

Approved: \_\_\_\_\_

Date

2-17-99

## MINUTES OF THE SENATE COMMITTEE ON AGRICULTURE.

The meeting was called to order by Chairperson Steve Morris at 10:00 a.m. on February 16, 1999 in Room 423-S of the Capitol.

All members were present except: Senator Tim Huelskamp (E)

Committee staff present: Raney Gilliland, Legislative Research Department  
Bruce Kinzie, Revisor of Statutes  
Nancy Kippes, Committee Secretary

Conferees appearing before the committee:

Mary Jane Stattelman, Assistant Secretary, Kansas Department of Agriculture  
M. S. Mitchell, Kansas Building Industry Association  
Constance Owen, Overland Park, Kansas  
Kent Moore, Water Protection Association of Central Kansas

Others attending: (See Attached)

Senator Umbarger made a motion to approve the minutes of the February 15, 1999 meeting. Senator Stephens seconded. Motion carried.

### **SB 287 - concerning chief engineer of division of water resources of department of agriculture; relating to powers thereof**

Mary Jane Stattelman, Assistant Secretary, Kansas Department of Agriculture, provided testimony in support of **SB 287 (Attachment 1)**. She stated there are two main concepts this bill addresses: 1) the transfer of rule and regulation authority from the chief engineer to the secretary and 2) establishment of a uniform hearing procedure for all appeals dealing with water issues that are regulated by KDA. Ms. Stattelman recommended two amendments to the bill: 1) set up a process where the chief engineer would propose the rules and regulations to the secretary, who in turn would initiate the rule and regulation process; and 2) that the regulations being referenced are regulations that have been previously adopted by the chief engineer as there may be confusion by referencing the "board of agriculture".

M. S. Mitchell, Kansas Building Industry Association (KBIA), testified in support of **SB 287** making reference to the ways in which the KBIA is affected by adoption of ordinances, resolutions and regulations whereby communities in Kansas become and remain eligible for participation in the National Flood Insurance Program (Attachment 2).

Constance Owen from Overland Park appeared before the committee in opposition to **SB 287 (Attachment 3)**. She was very supportive of leaving the Chief Engineer with the rule and regulation authority.

Kent Moore, Water Protection Association of Central Kansas (Water PACK), testified in opposition to **SB 287** stating that due to the unique scientific, hydrological water resources aspects and experience required, it is questionable as to whether the proper approach to new and existing rules and regulations is to dilute the authority of the Chief Engineer (Attachment 4). Mr. Moore said the Water PACK would propose that this bill be tabled and an interim study be conducted to consider what other states or the Federal government is doing in similar situations with rules and regulations.

Hearings were closed on **SB 287**.

The next meeting will be February 17, 1999.

# SENATE AGRICULTURE COMMITTEE GUEST LIST

DATE: 2-16-99

NAME	REPRESENTING
Alan Steppert	Water PACK
Kent L. Moore	Water PACK
Connie Owen	myself
STEVEN FROST	SWKSLMD / City of Kansas City
David L. Pope	
Kristine Meyer	KS Society of Professional Engineers
Alice Devine	Ks Dept. of Agriculture
R.E. Reincirt	LWU S
Shane Gagnelin	Sen. Stephens staff
Bill Fuller	Kansas Farm Bureau
Mary Jane Stattelmaier	KS Dept of Agriculture
Jamie Glover Adams	Governor's office
Walter P. Wirth	FARMER
Daniel I. Eklund	Kansas water office
Gordon Schmidt	Self
Mike Beam	Ks. LVSTK. ASSN.
Howard Parr	AG PRODUCER
Charles Benjamin	KNRC / KS Sierra Club

STATE OF KANSAS

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KANSAS DEPARTMENT OF AGRICULTURE

TESTIMONY  
TO THE

SENATE AGRICULTURE COMMITTEE

SB 287

BY

**Mary Jane Stattelmann, Assistant Secretary  
Kansas Department of Agriculture  
February 16, 1999**

Chairman Morris and members of the Senate Agriculture 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) the transfer of rule and regulation authority from the chief engineer to 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.

The bill goes through the various functions of the division of water resources and transfers the rule and regulation authority from the chief engineer to the secretary. The Administration supports the ultimate rule and regulation authority being placed with either an elected official or the head of an agency. 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. However, under the current statute, the chief engineer can adopt rules and regulations without input or approval of the secretary.

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. 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 would 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.

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Attachment 1*

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.

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.

I am also proposing two amendments to the bill. Section 1, subsection (a) is a little confusing in the fact that it requires the chief engineer to have a hearing before the secretary adopts the rule and regulation. The normal procedure in KDA and other agencies is for a program manager to propose rules and regulations to the secretary and then after the secretary promulgates the rules and regulations and the rules and regulations have been approved by the Department of Administration and the Attorney General's office, a public hearing is held. Since arguably Section 1 could require a procedure that is outside of the normal course and could be misleading, we are proposing a change to Section 1 as shown in the balloon that is attached to this bill. The changes in the balloon would set up a process where the chief engineer would propose the rules and regulations to the secretary, who in turn would initiate the rule and regulation process

I have suggested simplifying Section 1, subsection (b) so that the regulations being referenced are regulations that have been previously adopted by the chief engineer. I realize the intent of the drafter to capture all regulations that have been adopted by the chief engineer before and after the structure of the agriculture department occurred. However, by leaving in a reference to "board of agriculture" I am concerned that this may be confusing since when the reorganization occurred, there was language placed in statute that stated any time the words "board of agriculture" appeared they are to mean "secretary".

We believe this bill places 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.

# LEGISLATIVE



# TESTIMONY



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## SENATE COMMITTEE ON AGRICULTURE FEBRUARY 16, 1999 SENATE BILL 287

CHAIRMAN MORRIS AND MEMBERS OF THE COMMITTEE:

My name is M.S. Mitchell, appearing today representing the Kansas Building Industry Association, supporting Senate Bill 287.

Members of the KBIA are affected by adoption of ordinances, resolutions and regulations whereby communities in Kansas become and remain eligible for participation in the National Flood Insurance Program (NFIP). K.S.A. 12-766 gave authority to the Chief Engineer of the Division of Water Resources to approve or disapprove such community actions *before* the coming of the Federal Program to most of Kansas. Since that time, those local community ordinances, resolutions and regulations must comply with the Federal standards to the letter, and in most cases are direct copies of the models supplied by the Federal program. When the planning statutes were codified in 1991, members of the task force which worked to draft those statutes, recommended that the role of the Chief Engineer was no longer needed and he should be removed from that process. We were unsuccessful, and now see transferring that role to the Secretary of Agriculture as a step in the right direction.

With respect to K.S.A. 24-126 members of the KBIA are more intimately involved since many new subdivisions (and some construction on lots platted years ago) contain areas which are shown to be in the Special Flood Hazard Area on the Federal Emergency Management Agency's (FEMA) maps. Those same 1991 planning statutes gave the Chief Engineer authority to administer filling in what is designated as Floodway Fringe on those FEMA Flood Insurance Rate Maps (FIRM) by a policy which classified those fills as "other such improvement" under the levee law. Again, the KBIA members of the planning task force argued that since such filling was permitted by right under the NFIP, the Chief Engineer had no authority to disapprove such Floodway Fringe fills. On this point we also lost, and subdivision lots where all or part is mapped on the FIRM to be in a Floodway Fringe are required to apply for approval of plans under 24-126 and wait for processing of that application by the

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Chief Engineer. Here again, we see transferring that role to the Secretary of Agriculture as a step in the right direction, and would hope to find support for our position that approval of Floodway Fringe fills should be the responsibility of the local communities, unless they ask for help from the State.

K.S.A. 82a-303 and 303a are part of the statutes following 82a-301 which require a permit from the Chief Engineer for any water obstruction such roadways, culverts and bridges across streams; changes in the course, current or cross section of streams; and dams in excess of thirty acre feet. The Rules and Regulations which must be followed in order to obtain such a permit were effective in 1981, amended in 1982, 1983, 1984, 1985, 1986 and 1987. The set I now have does not show any updating since 1987. It is my opinion that the engineering firms which work with KBIA members would like to play an active part in an overhaul of those Rules and Regulations, but are reluctant to say so. We think giving responsibility for initiating and adopting new and/or revised Rules and Regulations for these statutes to the Secretary of Agriculture will improve that opportunity.

Builders and Developers have fewer needs to obtain, perfect and maintain water rights, but if legislation which proposes to require evaporation from present and future sand pit lakes to be covered by a water appropriation, that issue will become an important part of their business. Here again, having an opportunity for public input on Rules and Regulations to implement such legislation would be improved if final responsibility is given to the Secretary of Agriculture rather than the Chief Engineer.

The water evaporation issue and the discharge of stormwater into groundwater pits issue have found KBIA members at odds with staff of at least one Groundwater Management District. We believe that amending K.S.A. 82a-1028 to give responsibility for adopting Rules and Regulations recommended by Groundwater Management Districts to the Secretary of Agriculture will open up what is now a closely held process and provide our members the opportunity to have input on Rules and Regulations currently in effect and proposed by the Groundwater Management Districts. The same comments apply to K.S.A. 82a-1038 and the designation of areas as intensive groundwater use control areas.

K.B.I.A. members, and the professional consultants who work for them, have frequently complained about the length of time it takes to obtain approval of Floodway Fringe Fill Applications. As stated before, planning task force members agreed to a compromise under K.S.A. 24-126 which requires that if the Chief Engineer fails to approve or disapprove a plan within the ninety day period required, then the plan is deemed approved. In practice, what happens is that, often near the end of that 90 day period, DWR staff will ask for additional information, or that the technical review of the Application will be pigeon-holed until after the 30 day Environmental Coordination Act review period, then responses will be required to the ECA comments from any of the eight State Agencies which responded. When those have been satisfied, the technical review begins or resumes.

Depending on the location in the State, the type of Application being made, or other factors, different DWR staff are assigned to review Applications. It has been the experience of K.B.I.A. members and their consultants that those reviews are not uniform, and inconsistent application of Rules and Regulations (or in some cases, unpublished policies) cause delays in the final approval of plans and issuance of permits. In some instances, workload is the reason offered, but more often no explanation is given. Where workload exceeds staff resources, we recommend that turning over responsibility for review of many Applications can be given to local government staff who in most cases have already approved of the activity for which a DWR permit or approval of plans is required. Examples are Floodway Fringe Fills, bridges, culverts, channel improvements and other features which are built as part of new subdivision infrastructure. A situation similar to the one we suggest exists between KDHE and local engineering staff concerning new and extended sanitary sewers.

Thank you for the opportunity to appear today and I will attempt to answer any questions you might have.

TESTIMONY OF CONSTANCE C. OWEN  
BEFORE THE SENATE AGRICULTURE COMMITTEE  
IN OPPOSITION TO SB 287  
February 16, 1999

First, let me thank the Chairman and this committee for allowing me time to speak today. I will try to keep my comments brief and to the point. First, I will briefly introduce myself and then explain why SB 287 is not in the best interests of Kansans nor Kansas agriculture.

I am a stay-at-home mother. I live in Overland Park, Kansas. But this was not always the case. I am also an attorney and I worked for four years as Assistant Legal Counsel for the Chief Engineer of the Division of Water Resources (DWR), Kansas Department of Agriculture. At that time, DWR had its own, albeit small, staff of lawyers; the legal staff within the department has since been consolidated into a single office. I was responsible for advising the Chief Engineer and his staff on all aspects of intrastate water rights (those within Kansas boundaries), representing the Chief Engineer and DWR in administrative proceedings and in litigation in district courts throughout the state, as well as the Kansas Appellate Courts in Topeka. I traveled across the state to appear in court, as well as to present seminars and public information hearings.

I was actively involved in many issues before the Chief Engineer and observed first-hand the nature of those issues and the extreme difficulties they present. As I hope to convince you, those issues simply require a non-political decision-maker.

I want to make it absolutely clear that I appear here entirely of my own volition. No one, within or without the Division of Water Resources or Department of Agriculture, has asked me to appear here. I have not discussed my appearance or testimony with the Chief Engineer, David Pope. I am here because I know the management of water works well under the current system and I believe SB 287 holds great potential for tremendous mismanagement.

**Under SB 287, decisions about the use of water would no longer be based in science, but in politics.**

Currently, the Chief Engineer makes numerous decisions regarding the use of water in Kansas. His decisions must adhere to statute. Regarding water rights for such uses as irrigation, industrial, municipal, domestic, and others, the controlling statute is the Water Appropriation Act, K.S.A. 82a-801, *et seq.* The law sets forth basic parameters, such as the "first in time, first in right" principle and the prohibitions against impairing existing rights or unreasonably affecting the public interest.

Due to the highly technical nature of the subject, rules and regulations are necessary to make decisions about such things as whether a given application to use water for irrigation or industry can be granted in a given area. This subject matter calls for geology, hydrology, and various types of engineering proficiencies, hence the job title, "Chief Engineer."

If there were an overabundance of water in Kansas, such decisions would not be so difficult nor so contentious. However, the simple truth is **there is not enough water to go around.** The demands for water exceed the supply. In most areas of Western Kansas, the groundwater levels are declining and have been for many years. More

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water is being used than the natural system can support. The logical conclusion, the complete lack of usable water, is drastic, but inevitable if additional pumping is allowed.

However, new requests for the use of water continue to arrive on the Chief Engineer's desk. It is his job to say "no" when necessary – when science shows that the proposed use will directly harm a previous water right holder or when the water in that area is already "spoken for." These decisions can be excruciatingly difficult and the issues involved extremely complicated. The political pressures brought to bear on these matters can be enormous: new industry bringing jobs in an economically struggling area, adequate water supplies to serve an expanding community, a constituent family's need to expand their farm operation to keep the bills paid, a corporate hog farm seeking adequate water to run its facility. The list is endless. And so are the forces seeking approval for their own needs.

**If water use is approved based on political pressures, rather than on protecting existing rights and preserving the water supply, all water users will suffer. The sooner the supply runs out, the sooner all users would be harmed.**

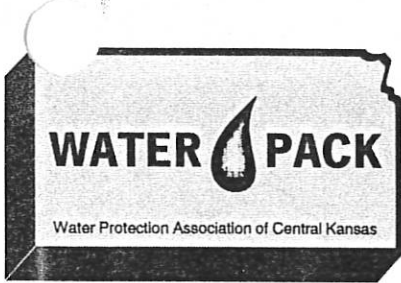
Currently, the Chief Engineer makes these tough decisions secure in the knowledge that he cannot be fired because any given application had to be denied. He is a classified employee (although there are bills pending that threaten that, too.) **Such decisions must remain the sole responsibility of a classified Chief Engineer because they require stability.** The management of the water supply, both surface water and groundwater, involves research, planning, and techniques based on many years of data and experience. Continuity in management is essential. **Under SB 287, such continuity and stability may well fall victim to the shifting winds of politics.**

To those who would see SB 287 as a boon to agriculture, I suggest caution. In the most simple of scenarios, one in support of agriculture may like the idea of a Secretary of Agriculture having authority over the use of water. Such a person may infer that agriculture would begin to get preferential approval over other types of use (municipalities or industries, for example). Even if the Water Appropriation Act allowed that, which it does not, such preferential treatment might create a backlash that agriculture would hardly enjoy. Also, a decision benefiting one agricultural interest may cause harm to another agricultural interest. It bears some thought.

I have seen the current system work. The Chief Engineer makes decisions about the use of water, and his professional judgment is statutorily protected from politics. He relies on advice and input from many sources and values such advice. The current system encourages people like Chief Engineer David Pope to put their talents to work for Kansas. David Pope is a true treasure for the State of Kansas. He is a man of wisdom, integrity and courage. Having worked in a number of governmental arenas, I know these qualities are exceedingly rare. Those who have dealt with David Pope, be they individual farmers, city council members, or captains of industry, regardless of the outcome of their requests, respect the Chief Engineer. **This Legislature should encourage that kind of respect for its public servants.**

Please recognize the wisdom of the existing water management system and defeat SB 287. Thank you. I would be happy to answer any questions.

C. Owen, 11201 W. 116<sup>th</sup> Street, Overland Park, KS 66210



Testimony Before the Senate Agriculture Committee - Senate Bill 287  
Tuesday, February 16, 1999

My name is Kent Moore, and I am a farmer from north of Iuka, Kansas. I am appearing before you as a Board of Directors member of the Water Protection Association of Central Kansas (Water PACK). Water PACK is a private, non-profit corporation of agricultural producers and related agribusinesses organized to work on water issues and serve as a proactive voice for irrigated agriculture in south central Kansas. The area of the state that we are active in is a 13 county area bounded by the cities of Great Bend, McPherson, Wichita, Pratt, Greensburg, Kinsley, and Larned. Currently we have about 550 members.

Our understanding of this bill is that it relates to the Chief Engineer, Division of Water Resources, and the powers or authority that he or she has.

Water PACK would agree that it is difficult to see what the role of the Secretary of Agriculture is in the administration of new and existing rules and regulations necessary to carry out the laws administered by the Chief Engineer. The Secretary should have a part to play. However, due to the unique scientific, hydrological water resources aspects and experience required, we question whether this bill which dilutes the authority of the Chief Engineer is the proper approach to these new and existing rules and regulations. The current system of administering these rules and regulations has resulted in science-based analysis, property rights less subject to political considerations, and long-term consistency in the administration of our state's most precious resource, second only to Kansas people. The Chief Engineer needs protection from political pressure when required to make politically unpopular decisions. These rules and regulations, with few exceptions, have been administered fairly in the past.

For over 50 years, the Chief Engineer has rendered fair, honest decisions based on weighing the unique scientific and hydrologic facts in each case. Even though we do not always agree with these decisions in the agricultural sector, we feel that the Chief Engineer has been impartial towards the comparative segments of our society: agriculture, fish and wildlife, industry, municipalities, etc.

This bill, as well as Senate Bill 64 and House Bill 2253, are being brought about so fast that no one really knows exactly what their full impact will be. Water PACK does not pretend to know what the answers to the questions this bill raises, but we do know that these issues need more than three weeks debate. Therefore, we would propose that this bill be tabled and an interim study conducted to consider what other states, or the Federal government is doing in similar situations with rules and regulations.

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Attachment 4*