

Approved: Carl Dean Holmes
Date 3-9-93

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 18, 1993 in Room 526-S of the Capitol.

All members were present except: Representative Myers, excused
Representative Long, excused

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

Conferees appearing before the committee: Bill Henry, Executive Vice-President, Kansas Engineering Society
Bruce H. Wingerd, City Attorney, City of Wakefield
Phil Barber, Mayor, City of Wakefield
Constance S. Crittenden, Legal Counsel for the Division of Water Resources, Kansas State Board of Agriculture

Others attending: See attached list

Chairperson Holmes called the meeting to order and appointed a Subcommittee consisting of Representative Hendrix as Chair, Representative Grotewiel and Representative Shore to follow up on the feasibility of the time schedule within HB 2070.

HB 2420-Utility rates; Incentives for conservation programs. A motion was made by Representative Gatlin and seconded by Representative Lloyd for favorable passage of this Bill. The motion carried. Representative Lawrence will carry this Bill on the floor.

The Chair introduced to the Committee, Phil Barber, Mayor of the City of Wakefield. He presented testimony to the Committee in favor of HB 2302 giving background on their water right problem and listed chronologically the chain of events which lead up to the current situation. The city was relocated with the construction of Milford Lake in the early 1960's with the original wells being acquired by the Corps of Engineers. The problems arose during the procedures for obtaining more water appropriation when the Wakefield City Clerk returned a form letter in error and said form letter terminated their vested rights. After obtaining more information as to vested rights, the city requested that their right be reinstated. The request was denied. (Attachment I)

Bruce H. Wingerd, Wakefield City Attorney, also presented his testimony in favor of the above legislation stating that HB 2302 was an appropriate remedy for the problems currently facing the city. He outlined to the Committee that in drafting the substance of the Bill, he was only addressing the Wakefield situation, and it was not his intent to make any substantive changes in the procedure by which vested rights are acquired. (Attachment I) 2

Connie S. Crittenden, Legal Counsel for the Division of Water Resources and Kansas State Board of Agriculture, appeared in opposition of HB 2302 on behalf of David Pope, Chief Engineer, and the Division. She defined the two kinds of water rights in Kansas in which the Water Appropriation Act governs, "first in time is first in right". The first being an appropriation right, which is obtained and regulated through a permitting process, initiated in 1945 with the adoption of the Act.

The other kind of water right is a vested right, which is based on water use which had been on-going prior to the adoption of the Act. To obtain authorization as a vested right, the would-be right holder needed to submit a verified claim to the Chief Engineer, describing their use and practices.

The Division is opposed to the reopening of the vested rights statute since its closing by the legislature in 1980 and the administration of the state's water resources have long been predicated on the current appropriation system. The Chief Engineer indicated he is willing to work with the City and to make every effort to help

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON ENERGY AND NATURAL RESOURCES, Room 526-S Statehouse, at 3:30 p.m. on February 18, 1993.

them address their concerns administratively, if possible. (Attachment III) 3

Bill Henry, Executive Vice-President of the Kansas Engineering Society, appeared and supported **HB 2443** and **HB 2444** concerning the acquisition of conservation storage water supply capacity in federal reservoirs. He informed the Committee that the Kansas Engineering Society and the Kansas Association of American Water Works are making presentations across the state in support of this issue outlining that this water supply in federal reservoirs is a necessary addition to our state assets. (Attachment IV) 4

The floor was opened for questions by the Committee.

Steve Hurst of the Kansas Water Office stated at this time that his office would compile data of funding options and their recommendations on purchases of water storage reservoirs in the State of Kansas.

The meeting adjourned at 4:45 p.m.

The next meeting is scheduled for February 22, 1993.

Date: February 18 93

GUEST REGISTER

HOUSE

-COMMITTEE ON ENERGY AND NATURAL RESOURCES.

[illegible]

CITY OF WAKEFIELD

"On Largest Blue Water Lake in Kansas"

REGULAR MEETINGS
FIRST MONDAY OF EACH MONTH
7:30 P.M.

PUBLIC HUNTING AREA
16,000 ACRES SURROUND WAKEFIELD
DUCKS, GEESE, QUAIL, PHEASANT,
SQUIRREL AND DEER

WAKEFIELD, KANSAS
67487

100-ACRE PARK
CAMPING, PICNICKING,
FISHING, BOATING

February 18, 1993

Proponent testimony HB 2302

Chairman, Carl Holmes
Energy and Natural Resources Committee

Mr. Chairman, Committee Members, Ladies and Gentlemen,

We want to thank you for the opportunity to present our testimony concerning House Bill 2302. I am Phil Barber, Mayor of Wakefield Kansas, also with me today is Bruce Wingard, City Attorney for Wakefield. Mr. Wingard will be giving testimony. Dennis Riffel the City Superintendent is with us today and will not be giving formal testimony but will be available for any technical questions you might have.

I will briefly give some background on our water right problem and a chronological chain of events that leads us up to the current situation.

Wakefield is a community located in North Central Kansas, about 20 miles northwest of Junction City. Our community has been fortunate to be one of the very few small towns in Kansas that has been showing consistent growth. In the last 20 years the population has shown a 31% increase and 14% increase in the last 10 years. Property evaluation has also increased 64% in the last 10 years. Of the last 20 years Wakefield has been a Pacemaker Community 10 of those years. The City just recently qualified for another 5 year Pacemaker award. We like to think of our community as a City with Pride and a City on the move.

The City was relocated with the construction of Milford Lake in the early 1960s. This is when our current problem begins.

ATTACHMENTS:

- Page 1 thru 3 outline of chain of events
- Page 4 map of old and new well locations
- Page 5 Future concerns and summary

MILFORD RESERVOIR
AREA

House E & NR
Attachment I
2/18/93

- 1.) The Vested Right Code 626 Clay County, Kansas
DATE: 9 November, 1948: First claim date
DATE: 28 June 1954: Established, Kansas State Board of Agriculture, Division of Water Resources, File Number CY-006
This Vested Right allows 35 Million gallons of water per year to be diverted at a rate of 0.45 cubic feet per second (202 gal. per min.) from 2 wells located on Lots 9 & 11 Block 1 of Batchelor Addition City of Wakefield (original order states: Lots 2 to 12 Block 12 Batchelor Addition City of Wakefield. The "Block 12" is in error, there was no Block 12.) This to serve 220 meters and a population of 600.
- 2.) DATE: 17 April 1963: Re. Contract between City of Wakefield and United States of America (Corps of Engineers) to sell portion of said City for location of Milford Reservoir This contract included the above described real estate, the water wells, and all equipment and piping. An exception reserved "To the owner, the City of Wakefield, Wakefield Kansas, the right to own, maintain, operate and keep permanently in place, to serve the City of Wakefield two (2) deep water wells and to maintain the necessary connecting pipelines thereto, on Tract No. 1340E"
Tract No. 1340E: All that part of Block 65, in the Town of Wakefield, Clay County, Kansas, lying below elevation 1182 (m.s.l.). (SEE MAP)
DATE: 28 February, 1966; Bill of Sale to City of Wakefield, Warranty Deed to United States of America above property.
- 3.) DATE: 8 February 1966; (present in Division of Water Resources File Number CY-006) Letter from W. H. Sunderland, Senior Engineer to J. E. Schrock, Water Commissioner, Re. Wakefield water wells, change in point of diversion.
DATE: 9 September 1966; Letter from W. H. Sunderland, Senior Engineer to J. E. Schrock, Water Commissioner, W. H. Sunderland met with Wakefield City Clerk and Water Superintendent, confirmed change in location of wells; recommended that requests for water usage were no longer necessary due to well location being isolated from any probable future well development. No mention of recommendation for change of point of diversion.
DATE: 31 July 1970; Memorandum, Re: "Vested Right No. 6, Clay County" (present in Division of Water Resources File Number CY-006) W. H. Sunderland corresponding with U. S. Corps of Engineers regarding ownership of this water right. (Not in file: any record of this correspondence or the conclusions).
- 4.) DATE: 1975; Third municipal water well constructed and put into service to supplement existing wells.
- 5.) DATE: January 1980; Water production records for 1979 show production of 40,999,704 gallons. (exceeds amount allowed by vested right).
DATE: 2 April, 1980: Application to Appropriate Water for Beneficial Use submitted to Division of Water Resources. Request is for 54 million gal. /yr.
DATE: 3 April, 1980: Application to Appropriate Water for Beneficial Use received by Division of Water Resources. (Assigned No. 34,087)
DATE: 21 April, 1980: Letter and receipt for application fee from Division of Water Resources. Letter indicated a few errors and omissions in the application and gave instructions for correction. One paragraph states: "The quantity of water requested will be in addition to the amount already allowed by Vested Right, Code 626 Clay County, Kansas, for the City of Wakefield."
DATE: 21 April, 1980: Cover letter from City of Wakefield indicating corrected Application to Appropriate Water for Beneficial Use returned to Division of Water Resources.

2081

DATE: 22 April, 1980: Second date stamp on copy of Application indicating receipt by Division of Water Resources.

DATE: 21 July, 1980: Letter from Division of Water Resources requesting additional information and corrections to Application. One paragraph of the letter states: "In Paragraph No. 10 you indicate this application does not cover the same points of diversion as Vested Right, Code 626 Clay County, Kansas. Information in this office shows the wells originally covered by your vested right were abandoned and taken over by Milford Reservoir. We are inclosing a form letter for you to sign, date and return to this office if you are in agreement that the use of water under your vested right has been abandoned and terminated."

DATE: 30 July 1980: Form letter dated, signed and mailed by Wakefield City Clerk.

DATE: 31 July 1980: Form letter date stamped received by Division of Water Resources. Same date stamp now appears on Application as well as the 2 dates previously affixed

NOTE: All of this correspondence is between Phyllis Auld, Wakefield City Clerk, and Robert A. Hall, Hydrologist for the Division of Water Resources.

DATE: 24 December, 1980: Letter from Guy E. Gibson, P.E., Chief Engineer-Director, Division of Water Resources acknowledging receipt of the form letter and informing the City of Wakefield that this document waived our right to a hearing and that our vested right was terminated.

DATE: 19 January, 1981: Annual water use report for 1980 sent to Division of Water Resources.

DATE: 20 January, 1981: Annual water use report for 1980 date stamped received by Division of Water Resources. A note appears on that copy indicating "File 6" which is not on Wakefield's copy of the original.

DATE: 26 January 1981: Letter from Division of Water Resources Approving Application to Divert Water for Beneficial Use and requesting Notice and Proof of Completion of Works. Letter signed Paul C. Clark, Hydrologist.

DATE: 3 February, 1981: Notice and Proof of Completion of Works sent to Division of Water Resources.

DATE: 20 February, 1981: Letter from Division of Water Resources acknowledging receipt of Notice and Proof of Completion of Works. Letter signed James O. Bagley, Engineer.

6.) DATE: 21 November 1986: Letter from Division of Water Resources reminding the City of the pending expiration of the time to "perfect" and indicating that an extension could be requested.

DATE: 24 November 1986: Form letter to Division of Water Resources requesting extension of time to perfect.

DATE: 25 November 1986: Form letter to Division of Water Resources date stamped received by that office.

DATE: 5 December, 1986: Letter from Division of Water Resources granting an extension to 31 December 1990.

7.) DATE: 4 October 1989: Telephone call from Dennis Riffel, Wakefield City Superintendent to Leland E. Rolfs, Legal Council, Division of Water Resources. The matter of reinstating the vested right was discussed and a request made for copies of the contents of File No. CY-006.

DATE: 4 October 1989: Letter from Leland E. Rolfs, Division of Water Resources confirming phone conversation of fourth and stating, in part ".....normally our policy is to not reinstate dismissed water rights if the request is made more than 60 days after the date the water right is dismissed." Also enclosed: copy of contents of File

No. CY-006. Another telephone call on this date requested copies of the File No. 34,087 which was received.

DATE; 27 October 1989: Letter from Dennis Riffel, Wakefield City Superintendent to David L. Pope Chief Engineer-Director, Division of Water Resources requesting reinstatement of Vested Water Right Code 626 Clay County, Kansas. Included with this letter was documentation showing that the U. S. Corps of Engineers had allowed the City of Wakefield to retain this water right after relocation for Milford Reservoir and that the Division of Water Resources had continued to allow us to divert water under this right for 15 years up to the time of the appropriation application.

DATE: 5 March 1991: Letter from David L. Pope Chief Engineer-Director, Division of Water Resources denying the request to reinstate because the request was more than 60 days after the dismissal.

- 8.) DATE: 17 April, 1992: Letter from David L. Pope Chief Engineer-Director, Division of Water Resources to State Senator Ross Doyan.(copy to City of Wakefield FYI) Mr. Pope discussed the matter of the reinstatement of the vested right but did not seem to have a full grasp of the situation. He again referenced the 60 day period and indicated an unwillingness to reinstate.
- 9.) DATE: 25 September 1992: Letter from Division of Water Resources announcing pending issuance of a Certificate of Appropriation within 30 days pending our review of the proposal.
- DATE: 13 October, 1992: Letter to Division of Water Resources requesting modifications to the proposed certificate. Due to a recent history of delayed response, a telephone call was made to confirm the delay requested.
- DATE: 18 February 1993: As of this date, no further correspondence has been sent or received.

SUMMARY: Vested Water Right Code 626, Clay County, Kansas was established in 1954 allowing the City of Wakefield 35 million gallons a year. In 1965, the 2 original water wells were acquired by the Corps of Engineers for Milford Reservoir. They were replaced by 2 new wells, drilled into the same strata as the original but from a higher elevation. The City constructed a third well in 1975 to supplement the wells drilled in 1965. Due to an increase in population and water usage, in 1980 application was made to appropriate more water. During the course of this procedure, a form letter was sent to us that would request the dismissal of our vested right. This form was dated and returned to the Division of Water Resources as instructed as the alternatives were not indicated. The application was completed in 1982 and records kept annually to use of the water requested. Due to better information about a vested right, in October, 1989 a request was made to reinstate our right. This request was denied in March of 1991. The appropriation right is currently pending certification with a request for some modification.

Existing storage buildings,
not in this contract

Existing water wells

1963 CORPS OF ENGINEERS
MAP OF WAKEFIELD
(PORTION).

N

1144.4
CONSERVATION
LAKE LEVEL

BACHELOR'S
ADDITION

BLK 2

BLK 4

BLK 3

ASPEN

CURRENT CITY LIMITS

BIRCH

CEDAR

1186

TRUNK

3RD STREET

STREET

NEW WELLS
1965
NEW WELL
1975
BLOCK
65
1186
581

WATER CONCERNS FOR THE FUTURE OF WAKEFIELD

If the sale of water to the City of Wichita and other Cities along the proposed pipe becomes a reality, the effects could be devastating to the City of Wakefield.

Under the current 1980 water right the City of Wakefield's wells would be junior to the water transfer. Under this current scenario the water sold thru the inter-basin transfer pipeline would carry a 1974 water right.


In the event we would see a drought situation as we did in 1991 and 1992, the City could be forced to shut down the wells.

It does not take a lot of imagination to see what would happen to our community.

The City of Wakefield has always tried to work with the State Water Office and the Division of Water Recourses in an open and above board manner. We believe that our current problem carries some special consideration, because of the relocation of the City, due to construction of Milford Lake and the eventual loss of the Cities original vested water right.

We are hopeful that the Committee will see fit to move HB-2302 foward.

Thank you for your time and consideration.



Phil Barber
Mayor, City of Wakefield

February 18, 1993
Energy and Natural Resources Committee
Hearing on HB 2302
Testimony of Bruce H. Wingerd, Wakefield City Attorney

Chairman Holmes and Committee Members:

My name is Bruce H. Wingerd. I am an attorney from Clay Center, and I have the privilege of serving as the City Attorney for the City of Wakefield. I have been requested to explain to the Committee why I believe this proposed legislation is an appropriate remedy for the problem facing the City.

In 1992 and after the City had communicated at some length with the Division of Water Resources, I was requested to review the present water law and also review the position taken by the Division of Water Resources relative to the problem at hand. In substance, the Division has concluded that given the circumstances involved, and the present statutory law, the Agency is powerless to restore the prior vested appropriation rights to the City. My research led me to the conclusion that under the current statutes and caselaw, that the position taken by the Division was correct.

Reaching this conclusion, it was my opinion then, that the only viable solution was the enactment of legislation which would authorize the Division to restore the rights, but that said restoration authorization would be limited by this legislation to only these unique and compelling circumstances.

After our Representative, Steve Lloyd, indicated his willingness to introduce such legislation, I drafted the substance of the pending bill. In this process, it was my intent to address only the Wakefield situation. It is not the intent of

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this bill to make any substantive changes in the procedure by which vested water rights are acquired. Therefore, in the drafting of the bill, the following limited features were included:

1. The prior vested rights sought to be restored must have been held by a municipality.

2. Those municipal vested rights had to have existed prior to 1965.

3. The prior vested right was diverted at points which were taken by the U.S. Government, and then only in connection with the construction of flood control projects.

4. The involuntary taking or condemnation involve that real estate upon which the original points of diversion were located.

5. The loss of the points of diversion resulted in a declared abandonment of the vested right by the Division.

6. The restoration process will exist only after the effective date of the enactment and to January 1, 1994, when the right to apply for restoration will expire.

To me, the most logical place for these amendments to appear is in K.S.A 82a-704a, which is the statute which provides the procedure for the Division to determine vested water rights.

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It is certainly possible that some other municipality may qualify for restoration under the narrowly drafted legislation, but I know of none. Further, the Division has not informed me or any City official that any other municipality would be a potential applicant under this legislation.

In conclusion, I submit that the proposed bill will address the genuine concern of the City, it will restore rights inadvertently lost because of the actions taken by the United States Government, and it will be of no significant burden to the Division in its regulation of appropriation rights.

Your attention is greatly appreciated, and I would be happy to field any questions.

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Presentation to the House Committee on Energy and Natural Resources
Re: House Bill 2302
February 18, 1993
By: Constance S. Crittenden,
Legal Counsel for the 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. David Pope, the Chief Engineer, sends his apologies for not being able to appear before you in person. He asked me to appear here on his behalf and on behalf of the Division as an opponent of this bill.

House Bill 2302 relates to the Kansas Water Appropriation Act, which is the fundamental statute under which all water use in this state is regulated. The Chief Engineer is the official charged by statute with the administration and enforcement of that Act. Because House Bill 2303 speaks to vested rights, a brief discussion of the different kinds of water rights may be helpful.

Basically, there are two kinds of water rights in Kansas. The Water Appropriation Act governs both. One is an appropriation right, which is obtained and regulated through a permitting process, initiated in 1945 with the adoption of the Act. This permit system governs all water rights based on use beginning after 1945.

The other kind of water right is a vested right, which is based on water use which had been on-going prior to the adoption of the Act. In addition to setting up a permit system governing future use, the Act set forth a method to authorize then-current and historical use. [To obtain authorization as a vested

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right, the would-be right holder needed to submit a verified claim to the Chief Engineer, describing their use practices. Then the Chief Engineer would conduct an investigation to ascertain the extent, if any, to which a claimant had developed a water right.] A successful claim resulted in the Chief Engineer issuing a document determining and establishing the extent of the vested right, as developed prior to 1945.

By statute, the last "window of opportunity" to submit verified claims for vested rights closed on July 1, 1980. The Water Appropriation Act, as amended in 1978, specifically prohibits the Chief Engineer from accepting any verified claim for a vested right after July 1, 1980. K.S.A. 82a-704a.

Perhaps the most fundamental premise of the Water Appropriation Act is the doctrine of prior appropriation, or the rule of "first in time is first in right." In times of shortage, the determination of which water right holders are allowed to continue using water is dependent on their place in the priority system. More recent rights must yield to more senior rights.

Turning to the matter at hand, the Division is opposed to House Bill 2302 for the following reasons.

1. The Division is opposed to the reopening of the vested rights statute. These kinds of rights were designed to authorize proven, established use prior to 1945. The legislature decided to close the issue as of 1980. The Chief Engineer's decisions regarding management and administration of the state's water resources have long been predicated on the appropriation system;

reinstating the opportunity to seek vested rights would be seriously detrimental to those efforts.

2. The impetus for this bill is the desire of the City of Wakefield to address its water resource needs. The Chief Engineer has indicated to the City of Wakefield that he is willing to work with the City and make every effort to help them address their concerns administratively, if possible.

3. As proposed in Section 1(g), "[t]he privileges and original priority date of the restored vested right shall apply to the present appropriation rights of the municipality regardless of the present source of the municipality's water supply." This provision contradicts the statutory directives for handling a change in a water right. This bill proposes, in effect, a two-step process in which (1) a previously existing vested right is restored and (2) the restored vested right is applied to currently existing points of diversion authorized under an appropriation right. This second step constitutes automatically granted change in a water right, contrary to the Water Appropriation Act's criteria for obtaining a change. Under the Act, a change in point of diversion, place of use, or type of use may only be granted if the requesting party demonstrates the change is reasonable, will not impair existing rights, and relates to the same local source of supply. K.S.A. 82a-708b.

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



Kansas Engineering Society

A state society of the National Society of Professional Engineers

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TESTIMONY

Thursday, February 18, 1993

House Bills 2444 & 2443

House Committee on Energy and Natural Resources

Chairman Holmes, members of the Committee, I am Bill Henry, Executive Vice-President of the Kansas Engineering Society and I appear before you today to voice the society's support for acquisition of conservation storage water supply capacity in federal reservoirs.

We think the direction of the Legislature in H.B. 2444 is appropriate because the Kansas Water Authority is certainly the agency in Kansas that should study options for financing the acquisition of the state of conservation storage water supply capacity in federal reservoirs.

We also support the concept found in H.B. 2443 where the Kansas Development Finance Authority would be requested to issue bonds pursuant to the Kansas Development Finance Authority act for the purpose of acquiring this conservation water storage. However, the use of bonds to make such a purchase will increase the total cost of the acquisition. We realize the state of Kansas is under definite physical constraints today but the direct purchase of approximately \$21 million worth of water is still a bargain in a \$5 billion state budget.

We believe that the House Appropriations Committee and the Senate Ways and Means Committee could look closely at income which to the state would be useful for such a one time purchase as was is detailed to you by the Kansas Water Office.

There will also be, as you learned in the Water Office presentation on this issue, future costs associated with the up-keep and maintenance of the particular reservoirs.

The Kansas Engineering Society and the Kansas Association of American Water Works have met together and we are making presentations across the state on this issue. We concur that this water supply in federal reservoirs is a necessary addition to our state assets.

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In addition, the \$21 million price tag can be reduced in the future as municipalities, rural water districts and water assurance districts make purchases from this supply.

Since we have such a limited time frame under the memorandum of understanding entered into by Kansas and the US Army Corp of Engineers in 1985, we should proceed directly to acquire this water for future use.

Kansas has been fortunate in recent years in that we have not had to face an extended drought such as what we endured in the 1950's. We are overdue to experience such an extended drought period and when we meet such drought conditions we will need to have every resource available to us for Kansas farmers, Kansas cities and Kansas industrial development.

We do realize that bond rates are somewhat favorable today but we are concerned that the interest rates that will have to be paid on the bonds will escalate the cost to the state of Kansas.

The Kansas Engineering Society believes the citizens of Kansas will someday recognize in the future the wisdom of what this Committee is proceeding to do now and the same Kansas citizens will be very grateful for this legislative foresight.

Respectfully Submitted,

Bill Henry
Executive Vice-President
Kansas Engineering Society