict that if SB 287 passes, Kansas will lose the lawsuit it filed against Nebraska over stream flows on the Republican River. Granted, the attorney general's office will try the case. But if SB 287 is adopted, there is a possibility that some personnel in the chief engineer's office might seek other opportunities. This could affect the presentation of technical information in the lawsuit, which could ultimately impact the resolution of the lawsuit. Thus the need to maintain continuity.

As mentioned earlier, our present system of water allocation is not perfect. Changes can and should be made. But rather than make spontaneous changes, we would suggest that this issue be studied by an interim legislative committee. Other water groups such as the 12 basin advisory committees, the Kansas Water Office and the Kansas Water Authority should be consulted for input. Public forums should be held to gather input from the public. We are confident that a process can be developed to accomplish the changes needed without politicizing the process.

There is probably no other resource in the state of Kansas that has a more direct effect on the economy than water. It's quantity and quality are vital to the economic viability of the state. Therefore, we must not trivialize the importance of the proposed changes and their long term effects on the citizens of Kansas.

The Lower Republic Water Association prays that you will give this issue the thorough review it deserves and arrive at a solution that will be fair and equitable to all.

Thank you for the opportunity to present our views on this issue.

Lower Republican Water Association

Working Together for the Preservation and Conservation of Water
RR 1, Box 42 • Courtland, Kansas 66939 • (913) 335-2524

HIGHLIGHTS OF TESTIMONY OF LOWER REPUBLICAN WATER ASSOCIATION

1. The Lower Republican Water Association opposes SB 287.
2. The association fears that the shift of power from the chief engineer to the secretary of agriculture will politicize the administration of Kansas water law.
3. The association feels that there needs to be continuity in the administration of Kansas Water Law.
4. The association recognizes there are problems with the present system. But rather than make spontaneous changes, we suggest that this issue be studied by an interim legislative committee.

TESTIMONY PRESENTED TO THE
HOUSE COMMITTEE ON ENVIRONMENT
REGARDING - SENATE BILL 287

BY SHARON FALK, MANAGER
BIG BEND GROUNDWATER MANAGEMENT DISTRICT NO. FIVE

On behalf of the Board of Directors, Big Bend GMD #5, I would like to thank Chairperson Freeborn and committee members for the opportunity to present comments regarding SB 287.

Senate Bill 287 proposes to change the way Kansas administers water law. These changes have the potential to impact all water users throughout the state of Kansas.

K.S.A. 82a-706a, is one of the statutes being amended. This statute allows for the adoption of rules and regulations to achieve the purposes of the Kansas Appropriation Act pertaining to... "the control, conservation, regulation, allotments, and distribution of the water resources of the state". The purposes I mention here should not be taken lightly. The magnitude and impact of even minor changes to these statutes could be extensive.

The water users in this state, are the ones who will pay the consequences if the amendments to this and other statutes are not carefully reviewed. These statutes are the backbone of water law in our state. It is critical that they be administered in a fair, consistent, and impartial manner. The placement of our water law in the political arena could dramatically change how the laws will be reviewed and interpreted. If these changes are made, will the laws always be administered objectively? Are these changes truly what the people of Kansas want?

The Board of Directors, GMD #5, respectively request this committee consider this bill for further study in the interim legislative session. This will give the legislature and the people of the state of Kansas the necessary time to determine the impact of changing laws that affect each and every citizen in the State of Kansas.

Thank you for the opportunity to present this information to you today.

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**KANSAS GROUNDWATER MANAGEMENT
DISTRICTS ASSOCIATION
POST OFFICE BOX 7
STAFFORD, KANSAS 67578**

March 10, 1999

Office of the Governor
State Capitol
2nd Floor
Topeka, Kansas 66612

The Honorable Governor Graves:

The following comments, questions, and serious concerns represent action taken by the Kansas Groundwater Management Districts Association at a KGMDA meeting in Topeka on March 3, 1999. Considerable discussion took place regarding the implications and potential impact that several proposed legislative actions, if passed, will have upon the water users in the State of Kansas. Senate Bill 287 is the focal point of this correspondence, but there are a number of other important bills addressed and should be considered as well.

SB 287 represents a significant change in the development, direction and delivery of water policy in the state.

Currently water rights issues - from policy to regulation to enforcement are almost exclusively the responsibility of the Division of Water Resources, Department of Agriculture. This Division was deliberately insulated from the Department of Agriculture and all other influences in two major respects - first the position of chief engineer was purposely made a classified position in the Kansas civil service, and secondly because his or her rule and regulation authority was specifically separated from the department. These two significant decisions were made some 22 years ago by the Legislature following recommendations to this effect made by Governor Bennett's Blue Ribbon Task Force chaired by Lt. Governor Shelby Smith. These deliberations were considered so important back then that a special committee procedure was set up to handle all the public input. These arrangements also insured that maximum consideration would be afforded all issues discussed by every participating party which chose to do so.

Today, SB 287 is proposing a very radical change in the water policy system that raises another public policy issue - should the development, direction and delivery of water policy in Kansas be consolidated under the control of a politically motivated secretary of agriculture, or left with the current system that was purposely insulated for maximum stability and uniformity over the long run?

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The Honorable Governor Graves
March 10, 1999
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It appears, after visiting with different legislators, several issues regarding the administration of water rights have been brought to the Department of Agriculture's attention. Is it possible that current administration (the Division of Water Resources) has not been provided the appropriate resources to adequately do a comprehensive job resolving water right issues?

We don't disagree that the policy issue of the appropriate delivery vehicle for water policy is a valid subject for public debate. Just because the legislature decided for the current system 22 years ago does not necessarily mean it remains the best system for us today. However, the issue is no less important today than 22 years ago, and should have the fullest attention possible by all who consider it. Moreover, the full citizenry of Kansas (at least every stakeholder) should have an adequate opportunity to digest the proposal and to offer thoughtful comment. This cannot and should not be done in the remaining weeks of our 1999 session - especially when one considers the way this bill entered the legislative system.

The major state water agencies (Division of Water Resources, Kansas Water Office and Kansas Department of Health and Environment) were not made aware of the introduction of this bill until the day it was introduced. Highly irregular. The local groundwater management districts were not made aware of it at all, yet it directly amends our regulation making authority as well. Also highly irregular.

Moreover, KSA 74-2622 gives the Kansas Water Authority (the state's water planning agency) specific statutory responsibility to consider precisely these kinds of water issues. This agency was established by the Legislature to expressly insure wide public consideration of important water policy and planning issues. Every stakeholder in the state has been provided representation on this body. Yet, as stated above, they were not informed or advised of the introduction of this bill until the day it was introduced. This body meets quarterly and will not meet again until April 8-9, 1999. Kansas citizens should have had an opportunity to discuss this bill with their KWA representative, and the KWA should have had an opportunity to consider this bill before the legislature passes on it.

The promoters of this bill contend that it will open up the process and make it more accountable to the citizens of the state. This much Secretary of Agriculture Devine told us personally on March 3, 1999. She went on to say that it would also insure that all the stakeholders would find places at the deliberation table when important policy/regulations were being developed. It is ironic that the very process the sponsors claim will bring about this openness of decision-making has itself been so restricted and condensed in time. A quick decision on these vital issues will surely be an incomplete one at best.

Other interested parties also have not had adequate time to consider the implications of this bill. The local groundwater management districts whose boards of directors meet monthly have had only one meeting each to consider SB 287 along with the rest of the water bills introduced this session (SB 64, HB 2253, HB 2404, and HB 2518). The boards desire more time to consider these bills and the impact they will have on local water users. Some opted to oppose the bill(s) simply to be on the safe side, hoping they would have more time to discuss them during their next meeting.

The Honorable Governor Graves
March 10, 1999
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In this same vein, one has to question whether any other entity has had adequate time to properly poll their members with full disclosure of the issues. We suspect most have been forced to go on the record in too short a time frame, like we have. One manager, following news that the League of Municipalities had supported the bill, discussed SB 287 with a member of the League's policy board. During that discussion the policy board member indicated that he talked briefly about SB 287 with the City of Colby, but that he got no specific direction from Colby. If this is typical, how did the League Policy Board make their decision to support SB 287? They could not possibly have had all the information they needed to adequately assess the bills impact on municipal water rights. This is a sure recipe for less-than-effective legislation.

Although SB 287 is currently the bill of focus, there are a series of other water bills that are also poised for action. SB 64 for example will unclassify the chief engineer's position and require that he or she serve at the pleasure of the Secretary of Agriculture. The current chief engineer is exempted. Coupled with SB 287, this completes the politicalization of water regulation in the state. HB 2518, HB 2404 and HB 2253 also relate to SB 287 in ways that need to be considered more closely.

For all the above reasons, we would urge the House leadership to not push these bills through at this time and consider giving them a more appropriate hearing during the interim legislative session. It will also give the Kansas Water Authority a chance to review these issues in depth. If these are really good ideas for the state, they will remain good ideas for another 10 months. The speed that SB 287 has traveled thus far means that many potentially affected Kansans are still unaware of this bill.

If there are any questions, please contact any GMD office.

Respectively Yours,

Sharon Falk

Sharon Falk, President
Kansas Groundwater Management District's Association

Keith Lebbin, Executive Director
Western Kansas GMD #1

Michael T. Dealy, Manager
Equus Beds GMD #2

Steven Frost, Executive Director
Southwest Kansas GMD #3

Wayne Bossert, Manager
Northwest Kansas GMD #4

Sharon Falk, Manager
Big Bend GMD #5

c: Legislative chairpersons
GMD's Board of Directors
Kansas Water Authority Members

March 14, 1999

Dear Chairperson Freeborn and House Environment Committee:

I appreciate the opportunity to be a proponent of this bill. I am from Long Island, Kansas, which is located in the northwest part of the state. We have multiple water rights that range from vested to appropriated and consist of surface, groundwater and irrigation district rights out of Keith Sebelius Reservoir. We have had continual, ongoing relations with DWR since the original act in 1945.

Prior to 1985, DWR's main working relationship was to help keep neighbors from fighting each other through administration of water law and to help in any way possible to develop and perfect water rights for all water users. In and around 1985, the DWR's relationship with irrigators has changed to micromanaging, restricting and reducing water rights in all possible ways.

Along with this thrust of administration, literally hundreds of rules and regulations have evolved. The unfortunate thing about all of these rules is that the water right holders (that includes municipal, industrial, recreational and irrigators) have had literally no input into these regulations.

It is absolutely imperative as we go forward with water law that all water users have a direct input into these regulations that will govern them.

The Secretary of Agriculture needs to be able to sign and approve all rules and regulations before they even go through the hearing process. I hope this could be accomplished through a committee of water users from across the state that has an excellent understanding of water law. This committee would review, comment and give recommendations to the Secretary of Agriculture on the rules and regulations that are being developed by DWR.

The second half of this bill deals with having a water court that all water users would be able to access before having to hire water law attorneys and drag their cases through the district courts. Currently, the Chief Engineer is the presiding judge of his own department, and it is very difficult to rule against your own department in a dispute.

It has been my experience that finding an attorney within the state of Kansas who will even think about contesting the DWR is extremely difficult. Three years ago I discovered the DWR had knowingly given my water right to my neighbor ten years previously without my knowledge. It took hundreds of hours, thousands of dollars and two and a half years to dodge every technical roadblock that DWR could throw in the path to the District Court. The court found DWR had materially changed a contract without my knowledge. It is my sincere opinion that a review panel or a water court would have found the exact same findings of the District Court in less than twenty minutes and saved all of us literally tens of thousands of dollars.

Intimidation is the main reason you don't see more water users testifying for this bill. I was told that if I took my case to District Court and succeeded, the DWR would fight it all the way to the Supreme Court. Factually, after the District Court Judge awarded my original water rights returned, the DWR dropped the case. Most of my friends would admit that I don't intimidate easily.

SB287 is a statute that has outstanding concepts that will help ALL water users in the state of Kansas help preserve and protect their rights and their water.

This bill and the high probability that you will see a water banking bill in front of you next year give me great hope that we are on the right path in water legislation.

Thank you very much for your time!

Terry Nelson
Rural Route 2, Box 18
Long Island, Kansas 67647

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2/14/99

Legislative Committee Member of Environment

Senate Bill 287

I would like to express my concern as a tax payer and Republic County businessman about Senate Bill 287. This bill, will make some changes but are they the right changes and are they the ones that need to be made. Do we want to possibly make rules and regulations as political as any Governor or Secretary of Agriculture would want them. A Governor by their appointment of the Sec. of Ag. is just one step in the political appointees, we next have the Sec. of Ag. to make appointments.

With agricultures lessening of importances in the mind of some with S.B. 287 are we putting one of the states most valuable resources in the hands of those very same minded politically. Whose to say in the years ahead of us there may not be the same mind set at the state level with the Sec. of Ag. or the Governor, or for that matter the Chief Engineer. We must be very careful as we open up a new area of rules and regulations. Are we willing to let politically appointed people, without an over view of the one's being regulated. S.B. 287 does touch on this with an Hearing Officer that is also appointed by the Sec. We use that word appointed alot lets get some involvement from the ones that are to be regulated.

This bill has moved so fast though the political system. I wonder if it has been reviewed by the KS. Water Office or the KS. Water Authority has the twelve Basin Advisory Boards advised on the bill. I have not heard of it being presented at any public forum. The authors of the current law, with their advisers and knowledge of agriculture and the relationship with the Dept. of Ag. tried to create a system of as little politics as possible in the appropriation of water and to maintain the accountability, and continuity that the rules and regs. would be administered equally for all.

The Kansas law suit with Nebraska is vital to the water interest of KS. The strength of the states position in the suit as well with the Colorado suit was the continuity in the Chief Engineer's office and his staff. The technical

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staff and administration of water law must not be politicized with the fear of doing a political wrong. We can look at Nebraska's system of politicized water issues and see what they have gotten done. There are changes that do need to be made within the KS. system. But lets step back and visit those issues before we change a law that has worked for how many decades. Lets look at the possible long term effects. If S.B. 287 stands as written are we willing to turn these issues over to any political appointees of any Governor. It is my suggestion these issues be studied by an interim committee, and have input from those that are being regulated. Eighteen pages of a bill relating to KS. law and lines and lines of amending laws and repealing existing sections. Who knows how all this reads. Lets slow down if these changes are good today I would think they would be good yet next secession.

Sincerely



Mike Brzon
RR 1 Box 42
Courtland, KS. 66939
ph 785-335-2624

Groundwater:

"The Resource
of the
Future"

Southwest Kansas Groundwater Management District

* * * * *

(316) 275-7147

409 Campus Drive, Suite 106
Garden City, Kansas 67846

March 8, 1999

Representative Joann Lee Freeborn, Chair
Environment Committee
Kansas House of Representatives
Capital Building, Room 426 - South
Topeka, Kansas 66612

RE: S.B. 287

Dear Representative Freeborn and Associate Committee Members,

The District again respectfully requests your very deliberate consideration in the matter of S.B. 287, and further wishes to advise you and to convey the recommendations of the Directors in this regard. The Board perceives that S.B. 287 provides for several potentially beneficial but significant changes to the current structure of water resources administration in Kansas.

It is agreed in concept that,

1. The provision for an additional avenue of appeal and judicial relief by an independent hearing officer and the Secretary of Agriculture appears to be desirable;
2. The provision for an additional level of regulatory rule-making review and approval by the Secretary of Agriculture appears to be desirable;
3. It would not be advisable to declassify the Chief Engineer's position (as proposed in S.B. 64 and H.B. 2253) if the provisions of S.B. 287 are adopted; these two concepts are seen to be incompatible.

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and 4. The proliferation of water related legislation presented in rapid-fire succession during the 1999 Session has the potential (if adopted in entirety) to create many unforeseen ramifications and "chain reactions". It is advisable to consider the collective effects of all of this legislation and it's impacts on the water-using community in a comprehensive manner rather than on an individual or "piece-meal" basis.

As you are aware, our testimony is again one of concern over the ultimate direction and disposition of the policy of water, and water politics, in Kansas. If any or all of the proposed water legislation in this session possess true value and merit they will possess the same attributes in the next legislative session (2000). Extended deliberation over the ultimate outcome of these issues during an interim study could do no harm and could only be beneficial to everyone's level of comfortability. The Board of Directors premises it's recommendations about S.B. 287 on the proposition that further review and evaluation may be necessary and would be productive.

Thank you for your consideration of the District's comments.

Please feel free to write or call if you have any questions or if we can be of any assistance. You may also wish to contact the District's Legislative Representative, Chris Wilson, in these regards; she will be equally pleased to be of help.

Sincerely,



Steven K. Frost
Executive Director

pc: Governor Bill Graves
Representative Robin Jennison, Speaker of the House
Senator Steve Morris, Chair - Senate Agriculture Committee
Senator Dave R. Corbin, Chair - Senate Energy and Natural
Resources

Senator Tim Huelskamp
Representative Joann Flower, Chair - House Agriculture
Committee

Representative Carl Dean Holmes
Representative Ward Loyd
Representative Gary Hayzlett
Representative Bill Light
Representative Melvin Neufeld
Representative Ethel M. Peterson





Kansas Soybean Association
2930 S.W. Wanamaker Drive
Topeka, Kansas 66614
Phone (785) 271-1030

March 12, 1999

Representative Joann Freeborn
State Capitol Building
Room 155 E
Topeka, KS 66612

Dear Honorable Freeborn and Members of the House Environmental Committee,

I am writing to you on behalf of the members represented by the Kansas Soybean Association. Our association is concerned with the effect Senate Bill 287 would have on Kansas farmers and other rural interests.

Historically, the Kansas Legislature has determined that an employee of the state, who has the combination of technical expertise, along with the continuity of service, should conduct the rules and regulations process for the appropriation and or transfer of water. Based upon our adopted policy regarding state water issues, the Kansas Soybean Association believes the rules and regulations process should remain in its present form.

The Kansas Soybean Association adopted policy states: *The Kansas Soybean Association opposes any modifications to the Kansas Water Transfer Act that would encourage or permit water transfers between basins which would be detrimental to rural Kansas. We oppose any changes to the water appropriations process that would weaken or remove any authority from the Chief Engineer, Division of Water Resources, Kansas State Department of Agriculture.*

Decisions and investments concerning the use of water are made on an extremely long-term basis. If control of the rules and regulations process is turned over to the politically appointed Secretary of Agriculture, Kansas potentially could have numerous changes with each new appointee. This would create havoc with long-term projects being constructed or even completed projects that did not meet the requirements set forth by the new appointee.

Rural Kansas continues to see its political power base erode with the concentration of our citizens in metropolitan areas. If control of this process were turned over to a political appointee, it would not bode well for rural Kansas in the long run.

Several of our members have participated in the hearings under the current rules and regulations process, and have found them to be open and conducted fairly. We believe

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if there are problems with the current system, those problems can be handled administratively, or in conjunction with the Joint Committee on Rules and Regulations. Therefore, based upon our previously stated policy regarding state water issues, along with some concerns our organization has with the final implementation of the proposed legislation, the Kansas Soybean Association respectfully opposes the passage of Senate Bill 287.

If you, or any member of the House Environmental Committee, should have questions relating to the Kansas Soybean Association's position regarding Senate Bill 287, may I refer you to contact either our Topeka office, or our vice president, Mr. Mark Taddiken of Clifton, Kansas? Mr. Taddiken is quite familiar with state water issues, and is the chairman for the Kansas Soybean Association public affairs committee.

Respectfully yours,



Ronald E. Westervelt
President
Kansas Soybean Association

RW/djm

March 15. 1999

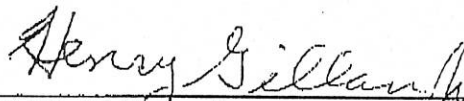
House Environment Committee
RE: SB 287

The Associated Ditches of Kansas is an organization of five (5) irrigation ditches with Senior Water Rights in South-Western Kansas. The surface water used for irrigation of our 60,000 acres comes from the Arkansas River which is under the contro of the Kansas-Colorado Compact.

According to the rules of the Kansas-Colorado Compact the Chief Engineer of The Division of Water Resources is the chairman of the Kansas Compact members. His duties in dealing with the Colorado Compact members require that he must have a VAST amount of back-ground knowledge that CAN NOT be acquired in a short time. For our ongoing relations with the State of Colorado, we MUST have CONTINUITY through the years.

Therefore The Associated Ditches of Kansas emphatically request that SB 287 should be studied further & recommend it be referred to an interim Committee.

Thank you for giving this matter your SPECIAL ATTENTION.



Henry Gillan Jr. - 316-275-5036
President of The Associated Ditches of Kansas
5120 N. U.S. Hwy 83
Garden City, Ks., 67846

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March 15, 1999

To: The House Environment Committee

From: The State of Kansas Compact Members of the Kansas-Colorado
Arkansas River Compact Administration
David A. Brenn
Randy L. Hayzlett

Re: Considerations in regards to Senate Bill 287

Dear Honorable Chairperson Freeborn
& Members of the House Environment Committee:

It is our position that the decision in regards to Senate Bill 287 should be put off and go to interim, so that the issue and implications can be further and objectively studied.

It is further our position that the consideration of this legislation comes at an inopportune time in regards to the Kansas vs. Colorado Law Suit. As you know the State of Kansas has invested millions of dollars in this suit and even though the Special Master has ruled in favor of Kansas on most points, the case is currently in the critical damages determination phase. The Chief Engineer's knowledge, experience and background, as it relates to this issue, as well as the conflict with Nebraska, are very important to Kansas representation and success.

Although, we realize that this particular legislation does not directly affect the current Chief Engineer position, we feel that it is in the best interest of the State to maintain continuity and stability in the position of Chief Engineer of the Kansas Division of Water Resources. This is particularly true as stated before in regards to experience and knowledge of water issues and engineering that can only be gained by years in service.


We additionally feel that at this time and in the future, it is important to send a message of stability to the State's that we are and maybe in conflict with over water issues.

Thank you.

Respectively Submitted:



David A. Brenn
Compact Member



Randy L. Hayzlett
Compact Member

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TERRY R. FULLER
ATTORNEY AT LAW
PO BOX 314 313 COLONY
KINSLEY, KS 67547
PHONE 316-659-2222
FAX 316-659-2063

March 16, 1999

TO: House Environmental Committee
Attn. Chairperson Joan Freeborn

RE: Proposed Division of Water Resources Legislation

Please accept these comments as you consider the functions and duties of the Chief Engineer of the Division of Water Resources. Every serious discussion of water and the state's interest in the utilization of water should begin with the recognition that water is unique. James Madison once wrote:

"...as a man is said to have a right to his property, he may equally be said to have a property in his rights."

Water represents a unique right, both a property right, appurtenant to land, and a personal right, vital to life, freely shared when it is plentiful and rationed when scarce. The Kansas legislature through the years has been guided by the principle that because water is unique, the Division of Water Resources and the Chief Engineer, while rightly a part of the Executive Branch and of the Department of Agriculture (formerly Board of Agriculture), should administer water law and carry out legislative policy primarily independent of the governor's office and of the Secretary of Agriculture. The administration of water law requires extensive scientific knowledge and expertise. The Chief Engineer on a daily basis is required to balance the conservation of water for all inhabitants of Kansas with the beneficial use of water for all inhabitants of Kansas. This task requires the blending of mass amounts of knowledge and data with legislative policy. To top it off, the result must be both historically consistent and constitutionally sound. Proposed legislation now places the State at risk that the blend of legislative policy and scientific expertise, will be outweighed by executive policy. The rules, regulations, and standards of the Division of Water Resources should not be controlled by the Secretary of Agriculture. Decisions of the Chief Engineer should not be subject to administrative review of the Secretary of Agriculture. Legislative oversight and redress to the Courts are well suited to redress errors and abuses that may occur. Why in the world do we need another strata of administrative appeal to the Secretary of Agriculture? Farmers and small cities already involved in the water law administrative process do not need the additional expense of another strata of appeal. The Chief Engineer does not need the incentive to shift particularly tough issues to the Secretary of Agriculture, nor does the Chief Engineer need the extra burden of testing the favors and disfavours blowing in the political wind in the administration of water law. A Chief Engineer functions best with some security in his office, he should not be removed at the discretion of either the Secretary of Agriculture or of the Governor of Kansas. I am not trying to suggest that the Secretary of Agriculture and the Office of Governor should not have an important role. However the blend of expertise and legislative policy in the administration of water law should not be subordinated. The authority of the executive branch should not be

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extended to where it can dominate the administration of water law. Water is unique.

My comments are not meant to be critical of the persons holding office who are concerned with the proposed legislation now before you. My perspective is that of a country lawyer who has represented farmers, a small city, and a small county in water law related issue .

Respectfully,

A handwritten signature in black ink, appearing to read "Terry R. Fuller", with a stylized flourish at the end.

Terry R. Fuller
Attorney at Law

STATE OF KANSAS

BILL GRAVES, GOVERNOR
Alice A. Devine, Secretary of Agriculture



DIVISION OF WATER RESOURCES
David L. Pope, Chief Engineer-Director
901 South Kansas Avenue, 2nd Floor
Topeka, Kansas 66612-1283
(785) 296-3717 FAX (785) 296-1176

KANSAS DEPARTMENT OF AGRICULTURE

March 16, 1999

Honorable Joann Freeborn
State Representative
Chairperson, House Environment Committee
Room 155-E, Statehouse
Topeka, KS 66612-1504

Dear Representative Freeborn:

In response to your request of March 10, 1999, the following information is provided:

1. Length of time for a decision on various applications

- a. New Application - The average time to process an application in the last 12 months is about 80 days. The length of time can vary fairly extensively due to the complexity of the application, response time from the applicant when additional information is needed, complaints, or other reasons needed to resolve more difficult issues that may affect the application.
- b. Application for change to an existing water right - Processing time for change applications varies significantly by type of application and its complexity. Straight forward applications for changes in the point of diversion (i.e. usually replacement wells) and certain changes in the place of use for irrigation purposes are processed within approximately 30 days at the field office level. More complex applications are processed in headquarters and average approximately 90 days although some have been delayed this last year beyond that limit due to workload issues and some take additional time for issues similar to those referred to for new applications. In general, our goal of processing these applications is met.
- c. Issuance of a certificate of appropriation - It is difficult to provide an average time frame because of the variable circumstances related to the issuance of certificates. Certificates of appropriation are not issued until the time to perfect the water right has expired, a field inspection is completed, information is gathered, discussed with the

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water right holder and analyzed and given an opportunity to comment on a proposed certificate of appropriation. This process may take approximately one year after it has begun. However, approximately 3,500 such files are pending for which the time to perfect the water right has expired and are a part of a "backlog" of work needing to be completed. An additional 2,500 permits will need to be certified in the future when their time expires along with any new projects approved and completed. Approximately 2,000 of these have had the field inspection and some part of the work done to complete the process.

- d. Abandonment of water rights - The time frame varies extensively depending on how the issue is resolved and at what stage. Internal status review once a question of abandonment comes up is usually resolved in a few months if the water right is found in good standing. However, if information available as a result of staff review does not indicate due and sufficient cause for non use of water pursuant to the rules and regulations, a notice of proposed abandonment is issued. If the water right holder does not request a hearing, an order of abandonment is issued by default shortly thereafter as provided by the Kansas Administrative Procedures Act. If a hearing is requested, then the total time period is normally several months or perhaps up to approximately one year depending upon the availability of hearing officer, schedules and whether or not the initial order is appealed.

2. Number of decisions in each category for the last 10 years. (January 1, 1989 to December 31, 1998)

a. New Applications:

Type	Approved	Denied (Upon Merits)	Dismissed* Prior to Approval	Total
Regular applications	3,779	307	607	4,733
Term permits	1,345	12	3	1,410
Temporary permits	4,948	3	9	4,960
Total	10,072	322	619	11,103

b. Applications for a change to an existing water right:

Approved	Denied (Upon Merits)	Dismissed* Prior to Approval	Total
5,431	23	311	6,265

* Dismissals generally occur at the request of the applicant or for failure to return the application within the time allowed after a request for more information.

c. Certificates of Appropriation issued during the last 10 years: 6,605.

d. Abandonments: A computer search was not able to provide a complete record of how many were handled in the last 10 years. However, during the period December 1997 to January 1999, the following occurred:

- 265 Files reviewed for abandonment by staff for non-use
 - 189 Found in good standing, for good cause
 - 76 Resulted in notices of proposed abandonment (staff did not find due and sufficient cause for non-use)
 - 28 Failed to respond and were dismissed
 - 48 Hearings have been scheduled
 - 9 Were settled, owner kept part or all of the water right
 - 4 Water right owner won--kept right
 - 2 Water rights terminated, after hearing
 - 2 Voluntary forfeiture, after hearing
 - 31 Pending decisions

3. **Number of files waiting decisions for each category**

- a. Approximately 500 new applications are in some stage of processing waiting for a decision with approximately 280 of these waiting on applicants for additional information, comment by a groundwater management district, other agency or adjoining owners response. Of the remaining number, approximately 30 are pending final action by the Division of Water Resources with the remainder in some stage of processing the application and the information submitted. This is a dynamic process. This includes regular applications and term permits.

Applications for temporary permits are generally processed on a daily basis without delay.

- b. Change Applications - approximately 350 total applications are pending. We do not have a specific breakdown, but the distribution would be similar to that of new applications.
- c. Certificates of Appropriation - Approximately 3,500 certificates are pending for which time has expired to perfect the water right. See information referred to above.
- d. Abandonment of Water Rights - Approximately 30 decisions are pending final resolution as a result of hearings that have been held.

4. **Proposed Rules and Regulations based upon existing Administrative Policies and Procedures:**


The following is a list of policies and procedures, specifications and issues, the staff has reviewed in the last 30 days for which rules and regulations are needed and are under development. A more complete review of all existing policies and procedures will be accomplished as soon as possible.

Item	Reference No.	Title	Comment
1	83-33	Allowable Quantities/Certificates of Appropriation/Irrigation Use	Regulation will replace policy
2	86-8	Annual Quantities for Irrigation Use-Permits and Approvals	Same as above
3	83-47	Exemption for the production of return of salt water in connection with the operation of oil and gas wells	Same as above
4	None	Water flow meter specification	Regulation will replace specification
5	None	Meter requirements on change applications	Same as above
6	None	Conditions on certificates of appropriation	
7	91-7	Feedlot capacity and water needs determination	Rescind or replace with regulation
8	91-6	Check valve specifications	Regulation will replace specifications

Representative Joann Freeborn
March 16, 1999
Page 5

9	None	Guidelines for approving applications for additional rate only	
10	85-12	Criteria for additional wells	Regulation will replace policy
11	None	Processing certificates of appropriation	

Sincerely yours,



David L. Pope, P.E.
Chief Engineer-Director

DLP:dr
pc: Mary Jane Stattelmann

STATE OF KANSAS

BILL GRAVES, GOVERNOR
Alice A. Devine, Secretary of Agriculture
901 S. Kansas Avenue
Topeka, Kansas 66612-1280
(913) 296-3558
FAX: (913) 296-8389



KANSAS DEPARTMENT OF AGRICULTURE

Memorandum

To: House Environment Committee
Through: Alice A. Devine, Secretary of Agriculture
From: Kirk Patten
Date: 3/16/99
Re: Authority of Wester States water regulators to adopt rules and regulations

California

The State Water Resources Control Board can adopt rules and regulations to carry out the duties of the Board. Cal. Water Code § 1058.

Oregon

The Water Resources Commission is precluded from delegating it's rule making authority to the Director of the Water Resources Department. Or. Rev. Stat. § 536.025

Alaska

The Executive Officer may adopt regulations consistent with laws or regulations adopted by the governor for 1) the administration of the department, 2) the conduct of the department's employees and 3) the distribution and performance of business and preservation of documents regarding department business. Alaska Stat. 44.17.030.

Washington

The Director of Ecology is authorized to adopt rules and regulations as are necessary and appropriate to carry out the provisions of the law. R.C.W.A. 90.02.015

Wyoming

The Board of Control may adopt reasonable rules and regulations to carry out the duties imposed by law on the Board of Control. W.S.A. 41-4-211.

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Texas

The Texas Natural Resource Conservation Commission shall adopt any rules necessary to carry out its powers and duties, and adopt reasonable procedural rules to be followed in a hearing. V.T.C.A. Water Code 5.103.

In addition, before establishing rules regarding the state drinking water standards the commission shall hold public hearings concerning the drinking water standards. V.T.C.A. Water Code 5.1035

Utah

The Chief Engineer can publish rules and regulations necessary to carry out the duties of his office. U.C.A. 73-2-1. These rules and regulations are subject to the Utah Administrative Rule Making Act. U.C.A. 63-46a-1 et seq. This act provides general procedures for all agencies to follow when implementing, modifying or repealing rules and regulations.

Arizona

There is no authority expressly granted to the Director of Water Resources to adopt rules and regulations.

Montana

The Department of Natural Resources and Conservation is granted general authority to adopt rules and regulations. M.C.A. 85-1-201. Specific authority for adopting rules and regulations is granted to the Department of Natural Resources and Conservation for 1) land lease management programs, M.C.A. 85-1-803, 2) for adopting, rejecting, modifying or conditioning water appropriation permit applications, 85-2-112(6) and 3) for emergency appropriations, M.C.A. 85-2-113.

Nebraska

The Director of the Department of Water Resources is empowered to make rules and regulations. R.S.N. 46-704

New Mexico

The State Engineer is granted the authority to (a) adopt regulations and codes to implement and enforce the law; (c) the regulations and codes shall be reviewed by the attorney general or other legal counsel; and (d) the regulations shall be filed first as "proposed regulations," shall be on file in the state engineer's office for inspection, and shall state the State Engineer's justifications for the proposed regulation. After one month, the proposed regulation must be published in not less than 5 newspapers of general circulation, once a

week for 2 consecutive weeks, and shall state there will be a hearing on the proposed regulation. N.M.S.A. 72-2-8(a),(c) & (d).

North Dakota

The State Water Commission can adopt and publish rules and regulations. N.D.C.C. 61-02-11.

Oklahoma

The Water Resources Board is granted the authority to adopt rules, regulations and orders. Okl.St. Ann. 108.2(7).

South Dakota

The Water Resources Board is granted the authority to adopt rules. S.D.C.L. 1-26A-1.13.

Colorado

The State Engineer is granted rule making authority. C.R.S.A. 37-80-102(g).

Idaho

There is no express authority granted to the Director of the Department of Water Resources. However, the Water Resources Board (limited authority, such as developing the state water plan) is granted authority to adopt rules and regulations regarding the construction, maintenance and supervision of dams. Idaho Code 42-1714.

Hawaii

The Commission on Water Resources is granted the authority to adopt rules to administer the commissions duties. Hawaii Code 174C-8.

STATE OF KANSAS

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KANSAS DEPARTMENT OF AGRICULTURE

Memorandum

To: House Environment Committee
Through: Alice A. Devine, Secretary of Agriculture
From: Kirk Patten
Date: 3/16/99
Re: Information regarding Western States water regulators and Legislative history of the Water Appropriation Act of 1945.

California

Water Regulator- State Water Resources Control Board- Cal. Water Code § 174

1. Structure- The State Water Resources Control Board is within the California Environmental Protection Agency.
 - A) The control board is composed of 5 members. Cal. Water Code § 175.
 - i)1 attorney qualified in the area of water supply and water rights.
 - ii)1 civil engineer- qualified in area of water supply and water rights
 - iii)1 civil engineer- qualified in sanitary engineering
 - iv)1 individual qualified in field of water quality
 - v)1 individual not specialized
2. Authority- The Control Board has oversight of any law under which permits or licenses to appropriate water are issued, denied, or revoked or under which the functions of water pollution and quality control are exercised. Cal. Water Code § 179.
3. Appointment-
 - A) Appointed by Governor, subject to confirmation by Senate
 - B) Removed from office by the legislature by concurrent resolution adopted by a majority vote of all members elected to each house.
 - C) 4 year terms.

Oregon

Water Regulator- Water Resources Director- Or. Rev. Stat. § 536.032

1. Structure- Water Resources Director is the head of the Water Resources Department which is within the Water Resources Commission.
 - A) Water Resources Commission- 7 members appointed by Governor
 - i) establishes the policies for the operation of the water resources department. Or. Rev. Stat. § 536.025
 - ii) may delegate any authority to Water Resources Department except to adopt rules.
 - B) Water Resources Department- consists of the director or the department and his employees.
2. Authority- The Director of the Water Resources Department duties are to carry out the laws of the state, subject to policies and direction of the Water Resources Commission.
3. Appointment- Or. Rev. Stat. 536.032
 - A) Appointed by Governor, confirmed by senate
 - B) Term of 4 years
 - C) Serves at the pleasure of the Governor
 - D) Must be licensed engineer in water related engineering.

Alaska

Water Regulator- Commissioner of Department of Natural Resources- Alaska Stat. 46.15.010

1. Appointed by the Governor- Alaska Stat. 39.05.020
2. Jurisdiction- carry out the laws of the state of Alaska.

Washington

Water Regulator- Director of Ecology- R.C.W.A. 90.03.015

1. Structure
 - A) Head of the Department of Ecology- created at R.C.W.A. 43.17.020
2. Authority- Oversight powers- supervise public waters, inspect dams, regulate diversion of water, determine discharge of streams, keep records. R.C.W.A. 43.21A.064

3. Appointment- R.C.W.A. 43.17.020 & 43.21A.050
 - i) Appointed by the governor
 - ii) Serves at the pleasure of the governor

Wyoming

Water Regulator- Board of Control- Wyo. Const. Art. 8 § 5,

1. Structure- 10 W.S.A. 41-4-201
 - A) Chief Engineer
 - B) Superintendents of the 4 water divisions
2. Chief Engineer- Wyo. Const. Art. 8 § 5
 - A) Appointment
 - i) Appointed by Governor, confirmed by senate
 - ii) 4 year term
 - B) General Supervision of the water of the state
 - C) "No person shall be appointed to this position who has not such theoretical knowledge and such practical experience and skill as shall fit him for the position."
 - D) Subject to removal only by the Governor. See In Re Big Horn River Sys., 835 P.2d 273 (Wyo. 1992).

Texas

Water Regulator- Texas Natural Resource Conservation Commission- V.T.C.A. Water Code § 5.051

1. Structure-
 - A) 3 members appointed by Governor with advice and consent of senate. V.T.C.A. Water Code § 5.052.
 - B) Removal for (V.T.C.A. Water Code § 5.059
 - i) Failing to maintain adequate qualifications for appointment
 - ii) Conflict of Interest
 - iii) Unable to fulfill duties because of illness or disability
 - iv) Absent for ½ of commission meetings.
2. Jurisdiction of Commission- V.T.C.A. Water Code § 5.013
 - A) Water and water rights.
 - B) State water quality program.
 - C) State weather modification program
3. Executive Director- V.T.C.A. Water Code § 5.108
 - A) Appointed by the Commission

- i) Serves at the will of the commission
- B) **"Shall manage the administrative affairs of the commission subject to this code and other laws and under the general supervision and direction of the commission."** V.T.C.A. Water Code § 5.221.

Utah

Water Regulator- Chief Engineer-U.C.A. 73-2-1

1. Structure- Division of Water Rights- U.C.A. 73-2-1.1
 - A) Supervised by Department of Natural Resources and that department's Executive Director
 - B) Administrator of Division of Water Rights is the Chief Engineer
2. Jurisdiction of Division of Water Rights and Chief Engineer
 - A) Vested with such powers required to perform such duties as are set forth in the law.
 - B) Appropriation statutes speak of Chief Engineer taking action.
3. Appointment- U.C.A. 73-2-1
 - A) Appointed by Governor with consent of Senate
 - B) 4 year term
 - C) No less than 5 years experience as practical engineer or less than 3 years residency or "has not such theoretical knowledge and practical experience and skill."

Arizona

Water Regulator- Director of Water Resources

1. Structure- Department of Water Resources- A.R.S.A. 45-102
 - A) Director- Head of the Department of Water Resources
-responsible for direction, operation and control of department
2. Jurisdiction- A.R.S.A. 45-103
 - A) "Director has general control and supervision of surface waters, its appropriation and distribution and of groundwater to the extent provided by this title, except distribution of water reserved to special officers appointed by courts under existing judgment or decrees."
3. Appointment-
 - A) Appointed by and serves at the pleasure of the Governor
 - B) Experienced and competent in water resources management and conservation.

Montana

Water Regulator- Director of the Department of Natural Resources and Conservation- 1
M.C.A. 2-15-111

1. Structure- Department of Natural Resources and Conservation
 - A) Director- head of the department
2. Appointment-
 - A) Appointment by Governor, confirmed by Senate
 - B) Serves at the pleasure of the governor, subject to removal at any time
 - C) Selected on the basis of professional and administration knowledge and experience and such additional qualifications as provided by law.

* Water appropriation statutes refer to the Department rather than the director.

Nebraska

Water Regulator- Director of the Department of Water Resources- R.S.N. 46-701

1. Structure- Department of Water Resources
 - A) Director is the head of the department
 - B) Department is granted authority to administer the law- R.S.N. 46-208-209
2. Appointment
 - A) Appointed by the Governor, confirmed by the legislature
 - B) Serves at the pleasure of the Governor
 - C) Without term limits- R.S.N. 81-109
 - D) Shall be
 - i) qualified by training and business experience to manage and supervise the department.
 - ii) a professional engineer and has at least 5 years experience in a position of responsibility in irrigation.

New Mexico

Water Regulator- State Engineer- N.M.S.A. 72-2-1

1. State Engineer
 - A) Technically qualified and registered professional engineer
 - B) Appointed by Governor, confirmed by Senate.
 - C) 2 year term- no reference to successive terms
 - D) Removed only for cause
 - E) General supervision of the waters of the state and of the measurement,

appropriation, distribution thereof and such other duties as required. See also 72-2-9.

F) Authority to adopt rules and regulations 72-2-8.

North Dakota

Water Regulator- State Engineer- N.D.C.C. 61-03-01

1. Structure- State Water Commission- N.D.C.C. 61-02-04

A) 9 members

- i) Governor- acts as chairmen
- ii) Commissioner of Agriculture
- iii) 7 members Appointed by the Governor
 - a) 6 year terms
 - b) subject to removal through judicial procedure

B) State Engineer- serves as the secretary of the State Water Commission

- i) appointed by State Water Commission
- ii) "Shall be technically qualified and experienced hydraulic engineer and also shall be an experienced hydraulic engineer and also shall be an experienced irrigation engineer."
- iii) term determined by Commission

* Water appropriation statutes refer to State Engineer as the regulator- N.D.C.A. 61-04-01.

Oklahoma

Water Regulator- Water Resources Board* or Executive Director of the Board- Okl.St. Ann. § 1085.2.

1. Structure- Oklahoma Water Resources Board

A) 9 members

- i) appointed by governor, with advice and consent from the Senate.
- ii) At least one member of the board must be well versed in each of the following types of water use.
 - (1) recreational
 - (2) industrial
 - (3) irrigational
 - (4) municipal
 - (5) rural residential
 - (6) agricultural and soil conservation use.

iii) Removed only for cause

B) Board can delegate authority to Executive Director

- i) Appointed by Board
- ii) Minimum of 6 years practical administrative experience in water

resource management.

iii) *Board cannot delegate any power "of final adjudication of any claims applications or controversies all of which powers and duties shall be exercised solely by the Oklahoma Water Resources Board."

South Dakota

Water Regulator- Water Resources Board or Chief Engineer (if employed by Secretary of Department of Environment and Natural Resources)

1. Structure- Water Resources Board (within Department of Environment and Natural Resources)

A) 7 Members-

i) appointed by governor

ii) 4 year terms

iii) no more than 4 members may be of same political party.

iv) qualifications- S.D.C.L. 1-40-16

(1) 2 from public at large

(2) 1 experienced in municipal government and operations

(3) 1 experienced in irrigation methods and techniques

(4) 1 with knowledge of the concerns of domestic water users

(5) 1 experienced in area of industrial water use.

(6) 1 with fish and wildlife interests

B) Chief Engineer- S.D.C.L. 46-2-3.1- Water Management Board may "delegate authority to chief engineer to act in quasi judicial function of interpreting, applying and enforcing existing rules and laws and ordering action or abatement."

i) may also delegate Chief Engineer the authority to issue water rights permits.

ii) Chief engineer must be a licensed engineer, trained and experienced in hydrology.

iii) Shall act as advisor to Water Management Board. S.D.C.L. 46-2-3.

*Therefore, the status of the Chief Engineer depends upon whether the water management board has delegated the permit process to the Chief Engineer. If they have he is the water quantity regulator. If they have not he is the Water Resources Board.

Colorado

Water Regulator- State Engineer- C.R.S.A. 36-1-101, Col. Const. Art. XII § 13.

1. State Engineer-

A) Appointed by Governor

B) Duties- C.R.S.A. 37-80-102

- i) Executive officer in charge of supervising the work of all division engineers.
- ii) Discharge the obligations of the state of Colorado imposed by judicial order.
- iii) Implement legal opinions
- iv) Coordinate work of DWR with other offices
- v) Supervision of DWR employees
- vi) General supervisory control over measurement, record keeping, and distribution of the public waters of the state.

C) Must be a person qualified to be a registered engineer. C.R.S.A. 37-80-113.

*Only responsible for regulation of water uses, not for approval and adjudication of water rights. Water rights approval and adjudication are granted to the water courts. C.R.S.A. 37-92-101.

Idaho

Water Regulator- Director of the Department of Water Resources- Idaho Code 42-1401B.

1. Structure- Department of Water Resources- Idaho Code 42-1701

A) Executive and administrative authority of Department vested in the Director, except authority granted to Water Resources Board (limited authority, such as the state water plan).

2. Director-

A) "an independent expert and technical assistant to assure that claims to water rights acquired by state law are accurately reported."

B) Must be a licensed civil or hydraulic engineer-

- i) Not less than 5 years experience in the active practice of such profession and shall be familiar with irrigation in Idaho.

Hawaii

Water Regulator- Commission on Water Resources- Hawaii Code 26-15 & 174C-5

1. Structure- Commission on Water Resources is with the Department of Land and Natural Resources.

A) Commission has exclusive and final authority in all matters relating to implementation and administration of state water code.

2. Appointment- 6 members- Hawaii Code 174C-7

A) 4 appointed by Governor, confirmed by the Senate.

- i) Must have substantial experience in area of water resource

- management.
- B) Chairperson- Director of Board of Land and Natural Resources.
 - C) Director of Health- ex officio voting member.

Legislative History of the Water Appropriations Act of 1945.

In 1944, the governor appointed various officials to study the laws of Kansas regarding water appropriations and report their findings to the governor. This report became the Governor's Committee, Report on the Appropriation of Water for Beneficial Purposes (1944). While this report provides a thorough history of the events leading to the enactment of the Water Appropriations Act there is no reference to the autonomy or accountability of the chief engineer. In fact, the idea of a single chief engineer arose in legislation prior to the Water Appropriations Act. Unfortunately, committee minutes were not documented at this time. The following is a summary of the references to the chief engineer in legislation prior to 1945.

In 1917, the legislature created the Kansas Water Commission. See Ch. 172, Laws 1917. The members of the Water Commission included the governor and two governor appointed civil engineers. *The two engineers were appointed for four year terms and could be removed for cause only.*

In 1927, the legislature created the Division of Water Resources within the State Board of Agriculture. See Ch. 293, Laws 1927. The Kansas Water Commission and the Division of Irrigation were abolished and their powers, authorities and duties were given to the Division of Water Resources. The Division of Water Resources possessed the combined powers of both abolished entities, subject to "the control, administration and supervision of the state board of agriculture." Ch. 293, Laws 1927 § 2. Yet, no reference was made to a chief engineer.

In 1933, there were two laws passed which referred to the chief engineer. First, the

legislature granted the state board of agriculture the authority to employ a chief engineer and other experts or clerical assistants. See Laws 1933, ch. 271 § 7; for the present statute see K.S.A. 74-506d. Second, the legislature enacted Laws 1933, ch. 206 which imposed upon the chief engineer the duty of "aiding in the performance of court decrees for the distribution for irrigation of the waters of any nature stream . . ." These two provisions are the first statutes which mentioned a chief engineer. However, since there are no committee reports it is uncertain what led to the consolidation of the power into a chief engineer.

ST.	RULE & REG. AUTHORITY	WHERE IS PROGRAM HOUSED	APPOINTED/CIVIL SERVICE
CA	Board (5 members)	CA EPA	Appointed by Gov.— Sen. confirm (4 yr. term)
OR	Commission (7 members)	Water Resources Commission	Appointed by Gov.— Sen. confirm (4 yr. term)
AK	Water Reg/Commissioner	DNR	Appointed by Gov.
WA	Director of Ecology	Dept. of Ecology	Appointed by Gov.
TX	Commission	Nat. Resource Conserv. Commission	Appointed by Gov.— Sen. consent
WY	Board Chief Eng. & 4 water division superintendents	Board of Control	Appointed by Gov.— Sen. confirm (4 yr. term)
UT	Chief Engineer	DNR	Appointed by Gov.— Sen. confirm (4 yr. term)
AZ	no express authority	Dept. of Water Resources	Appointed by Gov.
MT	DNR	DNR	Appointed by Gov.— Sen. confirm
NE	Director	Dept. of Water Resources	Appointed by Gov.— Legis. confirm
NM	State engineer		Appointed by Gov.— Sen. confirm (2 yr. term)
ND	Commission (9 members)	State Water Commission	Appointed by Gov.— Engineer serves as secretary for commission
OK	Water Resource Board (9 members)	Resource Board	Appointed by Gov.
SD	Water Resource Board	DNR	Appointed by Gov. (4 yr. term)
CO	State Engineer		Appointed by Gov.
ID			
HI	Commission	Dept. of Land & Natural Resources	Appointed by Gov.

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*House Environment
3-16-99
Attachment 35*