Approved: Carl Dean Holmes
Date 2-10-1993

MINUTES OF THE HOUSE COMMITTEE ON ENERGY AND NATURAL RESOURCES.

The meeting was called to order by Chairperson Carl Holmes at 3:30 p.m. on February 3, 1993 in Room 526-S of the Capitol.

All members were present except:

Committee staff present: Raney Gilliland, Legislative Research Department
Dennis Hodgins, Legislative Research Department
Mary Torrence, Revisor of Statutes
Cindy Garland, Committee Secretary

Conferees appearing before the committee: Dr. John Peck, Professor, University of Kansas School of Law
David L. Pope, Chief Engineer-Director, Division of Water Resources, Kansas State Board of Agriculture

Others attending: See attached list

Chairperson Holmes welcomed Dr. Peck and David Pope to the Committee meeting.

Dr. Peck, University of Kansas School of Law, gave an overview concerning the proposed amendments to the Water Transfer Act. Dr. Peck reviewed the historical background of water transfers; the enactment of the Water Transfer Act; The Kansas Administrative Procedure Act; the 1990 Peck/McLeod Study on Transfer Act, for the Kansas Water Office; and the current proposals for amendments. Dr. Peck stated that legislators who are trying to do what is best for the state as a whole and are trying not to be guided by parochial interests and biases need to ask whether water transfers are desirable as a matter of state policy. He suggested legislators seek information about the experiences in other states where large transfers have taken place. Dr. Peck responded to questions from the Committee. (Attachment 1)

David Pope, Division of Water Resources, Kansas State Board of Agriculture, presented background information relating to the Water Transfer Act and to explain the consequences of some of the proposed changes to the Act. He stated that the Kansas Water Appropriation Act and the State Water Plan Storage Act have very adequate procedures to safeguard the processing of new applications, new water uses and changes in water use in most situations. He stated the following:

"The Water Transfer Act in an extraordinary process which needs to be invoked whenever there are likely to be substantial impacts on the factors set forth in subsection (c), on page 3, line 19, et seq."

Only when there are large transfers of water over long distances, which might involve the shifting of significant economic, environmental and other impacts on a statewide basis, should this extraordinary process of the Water Transfer Act be invoked. Mr. Pope responded to questions from the Committee. (Attachment 2)

A motion was made by Representative Hendrix and seconded by Representative Shore, to approve the Committee Minutes of January 25, January 26, January 28 and February 1, 1993. The motion carried.

The meeting adjourned at 5:25 p.m.
The next meeting is scheduled for February 3, 1993.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

GUEST LIST

COMMITTEE: ENERGY & NATURAL RESOURCES DATE: Feb 3, 1993

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Ruth Lord	210 S 6th Marysville Ks 66508	Sr. Citizens Group
Phyllis Herman	Axtell, Ks.	"
Shirley Valecky	Oketo. KS	"
Margaret E. Helms	110 So. 8th St., #5 Marysville, Ks	"
Joe and Mae Robinson	Frankfort, Kansas	
Shelley Wells	Lawrence KS	Intern Rep McClure
Karen Zambri	Lawrence, KS	Intern Sen. Lee
Pat Williams	Beloit KS	GEIDS
David Williams	Beloit, Ks.	GEIDS
Jayne Ekey	Lawrence	Ks. Audubon Council
Mike Beam	Topeka	Ks. Forestry Assn.
Franklin H. Fisher	Waterville	Mayor
CHARLES JONES	TOPEKA	KDHE
Catherine Burges Catherine Burges	Topeka	
L.N. Rasmussen	Frankfort	NEMAAA
Preston A. Pratt	Lawrence	Intern (Neal)
MIKE ARMSTRONG	PRAIRIE VILLAGE	WATER DIST #1
Byron Johnson	Mission	Water Dist. #1
Eileen Tatelas	Mission	Water Dist. #1
Kent Weatherby	Topeka	WRI
R.E. Pelton	Topeka	City of Topeka
Merlin Zoeller	Marysville	Sr. City visitor
Alvine Zoeller	"	"
Louise J. Reust	Frankfort, Ks.	"
Mary Engelhardt	Marysville Ks.	"

GUEST LIST

COMMITTEE: ENERGY & NATURAL RESOURCES DATE: Feb. 3, 1993

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Pansy Rudolph	Blue Rapids	Ms. Co. Agency on Aging
Steve Hurst	Topeka	KCJO
Alan Steppat	Topeka	Pete McGill & Assoc.
Jim Ludwig	"	Western Resources
Trevor Potter	"	Williams
Judy A. Holley	K.C. Ks.	Intern
Ret Buchanan	Lawrence, Ks	Ks. Geological Survey
Drew Toplikar	Lawrence	Law. Jr. World
B. J. Charlton	"	Reg.
Kenneth & Faye Tilley	Frankfort Ks	Agency on Aging

Proposed Amendments to the Water Transfer Act, H.B. 2070

House Committee on Energy and Natural Resources

February 3, 1993

John C. Peck, Professor
University of Kansas School of Law

Outline:

I. Introduction
II. Historical background of water transfers
III. Enactment of the Water Transfer Act
IV. The Kansas Administrative Procedure Act
V. Peck/McLeod Study on Transfer Act, 1990, for the Kansas Water Office
VI. The current proposals for amendments
VII. Conclusion

I. Introduction. Thank you, Mr. Chairman, for inviting me to speak today. When we discussed this possibility two weeks ago in Great Bend, you suggested that I might come to this committee, much as I had done in the 1989 session, to present background legal and historical information, and not to act as a proponent or opponent to H.B. 2070.

I teach a course in water law at the KU Law School. I conduct legal research and write articles on water law. I consult with businesses, law firms, cities, and other entities in the state on water law problems. Certainly the subject of water transfers is an important one to this state.

II. Historical Background of Water Transfers. I first became interested in the topic of water transfers in the fall of 1978, when Jim Powers, then head of the Kansas Water Resources

House E&NR
Feb 3, 1993
Attachment 1

Board, the predecessor agency to the Kansas Water Office, asked me to conduct a research project on the legal aspects of a hypothetical diversion of water from eastern Kansas to western Kansas. I was not to look at the economic questions. Others would do that. I was to confine myself to the legal questions, and specifically to examine two hypothetical diversions, one from the Missouri River and the other from Tuttle Creek Reservoir. I completed my report and published an article called "Legal Aspects of Diverting Water from Eastern to Western Kansas" in a 1980 report of the Kansas Water Resources Research Institute (KWRRI) and in the 1982 volume of the Kansas Law Review, published by our law school.

I learned that we have two main water allocation doctrines in the United States. The moist eastern states, Missouri eastward, follow the so-called "riparian doctrine" for water rights. There, owners of land along rivers and streams have water rights by virtue of ownership of land along the stream. They must use the water on land next to the stream. As a general rule, they may not divert water out of the watershed of the stream.

The drier western states, those in the tier of states from the Dakotas to Texas and westward, including Kansas, follow the doctrine of "prior appropriation." Water rights are obtained in these states, not by virtue of owning land along streams or above groundwater, but by first obtaining a water rights permit from a state agency. "First in time is first in right" is the guiding

principle, which means that, in times of water shortage, the water rights permits obtained earlier are superior to those obtained later; the "junior" right is shut down in favor of the "senior" right. Water rights not used are lost through abandonment or forfeiture.

The arid character of the western states creates a problem. Water may not be located where people want to settle. The most fertile soil may not be where the most water is located. Mines often need water from a distance away. One of the oldest tenets that grew up in the prior appropriation doctrine, indeed going back to its very origins in the mining lands of California during the Gold Rush, is that the doctrine does not regulate or limit the place of using the water. The early miners moved the water long distances. Priority of right according to date was important, not the location where the water was moved and used.

The problem of water transfers has faced many western states. Interestingly, some of these states, including Colorado and California, have enacted so-called "basin-of-origin protection statutes." Yet, ironically, these states have allowed statutory exceptions to these basin protection statutes to permit large water transfers to help feed the thirst of Los Angeles and Denver.

What about the Kansas law on water transfers at the time of my 1980 article? Although at statehood Kansas had adopted the eastern states' riparian doctrine, we changed to the prior appropriation doctrine with the legislature's enactment in 1945

of the Kansas Water Appropriation Act. At the time I wrote my 1980 article on water transfers, the 1945 Act was still the guiding law. We thus had the prior appropriation doctrine, which inherently allows interbasin transfers. We had no express basin-of-origin protection statutes, with the exception of one in the Big Blue River Compact with Nebraska, which denies either state the power to make interbasin transfers from the Big Blue River without permission of the other state. An entity seeking an interbasin transfer from any other river or reservoir in the state in 1980 would have to have obtained an appropriation permit from the Chief Engineer or a water purchase contract from the then Kansas Water Resources Board. The Chief Engineer was guided by the Appropriation Act's requirement that no water right be given if it would impair existing rights or adversely affect the public interest. The term "public interest" was not defined in the Appropriation Act. But transfers were certainly possible.

I found other hurdles besides the need for an appropriation permit or a purchase contract. One seeking to transfer water by acquiring existing water rights would also have been required to obtain permission from the chief engineer for a change in the water right. In that case, the transferring entity was not allowed to impair other existing water rights, either senior or junior. The federal government has possible interests, including its right to control water use in the reservoirs and its constitutional duty to maintain navigation in interstate rivers. Federal statutes also protect the environment and endangered

species. Other states would be interested in an interbasin transfer. Missouri, for example, would likely look carefully at a transfer from the Missouri River or from Tuttle Creek, my two hypothetical sources of water for the 1980 study.

In short, water transfers were legally possible in 1980. The chief engineer had to consider existing rights and the public interest in his decision whether to permit a transfer. Other potential stumbling blocks might have included objections from other water right holders, the Federal Government, and downstream states like Missouri.

III. Enactment of the Water Transfer Act. After my study was completed, the legislature made some changes in the administrative agencies. It created the Kansas Water Office and the Kansas Water Authority to take the place of the Kansas Water Resources Board and its staff.

In 1983, the legislature enacted the Water Transfer Act. Since I did not take any role in this legislation, I do not know the details of why it was enacted. The legislature must have felt that it would be preferable to have a multi-level review process rather than to leave the ultimate administrative decision of whether to allow interbasin transfers in the hands of one water administrator, regardless of his expertise and objectivity. It was a burden that the chief engineer may have gladly relinquished. The Water Transfer Act greatly changed the process for approving transfers. It defined "water transfers" to include

movement of 1000 acre feet or more of water a distance of 10 miles or more. It required applicants for these newly-defined "water transfers" to go through a 3-level review process: a hearing before a 3-person panel of water agency heads, followed by a review by the Kansas Water Authority, followed by a chance of a veto by the legislature. The Act established its own special procedures for these hearings and reviews because at that time we had no comprehensive administrative procedure act.

IV. The Kansas Administrative Procedure Act. The legislature enacted the Kansas Administrative Procedure Act ("KAPA") in 1984. KAPA is a general law for state administrative agencies, providing detailed administrative procedures for the hearing process, from pre-hearing matters to the hearing and post-hearing stages. But KAPA is applicable only if the statutes for the state agency expressly make KAPA applicable. In 1984, KAPA was not applicable to the Water Transfer Act. In 1988, the legislature made KAPA applicable to the Water Transfer Act.

V. Peck/McLeod Study on Transfer Act, 1990, for the Kansas Water Office. By 1989, six years after enactment of the Water Transfer Act, no one had filed an application for a water transfer. The Water Office, concerned about what it considered ambiguous procedures in the Water Transfer Act, asked me to conduct another legal study, this one on the procedures governing water transfer applications. I was not to study or comment on

the substantive aspects of the Act, only the procedural aspects.

A 3rd year law student, Brian McLeod, helped me with the study. We studied the Water Transfer Act and KAPA and their interrelationship. We pointed out many problems, ambiguities, and inconsistencies. We suggested many procedural changes in the Water Transfer Act. We suggested no changes in KAPA, because KAPA is a general act governing all agencies; if changes were to be made, we felt they should be made in the Water Transfer Act. I repeat that our recommendations were restricted to procedural matters only, not to changes in the substance of the Act. Sometimes, however, changes in procedure can affect substance. For example, we suggested changes regarding potential conflicts of interest in the panel and regarding the legislative veto provision.

Time does not permit a detailed listing of our recommendations for changes in the procedures of the Water Transfer Act to mesh with KAPA. Suffice it to say that our study was long and detailed and that the Water Office and Water Authority have used it to some extent in drafting proposals for amendments last year and this year. While we suggested even more deference to KAPA and more ways to clarify the procedure, there is nothing inherently wrong with having a procedure that does not track KAPA's procedures exactly.

VI. The current proposals for amendments. Let me comment briefly on what I see as possible effects of a few of the

proposed amendments found in H.B. 2070, some of which relate to our study, and some of which are substantive changes.

1. Section 1. Section 1. changes the definition of "water transfer" from 1000 to 2000 acre feet and from 10 to 50 miles. This amendment would make fewer proposed diversions of water subject to the Act and would thus make it easier to make many of the anticipated smaller, less controversial diversions.

2. Section 3. The Act has a clause protecting the basin of origin except when the statewide interest prevails. H.B. 2070 alters this basin-of-origin protection clause to make it just one of the factors in Section 3. that the hearing officer is to consider in deciding whether statewide interests prevail over the interests of the basin of origin. The result will be less protection for the basins of origin and therefore probably more transfers of water. The current Act's clause is admittedly just a crumb for the basins of origin; H.B. 2070 makes the crumb even less significant.

3. Section 4. Section 4 makes significant changes in the hearing and review process, some of which we had recommended in our study. For example, it provides a more realistic time frame from filing the application to the hearing. It allows intervention of parties.

4. Section 5. Section 5. changes the method of the hearing process to make the initial determination by a hearing officer appointed by the panel, followed by a final review by the panel. It eliminates the review by the Water Authority and the

legislative veto provision. The effect of these changes would probably make water transfers more easily obtainable. It would be a less political process.

We analyzed the legislative veto provision in our study. Our study preceded a 1991 attorney general's opinion on the subject. We concluded, as did the attorney general, that the legislative veto in its present form is probably unconstitutional. Its present form is to allow veto by concurrent resolution of the legislature, and thus permits the legislature acting alone and without consent of the governor to veto a proposed transfer. Since we were not making recommendations on substance and were confined to procedure, our report suggested amending the legislative veto procedure to require the legislature to enact a bill vetoing the water transfer and to present it to the governor for signing. In our opinion, it would be constitutional to provide for legislative veto of a water transfer if done by an act of the legislature rather than by concurrent resolution. We did not suggest abolishing legislative veto entirely. You should understand that, in our opinion, you need not delete the concept of legislative veto if you want the legislature to retain ultimate control over water transfers. But you would have to amend the present Act to do so constitutionally.

VII. Conclusion. Whether any individual legislator wants the changes sought in H.B. 2070 depends on the viewpoint taken.

Legislators who are trying to do what is best for the state as a whole and are trying not to be guided by parochial interests and biases need to ask whether water transfers are desirable as a matter of state policy. They should seek information about the experiences in Colorado, California, Arizona, and other states where large transfers have taken place--environmental, economic, and social repercussions of these transfers. If legislators can then support the concept in general, they must seek to craft an approval process that is fair and is protective of all interests.

Legislators who view themselves as representing only their own districts will have only the narrow interests of those districts at heart. But even then, these legislators must ask whether entities in their districts in the future will be seeking a water transfer, trying to block a transfer, or perhaps standing on either side of the issue at different times, depending on matters such as the entities involved, economic and climatological conditions, water sources, and timing. In other words, a basin might have to give up water in one instance, but a city or industry in the same basin might seek a transfer from another basin at another time.

In my opinion, you should seek to make water transfer law as fair and just as possible so that its application will be equitable for the state as a whole and for both the transferring entity and the basin of origin, either or both of whom could come from your district. Your choice could thus be to leave the Water Transfer Act as is, to accept H.B. 2070, to amend H.B. 2070, or

to write an entirely new Water Transfer Act.

PRESENTATION TO THE HOUSE COMMITTEE
ON ENERGY & NATURAL RESOURCES
RE: HOUSE BILL NO. 2070
FEBRUARY 3, 1993
BY DAVID L. POPE, CHIEF ENGINEER-DIRECTOR
DIVISION OF WATER RESOURCES
KANSAS STATE BOARD OF AGRICULTURE

Thank you, Chairman Holmes and members of the Committee, for this opportunity to appear before you here today. I am not here as a proponent or opponent of this bill. I am here to present some background information related to the Water Transfer Act, explain my understanding of the consequences of some of the proposed changes to the Act, to hopefully answer some of the questions that have been raised in these hearings to date and attempt to answer any other questions that the committee might have on this matter.

As I stated in an earlier appearance before this committee, the Kansas Water Appropriation Act is the fundamental statute under which all water use in this state is regulated. As Chief Engineer, I am the primary official charged by statute with the administration and enforcement of that Act. Since there are a number of questions related to water availability and the right to the use of water, a brief discussion of these matters may be useful.

As stated in section 2 of that Act, "All water within the state of Kansas is hereby dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner herein prescribed." K.S.A. 82a-702.

It is generally considered that the State of Kansas owns the water of the State of Kansas and may issue water rights or permits to its "use". Water rights

House Energy & NR
Feb 3 1993
Attachment 2

are, by statute, "real property rights" but these "real property rights" are rights to the "use" of the water, not to the water itself. An appropriator actually owns the water only after it is physically brought under control by the appropriator in accordance with the terms of his or her water right or permit. Everyone using water for any beneficial purpose, except domestic use and other minor exceptions, must have a water right or permit.

The 10 beneficial uses are set by regulation and are: "domestic, stockwatering, municipal, irrigation, industrial, recreational, water power, artificial recharge, hydraulic dredging and contamination remediation." See K.A.R. 5-1-1(f). Definitions of these types of beneficial uses have been adopted by regulation and are found in K.A.R. 5-1-1. To answer an earlier question from the committee, most "agricultural" uses of water would fall within either irrigation or domestic use, if for the watering of farm and domestic animals. (Not including feedlots with over 1,000 head capacity, which is a stockwatering use.)

Availability of Water for Transfer

All uses of water, except for domestic use, must be authorized by a vested or appropriation right established pursuant to the terms of the Kansas Water Appropriation Act or a water reservation right, held by the Kansas Water Office, for use of water from state controlled storage in federal reservoirs. In other words, a water transfer can not occur without a water right or a contract from storage and these rights can not be exercised, if the proposed use of water is subject to the Water Transfer Act, until approval is granted by that Act.

Consequently, water is available within the State of Kansas in one of three ways. First, water is available if a new application for permit to appropriate water has been approved by my office. In other words, the source of water from which the application proposes to divert water has not yet been fully appropriated. In order to determine whether water is available for appropriation in areas where no specific safe yield or allowable appropriation standard has been set by regulation, the Chief Engineer evaluates new applications on a "safe yield" basis. At the present time, there are many areas of the state which are fully appropriated because water is not available in excess of the needs of existing water rights and further use would not be in the public interest. In those cases, no new permits to appropriate water are available in those areas.

From a water appropriation standpoint, it is really not possible on a statewide basis to say specifically where water is available for appropriation. I can tell you that there are a number of locations that water is definitely not available. In the remaining portion of the state, that determination is not made until actual applications are considered or studies are done for the source of supply. Mr. Chairman, if time permits, I can use a map of the state which illustrates various features to describe to you generally where water is not available and the general status in other areas.

Second, if no new permits to appropriate water can be approved, then the only way water can be acquired by appropriation is through obtaining a water right from someone who already has one. In other words, a user desiring a new water supply or an additional water supply, in a closed area, must go out and acquire an existing water right. This may be done anywhere in the state by

purchase, lease or possibly condemnation. If a water right is acquired in such a manner, and any changes are desired to be made to either the point of diversion, the place of use and/or the type of beneficial use, a change approval must be obtained from the Division of Water Resources prior to that change being implemented. At this time, this is basically the only way a water right may be acquired in a majority of the state.

In processing an application for change, adequate safeguards are provided for in the Kansas Water Appropriation Act and its regulations, to safeguard water users in the area of the point of diversion to protect them from adverse impacts because of the change. A change to an existing water right can not increase the authorized quantity or rate of diversion, increase the consumptive use or relate to a different source of supply. It does allow the user to maintain the same priority date as the original water right.

The third way to acquire water is through the State Water Marketing Program where water may be purchased under contract from the Kansas Water Office with the approval of the Kansas Water Authority. This is water stored under a water reservation right that would be available to be purchased from state controlled storage in large federal reservoirs. The Kansas Water Office has specific information about water available to be purchased from the State Water Marketing Program.

In summary, water must be acquired through one of these methods or a proposed water transfer is a moot issue, because it can not occur without compliance with the other statutes.

"Need" for Water

A question has been raised concerning how an applicant's "need" for water is determined. The primary determination of whether the applicant has "need" for the water is made prior to even entering into the water transfer process.

For example, if a municipality filed an application for a new permit to appropriate water, or an application to change place of use, type of use, and/or point of diversion, the Division of Water Resources would assess that municipality's need for the water based on past and projected population growth, the prior water use history of the municipality, comparison of per capita water use of peer cities in that same region of the state and other factors. Municipalities are allowed to project water needs a reasonable time into the future, which, for the purposes of planning, financing and constructing infrastructure, such as water treatment plants, sewage facilities and pipelines, is generally allowed to be 20 years.

In other words, a city applying for either a new permit or a change application would have had its "need" for the water reviewed and evaluated and the application limited to a reasonable amount prior to a water transfer application even being filed. A similar type of process is used by the Kansas Water Office for a proposed contract to purchase water through the State Water Marketing Program.

Enforcement of Water Rights

Now turning to the issue of enforcement. As I said when I appeared here before, water rights in Kansas are generally administered on the basis of "first in time is first in right". All water rights, whether groundwater or surface water, fit into the same priority system in the State of Kansas. Each water right has a separate priority date and time. This also applies to water reservation rights.

If at any time a water user feels that he or she is not getting the water to which they are legally entitled, they can request an investigation by the Division of Water Resources. If the Division investigates the matter and finds that they are in fact not getting the water to which they are legally entitled and that shutting off other junior water right holders will do a material amount of good, the water user can file a request to secure water with the Division. The Division will administer the priorities on the river to satisfy their water right to the extent possible. This enforcement is done strictly on the basis of priority except that all right holders must operate within the limits of their rights and not waste water. This priority system applies to water reservation rights as well as other water rights in the State of Kansas.

Because there have been specific questions concerning the Republican River and Milford Reservoir, I would like to use that for an example. In the Republican River Basin, there are numerous surface water and alluvial groundwater rights. One major surface water right in the basin is the water reservation right held by the Kansas Water Office with a priority date of April 3, 1974. This gives the Kansas Water Office legal right to store water in the storage

space which it has acquired from the federal government in Milford Reservoir. The Kansas Water Office is authorized by statute to market the water stored in Milford Reservoir and is required to repay the federal government for the cost of purchasing that storage space. Once all of the water that is available to be sold from Milford Reservoir (the 2% chance drought yield) is sold, it may be necessary for the Kansas Water Office, at various times, to have its priority to store water enforced in order to satisfy its contractual requirements to sell water. The water reservation right for storage of water in Milford Reservoir does have a restriction which requires the bypass of 50 c.f.s. in addition to whatever water is necessary to satisfy senior downstream water rights and permits whenever Milford Reservoir is above elevation 1140.0.

Further, the legislature has set minimum desirable streamflow values on the Republican River at Concordia and Clay Center (see K.S.A. 82a-703c). These minimum desirable streamflow values have a priority date of April 12, 1984 by statute. The Division of Water Resources enforces these flows at the request of the Kansas Water Office.

"Water Transfer"

Next, I'd like to move to questions relating to definitions in the Water Transfer Act.

The definition of "water transfer" has been proposed to be changed from moving 1,000 acre-feet per year more than 10 miles to moving more than 2,000 acre-feet per year more than 50 miles. I believe the important question is to

determine the criteria or the point at which extra-ordinary consideration should apply under the Water Transfer Act.

Although in one sense these "quantities" may sound quite large, I would like to try to put these quantities in perspective.

In central Kansas, where irrigation permits typically are authorized 1½ acre-feet of water per acre, under the current Act, 1000 acre-feet would irrigate about 667 acres, or about a square mile of land. Under the new proposed Act, about two square miles of land would be the equivalent before the Water Transfer Act would be invoked, if existing water rights were acquired.

The main proposed change to the threshold is the extension of the distance from 10 to 50 miles. Under the proposed act, any amount could be taken without a water transfer as long as it was within 50 miles.

As I have stated before, there are many safeguards built into both the new application procedure, the change application procedure and the water contracting procedure to protect the interests of other water right holders in the State of Kansas. The Water Transfer Act hearing process is an extraordinary process that is meant to be invoked only when it was felt that a transfer would reach such a magnitude the economic, environmental or other impacts to the state as a whole would justify invocation of such a process. It is simply a policy decision of when the Water Transfer Act should be invoked.

"Surplus Water"

Actually, the definition of "surplus water", although it is not specifically defined in the Water Transfer Act, it can be implied within the terms of the Act itself. "Whether the proposed transfer would reduce the amount of water required to meet the present or any reasonably foreseeable future beneficial use of water by present or future users in the natural watercourse or watershed aquifer or general area from which the water is to be taken for transfer."

Existing rights in the area could not be impaired even if it is not a transfer because the Kansas Water Appropriation Act still applies. (page 3, lines 23 through 27)

I think it was the intent of the Water Transfer Act that the only water which could be transferred would be water not needed in the basin or source of origin to meet the present needs and the reasonably foreseeable future needs. So to answer the question that was raised, in terms of new appropriations, I think it was the intent of the Act that "surplus water" would be all water not needed to meet the present needs of the basin or any future uses that are reasonably predictable.

The Act does not specifically speak to what "surplus water" is if the transferor or is acquiring an existing water right. In that case, the Kansas Water Appropriation Act provision would in all cases protect all the other water right holders in the area of origin from hydrologic injury.

"Commenting Agencies"

Next, there has been some question raised about who the commenting agencies should be. The definition of "commenting agencies" found on page 2, line 9, is a non-exclusive list. I think it was the intent of the Kansas Water Authority that these were the minimum number of agencies that must be notified of any hearing process and that their comments should be considered. Other appropriate natural resource and environmental agencies should be notified as appropriate. This was not intended to be an exclusive list. Broadening the list to include all of the rest of the agencies on the Environmental Coordination Act list would be quite possible. That would mean adding the following agencies: 1) the Office of Extension Forestry, 2) the State Biological Survey, 3) the State Historical Society, 4) the State Conservation Commission, and 5) the State Corporation Commission. Three of the four agencies listed in subparagraph (h), [the Kansas Water Office, the Kansas Water Authority and the Division of Water Resources] are not on the list of review agencies under the Environmental Coordination Act.

It was suggested that a change be made to delete some language which is redundant with the Kansas Administrative Procedures Act. It is true that on page 6, lines 9 through 12, are identical to the language found in K.S.A. 77-521, as defining a person who is allowed to intervene. I think those lines could be deleted and subsection (c) on page 6 could be ended after the words "hearing officer" on line 7.

Another question was raised concerning whether "commenting agencies" would be "intervenors". As far as I know, that would be determined on a case-by-case basis. Each agency would need to determine the extent it wished to be involved

in the hearing process in a particular case. If the agency merely wished to appear and make a statement, it would not become a party or an intervenor. If it wished to have an attorney, participate fully in the process, cross-examine witnesses, make motions and participate as a party, the commenting agency would be an intervenor in that particular hearing.

Assessing Hearing Costs

Considerable discussion has taken place concerning page 6, lines 25 and 26, which state, "the Hearing Officer shall fairly and equitably assess the following costs of the hearing among the applicant and other parties ..." (emphasis supplied).

When this matter was being considered, it was discussed by the Kansas Water Authority that a hearing officer should be allowed the judgment as to how to assess the costs for the hearing, as long as they were fair and equitably assessed.

I believe one of the original drafts of this section required the hearing officer to equally divide the cost of the hearing among the parties. It was felt that the hearing officer should be allowed to use more discretion as to how to fairly and equitably assess the costs of the hearing. The hearing officer could take into account factors such as an intervenor's ability to pay, the extent of its participation in the hearing and other factors. I would assume that the matter of the imposition of costs would be an appealable matter also.

For example, if a public interest entity came into the process represented by an attorney, participated in the hearing very little, called one witness, asked three questions on cross-examination, and had very little ability to pay, that entity might not get assessed any costs, or nominal costs, for participation in the hearing. On the other hand, if a well-funded entity appeared, filed 47 motions, vigorously cross-examined every witness, put on ten witnesses of their own and substantially affected the length and cost of the hearing process, that the hearing officer would have the option to assess them their fair and equitable share. It should be pointed out that only parties are to be assessed costs. Persons making a limited appearance for the purpose of presenting a statement for or against the water transfer are not parties (see page 2, lines 4 through 6), therefore, they would be able to present their statement without any costs.

Independent Hearing Officer

A number of issues have been raised considering the independent hearing officer. The only qualifications in the proposed Act for the hearing officer are those found on page 2, lines 28 through 30. There it says, "The Hearing Officer shall be an independent person knowledgeable in water law, water issues and hearing procedures."

The discussions at the Kansas Water Authority centered around the fact that, above all, the hearing officer should be "independent" and have no stake or bias in the matter, either as a water user or through some particular role as a state officer or employee. Because of the wide variety of possible transfers that may come up, and the unique issues associated with each one of them, they were unable to come up with a more specific list of qualifications that might be necessary

or desirable for all situations. At some times, the issues might appear to be more legal. At times the issues might appear to be more hydrologic or engineering related. At other times they might be economic or environmental. The expertise of the hearing officer would need to be appropriate for the specific water transfer that was being considered. It was felt that the panel, consisting of the Chief Engineer, the Director of the Water Office, and the Secretary of Health and Environment, or his or her designee, could select the appropriate qualified individual for that particular hearing.

As I stated earlier in this hearing in response to a question, I believe it would be the hearing panel who would set the fees for any hearing officer who is not a state employee.

There are many pros and cons related to having an independent hearing officer versus having the panel hold the hearing. For example, in the Johnson County Water District No. 1 proposed water transfer, which was probably, in relative terms, as simple as they will ever get, there were approximately two very long days of hearings. It is not beyond the realm of reasonable possibility that a highly contested hearing involving many issues could take four or five weeks, such as the Walnut Creek Intensive Groundwater Use Control Area hearings. Clearing the schedules of three agency heads to hear five weeks of testimony is extremely difficult at best. It was felt by the Kansas Water Authority that the panel could select a hearing officer who was capable of developing the evidence, making a record and deciding the legal issues so that it could be reviewed by the hearing panel in a reasonable amount of time. Review by the hearing panel is required by House Bill No. 2070.

Conservation Plan Requirements

There has been considerable discussion concerning whether the conservation plan and implementation requirements should be made stricter. Both the current Act and the proposed amendments have identical requirements for conservation plans. Both require that the applicant have adopted a conservation plan which meets the guidelines approved by the Kansas Water Authority and that this plan has been implemented prior to approval of the transfer. Without further changes in the law, the Kansas Water Office and the Kansas Water Authority have adequate authority to make those conservation plan guidelines stricter.

As far as the language on page 3, line 41, et seq. concerning conservation plans and practices adopted and implemented by any persons protesting or potentially affected by the proposed transfer, the language there was not intended to make any of those individuals have conservation plans. This is just one factor that the hearing officer can consider, if appropriate. Obviously, the considerations would be different if the protestor was a municipal water supplier who claimed that it needed the water in the basin of origin or if it was an individual taxpayer who lived in an apartment. No conservation plan is required of protestors, just consideration of what they have done, if it is relevant.

Although there is no specific requirement for a periodic review of the implementation of the conservation plans, that certainly could be imposed as a condition of the approval of a water transfer. As Chief Engineer, I routinely

do this for conservation plans required of applicants for permits to appropriate water.

Review of Panel's Decision

Another group of questions revolved around the review process once the panel has approved a proposed water transfer. In House Bill No. 2070, the Kansas Water Authority has been removed from the process. As Mr. Hurst stated earlier, when the original Water Transfer Act was designed, the Kansas Water Authority had a narrower role. The Kansas Water Authority could review the panel's decision and accept, reject or remand it. The Kansas Water Authority could not modify it. When the Kansas Administrative Procedures Act was engrafted into the Water Transfer Act several years ago, it arguably gave the Kansas Water Authority the authority to modify orders of the panel which, increased its review role. The Kansas Water Authority has voluntarily expressed its desire to be removed from the process. The role of the Kansas Water Authority is primarily one of water planning and policy, not a regulatory body. As a lay body, many of them may not have the time to deal with such matters nor have the technical expertise in some areas.

In addition to review of the independent hearing officer's initial order by the panel, the Kansas Judicial Review Act applies to the provisions of the Water Transfer Act. Any final order would be subject to review in the courts as would any other final order by a state agency.

2-15

KAPA Pre-emption

As far as the imposition of Kansas Administrative Procedures Act requirements on the Act, except for a few minor procedural matters and deadlines, the proposed Water Transfer Act would be compatible with the Kansas Administrative Procedures Act. On page 8, line 6, House Bill No. 2070 invokes the provisions of the Kansas Administrative Procedures Act "except as herein provided." Where there are a few conflicts with the Kansas Administrative Procedures Act, the Water Transfer Act would take precedence, but this would be mainly for deadlines and minor procedural matters. It was the intent that the Kansas Administrative Procedures Act would apply unless the Water Transfer Act had specific provisions in conflict with the Kansas Administrative Procedures Act.

The time lines in the Kansas Administrative Procedures Act were altered for this Act because, in general, the Kansas Administrative Procedures Act was not designed to deal with such large scale hearings such as this. It was more designed to revoke someone's license, etc. Because of the large numbers of persons or entities potentially involved in a water transfer, it takes much longer to give notice, get people organized and prepare for hearings. The issues will often be highly technical and complicated legally. In general, the time lines for beginning the hearing and holding the hearing were extended. This was done to provide a level playing field for both the proponents and opponents. Under the current Act, if a proponent of a transfer got fully prepared before ever publicly announcing its intentions, filed a water transfer application and demanded that a hearing start within 30 days, opponents would have no chance to adequately prepare, do engineering work, background studies or to get adequately

2-16

prepared for the hearing process. I believe that the time lines set forth in House Bill No. 2070 are reasonable to keep the hearing process moving but, at the same time, adequate to allow everyone an equitable chance to prepare for the hearing.

Miscellaneous

A question was raised whether the Water Transfer Act should specifically prohibit transferring all of the water out of a particular reservoir. It seems as though the definition of "surplus water" would protect a reasonable amount of water for use in the area of origin for the reasonably foreseeable future.

On page 3, line 13, the language approved by the Kansas Water Authority simply meant to mandate that the hearing officer must determine that the applicant had adopted and implemented conservation plans and practices.

On page 3, line 32, it was asked whether that language requires an environmental impact statement. To my knowledge, environmental impact statements are only required by federal law and there was no intent that this language speak to that issue, one way or the other. However, all of the provisions of subsection (c) provide the extremely important list of matters to be considered during the water transfer process.

I believe there was a question or comment about whether transfers between the Kansas and Arkansas River Basins should have an even greater level of review than transfers covered by the proposed Water Transfer Act amendments. It seems

that if this Act is properly enforced, that it will be adequate to evaluate all water transfers.

CONCLUSION

Both the Kansas Water Appropriation Act and the State Water Plan Storage Act have very adequate procedures to safeguard the processing of new applications, new water uses and changes in water use in most situations. The Water Transfer Act is an extraordinary process which needs to be invoked whenever there are likely to be substantial impacts on the factors set forth in subsection (c), on page 3, line 19, et seq. Only when there are large transfers of water over long distances, which might involve the shifting of significant economic, environmental and other impacts on a statewide basis, should this extraordinary process of the Water Transfer Act be invoked. It is a policy decision as to when those impacts get so great as to invoke the water transfer process. There are adequate safeguards in place to review the smaller transfers of water.

At the appropriate time, I would be happy to answer any questions you might have. Thank you very much for this opportunity to appear.

2-18