

Approved January 29, 1987
Date

MINUTES OF THE HOUSE COMMITTEE ON ENERGY AND NATURAL RESOURCES

The meeting was called to order by Representative Ron Fox at
Chairperson

3:30 ~~am~~/p.m. on January 21, 1987 in room 526-S of the Capitol.

All members were present except:

Committee staff present:

Ramon Powers, Research Department
Theresa Kiernan, Revisor of Statutes' Department
Betty Ellison, Committee Secretary

Conferees appearing before the committee:

The meeting was called to order by Chairman Fox. There were no objections to the minutes of January 13 and they were adopted.

A motion was made by Representative Spaniol to introduce the resolution recommended by the Special Subcommittee of the Interim Committee on Energy and Natural Resources as related to creation of a Radon Advisory Committee. Representative Sallee seconded and the motion carried.

Representative Spaniol, seconded by Representative Fry, made a motion to request introduction of the bill dealing with licensing procedure for testing for radon gas as recommended by the Special Subcommittee of the Interim Committee on Energy and Natural Resources. Motion carried.

Representative Grotewiel announced that the ranking minority members on subcommittees would be Representative Betty Jo Charlton--Natural Resources, and Representative Darrel Webb--Energy.

John Peck, Professor of Law, University of Kansas School of Law, gave an overview of Kansas Water Rights Law. He followed an outline which defines and explains these laws. (Attachment 1) Lengthy discussion followed Mr. Peck's presentation.

The meeting was adjourned at 5:05 p.m.

The next meeting of the House Energy and Natural Resources Committee will be held at 3:30 p.m. on January 22, 1987 in Room 526-S.

AN OVERVIEW OF KANSAS WATER LAW

by

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University of Kansas School of Law

Lawrence, Kansas

Presented to the Kansas House of Representatives

Committee on Energy and Natural Resources

January, 1987

Outline

- I. INTRODUCTION
 - II. OVERVIEW OF VARIOUS WATER RIGHTS DOCTRINES
 - III. KANSAS WATER LAW
 - A. Prior to 1945
 - B. The 1945 Water Appropriation Act--K.S.A. §§ 82a-701, et seq.
 - C. Special Water Districts
 - D. State Water Plan
 - E. Water Transfers
 - F. Storage in Large Reservoirs
 - IV. INTERSTATE CONFLICTS
 - V. OTHER POINTS OF INTEREST
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I. INTRODUCTION

- A. Preface. This presentation will give an overview of the major water rights doctrines in the country, of the Kansas Water Appropriation Act, of other important Kansas water law statutes and topics, and of several other points of interest to this committee.
- B. Hydrology.
 - 1. The hydrologic cycle.
 - 2. Kansas hydrology.
 - 3. Interrelationship between groundwater and streamwater.
 - 4. Well hydrology.
- C. Kansas Water Agencies.
 - 1. The Kansas Water Office/Kansas Water Authority.
 - 2. The Chief Engineer of the Division of Water Resources of the Kansas Board of Agriculture.
 - 3. Department of Health and Environment.
 - 4. Others.
- D. Federal Agencies.
 - 1. Corps of Engineers.
 - 2. Bureau of Reclamation of the Department of Interior.

II. OVERVIEW OF VARIOUS WATER RIGHTS DOCTRINES

A. What is a water right?

1. Real property.
2. Alternatives.

B. Surface water rights.

1. Surface water includes the following: a) diffused surface water (rain and snowmelt); b) water in watercourses; c) water in lakes and ponds; d) spring waters; and e) waste water.
2. Riparian Doctrine--Eastern United States.
 - a. Ownership of land on a watercourse gives owner the right to use of the water.
 - b. "Reasonable use" theory--each riparian owner on a watercourse or lake is to be free from unreasonable uses that cause harm to his own reasonable use of the water.
 - c. Attributes.
 - i. Non-use of the water does not result in a forfeiture of the right.
 - ii. Nonriparian use of water is generally an unreasonable use.

3. Appropriation Doctrine--Western United States.
 - a. "First in time--first in right" is the guiding principle, not the ownership of land along a watercourse or lake.
 - b. Appropriation and use of water to gain right has given way to an administrative permit system in most states, including Kansas, which requires an application for a permit prior to use of the water.
 - c. Attributes.
 - i. A period of non-use usually results in a forfeiture of the right.
 - ii. Sale of a tract of land to which right attaches carries with it the water right unless otherwise stated in the deed.
 - iii. Use of water need not be on land riparian to the watercourse; therefore interbasin transfers are generally permitted in appropriation states, unless prohibited by state statute.
 - iv. Right obtained by:
 1. Applying for permit;
 2. Building diversion works;
 3. Diverting the water.
 4. Putting the water to a beneficial use.

- v. "Senior" right (one earlier in time priority) can enjoy a "junior" right holder, or a person without a right, if the latter's use of water impairs the senior's right.

C. Groundwater Rights.

1. Includes waters flowing in defined subterranean channels, and diffused percolating waters.
2. Doctrines in the U.S. range from 1) the absolute ownership rule (Texas), where the surface owner may use all water found under the surface regardless of the effect on others, to 2) the reasonable use rule, where the user may adversely affect neighbors as long as he puts the water to a reasonable use on his own land, 3) the correlative rights doctrine, where there is a sharing of the pool of water underneath the surface by all surface owners using the water, to 4) the prior appropriation doctrine, where first in time is first in right.

III. KANSAS WATER LAW

- A. Prior to 1945.
 - 1. Surface water--Kansas was a riparian doctrine state following generally the "reasonable use theory."
 - 2. Groundwater--Kansas followed the "absolute ownership doctrine."
- B. The 1945 Water Appropriation Act--K.S.A. § 82a-701, et seq.
 - 1. Overview and key provisions.
 - a. Declares all water within the state to be dedicated to the use of the people, subject to the control and regulation of the state. (§702)
 - b. Chief engineer of the Division of Water Resources of the Bd. of Ag. enforces and administers the laws of the state. (§706)
 - c. Surface water or groundwater may be appropriated by the method set forth in the statute (§707) as follows:
 - 1. Apply to chief engineer giving source, maximum rate, location of works, estimated time of first application, and description and map of land to be benefitted (§709).

2. In passing on application, chief engineer considers possible impairment of use under existing rights and unreasonable effects on the public interest.
3. If granted, the permit authorizes the applicant to proceed with construction of the diversion works, at the completion of which, the chief engineer inspects and issues a "certificate of appropriation" which is recorded in the register of deeds in the county where the point of diversion is located. This certificate is evidence of a perfected water appropriation right in Kansas, but the priority date is the date of filing the application for the permit, and the approved permit constitutes a water right in Kansas (§§701(g), 712, 714, and 707(c)).
4. A water right consists of a priority date, a rate or diversion (gal./min.) and a total quantity allowed per year (acre feet/year).
5. The chief engineer may place conditions on the permit (§711a) and may require an applicant for a permit to adopt and

implement conservation plans and practices. (§711(d))

- d. Landowners who were not putting water to use on June 28, 1945, simply lost their riparian and common law groundwater rights.
- e. Landowners who were putting water to use on June 28, 1945, were given "vested rights," comparable to appropriation rights, but vested rights not claimed by July 1, 1980, were lost.
- f. The Act makes it unlawful for anyone to prevent waters from moving to a person having a prior right to use the waters, and the Chief Engineer may direct that the illegal user's works be shut down. The attorney general may sue to enjoin unlawful appropriations. A person with a vested or appropriation right may sue to enjoin anyone without such a right or with a later priority date from impairing the right. (§§706(b), 706(d), and 717(a)).
- g. Water rights are deemed abandoned if no beneficial use is made of the water for 3 successive years (unless there is "due and sufficient cause"), but the claimant has a right to a hearing before the final determination of abandonment is made (§718).

- h. With a few exceptions, such as for domestic use or reservoir impoundment of less than 15 acre feet, it is now unlawful (class C misdemeanor) to appropriate water without obtaining a permit under the Act.
 - i. The act allows the chief engineer, following designation by the legislature of streams to be protected, to withdraw unappropriated water to establish minimum streamflows, but prior rights are protected. (§§703a-703c)
2. Court cases concerning the Appropriation Act: The Kansas Supreme Court has upheld the constitutionality of the Act on several occasions (1949, 1962, and 1981).

C. Special Water Districts.

1. Kansas law provides for establishing of many kinds of special water districts, including drainage, irrigation, watershed, levee, rural water, soil conservation, sewer, water supply and distribution, groundwater management districts, and water assurance districts.
2. Groundwater management districts are important new districts in the western half of the state where to date 5 GMD's have been established. Water assurance districts will be established below federal reservoirs to help provide water supply to water right holders on the rivers.

D. State Water Plan (K.S.A. §§ 82a-901, et seq.).

(See the Report on Ks. Legis. Interim Studies to the 1985 Legis. (Dec. 1984) for a comprehensive history of water planning to that date.)

1. Although there had already been some water planning before, it was in 1963 that the legislature first provided for a formal state water plan to be made. The state water plan act provided for the formulation of a state water plan by the then Kansas Water Resources Board. The plan was to be a broad legislative statement of policy concerning water resources in Kansas, and was to be presented to the Kansas Legislature for its enactment. In 1965, the legislature passed the first water plan. It became a statutory law and was placed in the statutes at K.S.A. §§ 82a-927, et seq.
2. In 1981, the Legislature changed the act's name to the state water planning act and added "management" and "conservation" to development as major considerations in formulating the plan. It also provided for minimum streamflow designation for the first time.
3. In 1984, the Kansas Legislature merged the state water planning act and the state water plan into the state water resources planning act. This act further provided that the Kansas Water Office

would prepare a state water plan and have it approved by the Kansas Water Authority before presenting it to the legislature. The legislature could then enact the plan "by reference". In the 1984 session, the legislature enacted a minimum streamflow section of the Plan, and that section was the only part of the plan existing at the beginning of the 1985 legislative session.

4. In the 1985 Session, following recommendations of this committee, the legislature made a profound and beneficial change in the statute. It provided a method of continuous and dynamic planning to replace the cumbersome one existing to that time. That earlier procedure required that the water plan be accepted by the legislature and become statutory by incorporation by reference. In 1985 the legislature changed it such that the plan, after approval of the water authority, is to be submitted to the legislature and the governor. The legislature is now free to accept parts of the plan by considering and passing legislation recommended by the plan.

E. Water Transfers.

1. Interbasin transfers of water are generally allowed in appropriation states unless prohibited by statute.

2. However, Kansas has a law found at K.S.A. §§ 82a-1501, et seq., which governs "water transfers", defined as the "diversion and transportation of water in a quantity of 1,000 acre feet or more per year for beneficial use outside a ten-mile radius from the point of diversion of such water."
3. Thus, water transfers covered by the Act include both interbasin and intrabasin transfers, and include diversions from streams, groundwater, and stored water in reservoirs.
4. Persons desiring to transfer water must apply to the state, and the proposal will be reviewed first by a three-person panel (chief engineer, director of Kansas Water Office, and Director of the Division of Environment of the Dept. of Health and Environment); then by the Kansas Water Authority; and last, by the legislature

F. Storage in Large Reservoirs.

1. Large multi-purpose reservoirs have been built in the state by federal agencies. In western Kansas, the Bureau of Reclamation has built reservoirs for irrigation, but these have flood control and water supply functions as well. In eastern Kansas, the Corps of Engineers has built several reservoirs, primarily for flood control and water supply. These are also used for recreation, fish and wildlife, and as enhancements to water quality and

navigation in the rivers below the reservoirs. These eastern Kansas reservoirs may not be used for irrigation.

2. Kansas has agreed to pay the federal government for the space used by the state for water supply purposes, and payments are made annually by appropriations of the legislature. Kansas, however, controls most of the water running through the reservoirs and most of it stored in the reservoir.
3. Water supply from the reservoirs may be used for municipal and industrial purposes only. The state sells this supply water to cities and industries by way of long-term contracts under the state water marketing program.
4. Before the Kansas Water Office can market water from a reservoir, it must obtain the right to "divert and store" the water from the streams running into the reservoir. This type of water right is called a "water reservation right." It is similar to an appropriation right in the sense that it has an annual amount and a priority date. The reservation right then is just one of several other possible water rights on a stream-- appropriation rights, vested rights, and domestic rights.

IV. INTERSTATE CONFLICTS.

- A. Groundwater. Until 1984, Kansas allowed interstate movement of groundwater only to states that allowed its groundwater to move to Kansas. A similar Nebraska "anti-export" statute was declared unconstitutional by the U.S. Supreme Court, so the 1984 legislature amended our law to remove this reciprocity provision. (§ 82a-726).
- B. Surface water. Historically, surface water conflicts between or among states have been resolved in one of three ways--by the U.S. Supreme Court, by the Congress, or by the states themselves:
1. "Equitable Apportionment" by the U.S. Supreme Court. Kansas has been a party to such suits before, each involving the Arkansas River and the State of Colorado. In 1907 and in 1943, Kansas failed to show enough harm done by Colorado for the Supreme Court to divide the waters as we requested. Similar litigation is now underway in the U.S. Supreme Court.
 2. Congressional Apportionment. This method of settling conflict has been used only once by the Congress, when it divided the waters of the Colorado River.
 3. Interstate Compact. These must be approved by Congress.

- a. Kansas has entered into several compacts including the Republican River Compact (Colo., Neb., and Ks. --K.S.A. § 82a-518); the Arkansas River Compact (Colo. and Ks.--K.S.A. § 82a-520); the Missouri River Boundary Line Agreement (Mo. and Ks.--K.S.A. § 82a-521); the Arkansas River Compact (Okla. and Ks.--K.S.A. § 82a-528); and the Big Blue River Compact (Neb. and Ks.--§ 82a-529).
- b. Each of these, except the boundary line compact, attempts in various ways to allocate the waters of these rivers among the states involved.

VI. OTHER POINTS OF INTEREST

- A. Water Use by Kansans. As shown above, Kansas citizens, cities, and industries have choices in obtaining water. They may apply for an appropriation right from the chief engineer for groundwater or surface water, and the costs for this water includes the cost of the application fee, the construction costs of the diversion works, and the energy costs of pumping and transporting the water. There is no cost for the water itself. Alternatively, cities and industries may buy water from the state out of large reservoirs, and in this case, the costs include costs of the water itself as well as construction and energy costs.

B. Minimum Streamflows. If a stream is already fully appropriated, the state may not withhold water from appropriation for minimum streamflows, because to do so would involve a "taking" of a water right. If there is water available for appropriation, any water right obtained between 1984 and July 1, 1990, will be subject to a minimum streamflow established on a stream anytime before July 1, 1990, even though the water right predates the minimum stream flow.

C. Recent Enactments During the 1985 and 1986 sessions, the legislature enacted several measures recommended by the water plan, including the following (not a complete list):

1. Minimum desirable streamflow by month, location, and amount for 9 streams.
2. The multipurpose small lakes program act.
3. A section requiring the water office to develop and maintain guidelines for water conservation plans and practices, and other sections that can mandate conservation practices for certain water right holders or users.
4. A water assurance program for water right holders downstream from federal reservoirs.
- and 5. A section giving the water office power to issue revenue bonds for large reservoir projects.