

**Testimony on H.B. 2451
to
The Senate Agriculture Committee**

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February 7, 2012

Chairman Taddiken and Members of the Committee, thank you for the opportunity to come before you in support of H.B. 2451. We appreciate the Committee's consideration of this bill, which would amend the water right abandonment statute to provide that a water right in an area closed by rule or order of the chief engineer to new appropriations, with groundwater as the source, has due and sufficient cause for non-use and shall not be deemed abandoned. This provision removes the "use it or lose it" doctrine from the abandonment statute for these closed areas, sending the signal that water may be conserved and does not have to be put to use in order to preserve the water right.

This legislation was discussed by Governor Brownback in his State of the State address, when he encouraged us to transition "from a wasteful use-it-or-lose-it water law doctrine — to preserving our most precious natural resource: fresh water....Almost since statehood, we have told Kansans with water rights they must 'use-it-or-lose-it.' This has encouraged the overuse of water, particularly of the Ogallala."

The Governor proposed to repeal the "use-it-or-lose-it" doctrine of our water law, saying "It is way past time we move from a development policy with our water to a conservation ethic. We have no future without water. This is altogether fitting and proper. For our government is not only a compact among those who are living, but a covenant with those who are yet to be."

A year ago the Governor challenged the Department of Agriculture and the Water Office to work together to study whether this law should be changed. A Governor's Summit on the Ogallala was held in July, and Water Authority Chair Gary Harshburger appointed an Ogallala Aquifer Advisory Committee, with the charge of studying this issue. Some of you attended meetings of the OAAC held during the fall. After examining the issues, the OAAC recommended this legislation. The Department of Agriculture and our Division of Water Resources (DWR) and Division of Conservation (DOC) participated with KWO and the Authority in the OAAC process.

The abandonment clause is a common feature of the prior appropriation system of water law and is found in Kansas and many Western states. Under this system, water rights are "first in time, first in right." This system facilitates the development of water rights and insures that water is put to beneficial use and provides for the distribution of water in times of insufficient supply.

Another common feature of prior appropriation systems is this "use it or lose it" requirement, which says if an existing water right is not put to beneficial use for a period of years, that right will be forfeited and become available to other users. However, in areas which are fully or over-developed, as exists in the closed areas of the Ogallala Aquifer, the requirement to use the water in order to maintain the right doesn't foster a culture of conservation. Encouraging the culture of conservation is a key goal of our Ogallala Aquifer initiatives and programs and the work of DWR and DOC.

A water right is a real property right of the land on which it is established. It transfers with title to the land, unless expressly withheld. However, under the abandonment statute, the property right may be lost if it is not used. H.B. 2451 would provide for protection of water rights from unintentional forfeiture and help promote conservation.

It is important to note that this is a bi-partisan issue and that in 2010, the Legislature took a step towards removing "use it or lose it" through another amendment to K.S.A. 82a-718: "Notwithstanding the provisions of subsection (a), a groundwater right, which has as its local supply an aquifer area that has been closed to new appropriations by rule, regulation or order of the chief engineer and where means of diversion are available to put water to a beneficial use within a reasonable time, shall be deemed to have due and sufficient cause for nonuse and shall not be deemed abandoned." There have been concerns, however, regarding what should be required to meet the criteria of "means of diversion" and "reasonable time."

Water rights are appropriated and administered in Kansas by the Department of Agriculture through the Division of Water Resources. K.S.A. 82a-718 requires that all water rights of any kind be deemed abandoned and terminated when no lawful beneficial use of water has been made for five successive years without due and sufficient cause for non-use.

In 1999, the Kansas Legislature amended the Kansas Water Appropriation Act to require the chief engineer to notify water right owners by certified mail whenever the owner has reported three or more consecutive years of non-use on their annual water use reports. While receiving certified mail from a state agency may seem threatening, the Legislature's intent was to provide water right owners an opportunity to remedy an abandonment situation before five consecutive years of non-use occurs. Acceptable due and sufficient causes for non-use of water can be found in Kansas Administrative Regulation (K.A.R.) 5-7-1. The reasons must demonstrate that water use was prevented or made unnecessary during the period water was not used for beneficial purposes. The reasons for non-use should always be noted on the annual water use report so that they are a matter of record in the division's files. However, if an owner has not been reporting reasons for non-use, that information can be provided to the Division of Water Resources in writing at any time. The bill provides that the Chief Engineer does not need to notify water right holders in closed areas as such notice would be confusing to these individuals in light of the provisions of the bill.

Before a water right can be declared abandoned, the chief engineer must conduct a hearing, which gives the water right owner a final opportunity to submit evidence that a water right has not been abandoned. The chief engineer's staff carefully researches the non-use with the water right holder before reaching this step, but the burden of proving due and sufficient cause for non-use ultimately rests with the water right holder. If no due and sufficient cause can be found, the chief engineer will schedule a hearing and notify the water right owner(s) at least 30 days prior to the hearing date. Last year, DWR reviewed 134 files that had more than 5 years of non-use. Of those, 115 files were found to be in good standing with due and sufficient cause during the period of non-use. The remaining 19 files had a verified report prepared, which is the next step toward an abandonment hearing.

So while relatively few water rights are abandoned each year, some are non-voluntary, and the prospect of losing a water right through non-use is a concern to many water right holders. There are definitely those who only pump water in order to preserve a water right. H.B. 2451 will send the signal to those water right holders, in areas closed to further appropriation, where groundwater is the source, that they are free to conserve water without the fear and risk of losing the water right.

We would appreciate your favorable consideration of H.B. 2451 and recommendation for passage. I will stand for questions at the appropriate time.