

## MINUTES OF THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES.

The meeting was called to order by Chairperson Don Sallee at 8:00 a.m. on March 22, 1993 in Room 423-S of the Capitol.

All members were present or excused:

Committee staff present: Raney Gilliland, Legislative Research Department  
Dennis Hodgins, Legislative Research Department  
Don Hayward, Revisor of Statutes  
Clarene Wilms, Committee Secretary

Conferees appearing before the committee:

Dr. John C. Peck, Professor, University of Kansas School of Law  
Written testimony, Howard W. Tice, Executive Director, Kansas Association of  
Wheat Growers

Others attending: See attached list

**HB 2070 - Kansas Water Transfer Act**

Dr. John C. Peck, Professor, University of Kansas School of Law, appeared before the committee to provide background and suggested amendments concerning HB-2070, the Water Transfer Act. Dr. Peck told the committee he originally conducted a research project on the legal aspects of a hypothetical diversion of water from eastern Kansas to western Kansas without consideration of the economic questions. A further study dealing with the procedural aspects was conducted in 1990. Dr. Peck, in his written testimony, pointed out possible effects of some proposed amendments found in HB-2070, some related to his study and others which are substantive changes. Attachment 1

Senator Vancrum presented amendments to HB-2070 which had been compiled from a number of sources. Attachment 2 Four different amendments were suggested in this attachment.

Senator Vancrum made a motion to move amendments in Attachment 2. Senator Lawrence seconded the motion.

Discussion noted that by changing to a 50 mile radius the beneficial use area, it would extend the distance greatly by changing the beneficial use. A member noted you could transfer any amount of water 49 miles and due to the size of some districts this was a tremendous change from the House amendments. Concern was expressed that in some areas the original version of the bill would trigger water transfers within a water district. It was also noted that no one knows what the "point of use standard" is intended to mean. The use of the geographic center as the point for determining what the distance of transfer is was not a workable situation.

Senator Lee passed out a bill balloon and referred to page 4 of Attachment 3.

A member questioned the size of the district served in the Hays area. It was noted Hays was not a part of a water district but a new water district was being created north and west of town. Concern was expressed about the issue of triggering a water transfer within a water district. Another member noted there is a great deal of contention between the Post Rock Water District and the cities within that district which do not use the district water. It was noted that all entities within the district might not be as pleased with such regulations as the water districts themselves when considering water districts and areas of beneficial use.

The committee was apprised of the fact that the language used in Attachment 3 originated with David Pope, Chief Engineer, Division of Water, State Board of Agriculture and would demonstrate conservation, not only now but in the future without listing specific items. The intent, in order to be able to apply for a water transfer would have to have in place a system (which they could determine of water usage that would encourage efficient use of water) and that would be designed, implemented and maintained.

The intent is to require implementation and maintenance of a wise and responsible conservation plan.

## CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES, Room 423-S Statehouse, at 8:00 a.m. on March 22, 1993.

Concern was expressed about the balloon being fair, noting that when you were a landowner you had to abide by federal conservation acts and you had to have a conservation plan in place implemented and maintained by 1994. These are very expensive, there are teeth in that act, a small amount subsidized by the federal government but landowners responsible for paying for it and this is for the good of the state. It was noted that they could see no reason for city dwellers being treated any differently.

With the consent of Senator Lawrence, Senator Vancrum substituted Senator Lee's language on conservation rates in Attachment 3 for language on page 4 of Attachment 2 on this proposed amendment, also reduce the 50 miles to 40 miles. Senator Lawrence seconded the motion.

A member noted he still had a problem changing the beneficial use and extending the distance.

Written testimony was submitted by Howard W. Tice, Executive Director, Kansas Association of Wheat Growers noting concerns and setting forth two Resolutions stated in Attachment 4.

Further discussion will continue March 23, 1993.

The meeting adjourned at 9 a.m.

The next meeting is scheduled for March 23, 1993

## GUEST LIST

## SENATE COMMITTEE ON ENERGY &amp; NATURAL RESOURCES

DATE March 22, 1993

(PLEASE PRINT)

NAME AND ADDRESS

ORGANIZATION

David R Warren II

Interested Citizen

David R Warren 455 N Main Wichita

City of Wichita

Gerald Hiltzman

Wichita Chamber

R F Polton

City of Topeka

Steve Hurst

KWC

Tom Stiles

Ks Water Office

Lee Rolfe

DWR - KSBA

Bernie Koch

Wichita Chamber

Alexandros Soucek, 1324 Strong Ave, Lawrence

KU School of Law

Byron Johnson

Water Dist No 1 of Johnson Co

Karen Zambri

KU School of Law

Michelle Lester

Ks Gov Consulting

Bill Anderson

Water Dist #1 of Johnson Co.

Mike Beam

Ks. Forest. Serv.

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

Senate Committee on Energy and Natural Resources

March 22, 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, Senator Lee, for inviting me to speak today. When we discussed this possibility last Thursday over the phone, you suggested that I might come to this committee, much as I had done on February 3 for the House Committee, 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 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 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.

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, statutory or judge-made exceptions to these basin protection statutes have emerged to permit large water transfers to help feed the thirst of Los Angeles and Denver.

Let me describe the Kansas law on water transfers at the time of my 1980 article. The 1945 Water Appropriation Act was the guiding law. We 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. Indeed they existed. For example, the State Fish and Game Commission, now Parks and Recreation, held large water rights permitting the diversion of water from Wet Walnut Creek and the Arkansas River to the Cheyenne Bottoms. The cities of Hays, Russell, and Wichita also had water rights involving interbasin transfers.

I found other legal 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

ivers. 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 and they existed in Kansas 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. The intent of the legislature seems to have been to create a multi-level review process rather than to rest the ultimate administrative decision of whether to allow interbasin transfers in the hands of one water administrator, regardless of his expertise and objectivity. 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.

The Act made the process administratively more cumbersome. In my opinion, it also made it more difficult substantively to obtain permission from the state to divert water. The interbasin diversions existing at the time--for the Cheyenne Bottoms and for the cities of Hays, Russell, and Wichita--had been approved under the earlier procedure and therefore did not have to meet the strict rules under the Act. Some of them would have met the definition of a water transfer under the Act, and I cannot guess whether they would have been approved under the new rules and procedures of the Act had they had to meet them.

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. Our study was long and detailed. The Water Office and Water Authority have used it to some extent in drafting proposals for amendments last year and this year.

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. of original H.B. 2070 would have changed the definition of "water transfer" from 1000 to 2000 acre feet and from 10 to 50 miles. This original version of the 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, shorter, less controversial diversions. Amended H.B. 2070 goes back to the 10 mile definition, but increases the quantity to 4000 acre feet that will trigger the Act. Compared to original H.B. 2070, the amendment increases the number of potential transfers that would trigger the Act and would make it more difficult and more cumbersome to move water short distances.

2. Section 2. The current Act permits the chief engineer to invoke the Act even when a proposed diversion does not meet the definition of the Act if he determines that it is in the best interests of the state to do so. He may do so in two instances: when the applicant wants a new appropriation permit or wants a contract to purchase water from storage. What is missing in both the current Act and in H.B. 2070 is the power to invoke the Act when the chief engineer receives an application for a change in a water right.

3. Section 3. The current 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. It is my opinion, an opinion not shared by all, that the amended version will provide less protection for the basins of origin. This result is one that was not so intended by the drafters of H.B. 2070. The current Act's clause is admittedly just a crumb for the basins of origin; H.B. 2070 makes the crumb even less significant.

4. 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.

5. 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 be to make water transfers more easily obtainable, procedurally, at least. 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, industry, or even a wildlife agency 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.

Proposed Amendment to HB 2070  
(As Amended by House Committee of the Whole)

On page 1, in line 22, by striking all after "water" and inserting "in a quantity of 2,000 acre feet or more per year for beneficial use outside a 50-mile radius from the point of diversion of such water. If the area of beneficial use to be served by the proposed transfer lies partially within and partially beyond the 50-mile radius from the point of diversion, only that quantity of water which will be transported beyond the 50-mile radius to be used as an original water supply for that area or as amounts to supplement existing water supply for that area, shall be included to determine whether the proposed transfer and use of water constitutes a water transfer."; by striking all in lines 23 to 34, inclusive;

On page 2, by striking all in lines 7 to 9, inclusive, and inserting a new subsection to read as follows:

"(c) "Area of beneficial use" means the entire service area of a public water supply system, including the service area of direct wholesale water customers, the total irrigation area for an agricultural user outside of a public water supply system service area, or the meter location of any other individual water user which is outside a public water supply system service area.";

On page 4, in line 4, by striking all after "include"; by striking all in lines 5 and 6; in line 7, by striking all before "implemented" and inserting "a rate structure that encourages the efficient use of water which is";

On page 10, in line 10, by striking all after "of"; by striking all in line 11; in line 12, by striking all before "the"

Senate Energy & Natural Resources  
March 22, 1993  
Attachment 2, 1993

[As Amended by House Committee of the Whole]

As Amended by House Committee

Session of 1983

## HOUSE BILL No. 2070

By Committee on Energy and Natural Resources

1-20

11 AN ACT concerning water; relating to certain transfers; amending  
12 K.S.A. 82a-1501 through 82a-1505 and repealing the existing  
13 sections.  
14

15 *Be it enacted by the Legislature of the State of Kansas:*

16 Section 1. K.S.A. 82a-1501 is hereby amended to read as follows:  
17 82a-1501. As used in this the water transfer act:

18 (a) (1) "Water transfer" means the diversion and, transportation  
19 ~~or use~~ of water in a quantity of 1,000 2,000 acre feet or more  
20 per year for beneficial use outside a ten-mile 50-mile radius  
21 from the point of diversion of such water, and transportation of  
22 water: (A) In a quantity of 4,000 acre feet or more per year for  
23 beneficial use at a point of use more than 10 miles and less than  
24 50 miles from the point of diversion of the water; or (B) in a quantity  
25 of 2,000 acre feet or more per year for beneficial use at a point  
26 of use 50 miles or more from the point of diversion of the water.  
27 In determining the amount of water transferred in the case of a  
28 water transfer supplying water to multiple public water supply  
29 systems or other water users, the amount of water transferred shall  
30 be considered to be the aggregate amount of water which will be  
31 supplied by the transfer to all public water supply systems and  
32 other water users whose points of use are located within the dis-  
33 tances prescribed by (A) or at or outside the distance prescribed  
34 by (B), respectively.

35 (2) *Water transfer does not include a release of water from a*  
36 *reservoir to the water's natural watercourse for use within the nat-*  
37 *ural watercourse or watershed, made under the authority of the*  
38 *state water plan storage act (K.S.A. 82a-1301 et seq. and amendments*  
39 *thereto) or the water assurance program act (K.S.A. 82a-1330 et*  
*seq. and amendments thereto).*

40 (b) "Point of diversion" means:

41 (1) The point where the longitudinal axis of the dam crosses the  
42 center line of the stream in the case of a reservoir;  
43

- public record open  
for examination

define public water supply

Senate Energy & Natural Resources  
March 22, 1983  
Attachment 3



(2) the location of the headgate or intake in the case of a direct diversion from a river, stream or other watercourse;

(3) the location of a well in the case of groundwater diversion; or

(4) the geographical center of the points of diversion in the case of multiple diversion points.

(c) "Point of use" means the geographical center of each water user's proposed or authorized place of use where any water authorized by the proposed transfer will be used.

(d) "Chief engineer" means the chief engineer of the division of water resources of the state board of agriculture.

(e) "Secretary" means the secretary of the department of health and environment, or the director of the division of environment of the department of health and environment if designated by the secretary.

(f) "Director" means the director of the Kansas water office.

(g) "Authority" means the Kansas water authority.

(h) "Panel" means the water transfer hearing panel.

(i) "Party" means any person who intervened at the public hearing held pursuant to K.S.A. 82a-1503, and who presented testimony of witnesses under oath, conducted cross examination, presented oral arguments and filed written briefs: (1) The applicant; or (2) any person who successfully intervenes pursuant to K.S.A. 82a-1503 and amendments thereto and actively participates in the hearing. "Party" does not mean a person who made makes a limited appearance for the purpose of presenting a statement for or against the water transfer.

(j) "District court" means the district court of Shawnee county.

(k) (i) "Commenting agencies" means ~~the~~ groundwater management districts and state natural resource and environmental agencies, including but not limited to the Kansas department of health and environment, the Kansas water office, the Kansas water authority, the Kansas department of wildlife and parks and the division of water resources of the Kansas state board of agriculture.

New Sec. 2. (a) The water transfer hearing panel shall consist of the chief engineer, the director and the secretary. The chief engineer shall serve as chairperson of the panel. All actions of the panel shall be taken by a majority of the members. The panel shall have all powers necessary to implement the provisions of this act.

(b) The panel shall select a hearing officer to conduct a hearing in accordance with this act when: (1) An application for a water transfer is complete; or (2) the chief engineer determines it to be

1 in the best interest of the state to conduct a water transfer hearing  
2 on an application to appropriate water pursuant to the Kansas water  
3 appropriation act or on a proposed contract for the sale of water  
4 from the state's conservation storage water supply capacity, even  
5 though the appropriation or sale would not be a water transfer as  
6 defined by K.S.A. 82a-1501 and amendments thereto.

7 (c) The hearing officer shall be an independent person knowl-  
8 edgeable in water law, water issues and hearing procedures. The  
9 hearing officer shall serve as the presiding officer and, in addition  
10 to any other powers granted by this act, shall have the powers  
11 of a presiding officer as set forth in be a presiding officer for  
12 the purposes of the Kansas administrative procedure act. Subject to  
13 approval by the panel, the hearing officer, on behalf of the state,  
14 may employ such personnel and contract for such services and  
15 facilities as necessary to carry out the hearing officer's duties under  
16 this act.

17 Sec. 3. K.S.A. 82a-1502 is hereby amended to read as follows:

18 82a-1502. (a) No person shall make a water transfer in this state  
19 unless and until the transfer is approved pursuant to the provisions  
20 of this act. No water transfer shall be approved which would reduce  
21 the amount of water required to meet the present or any rea-  
22 sonably foreseeable future beneficial use of water by present  
23 or future users in the area from which the water is to be taken  
24 for transfer, unless: (1) The panel determines that the benefits to  
25 the state for approving the transfer outweigh the benefits to the  
26 state for not approving the transfer; (2) the chief engineer recom-  
27 mends to the authority and the authority panel and the panel  
28 concurs that an emergency exists which affects the public health,  
29 safety or welfare; or (3) the governor has declared that an emergency  
30 exists which affects the public health, safety or welfare. Whenever  
31 an emergency exists, a water transfer may be approved by the panel  
32 on a temporary basis for a period of time not to exceed one year  
33 under rules and regulations adopted by the chief engineer. The  
34 emergency approval shall be subject to the terms, conditions and  
35 limitations specified by the chief engineer panel.

36 (b) No water transfer shall be approved under the provisions of  
37 this act: (1) If such transfer would impair water reservation rights,  
38 vested rights, appropriation rights or prior applications for permit  
39 permits to appropriate water; and (2) unless the hearing officer de-  
40 termines that the applicant has adopted and implemented conser-  
41 vation plans and practices that (A) are consistent with the guidelines  
42 for conservation plans and practices developed and maintained  
43 by the Kansas water office pursuant to K.S.A. 74-2608 and amend-

which 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 area from  
which the water is to be taken for transfer,

ments thereto, (B) have been in effect for not less than 12 consecutive months immediately prior to the filing of the application on which the hearing is being held and (C) ~~if the transfer is for use by a public water supply system, include an increasing block rate structure that has been in effect for not less than 12 consecutive months immediately~~ designed to encourage the conservation of water, implemented prior to the filing of the application on which the hearing is being held.

(c) To determine whether the benefits to the state for approving the transfer outweigh the benefits to the state for not approving the transfer, the hearing officer shall consider all matters pertaining thereto, including specifically:

(1) 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;

(2) any current beneficial use being made of the water proposed to be diverted, including minimum desirable streamflow requirements;

(3) any reasonably foreseeable future beneficial use of the water;

(4) the economic, environmental, public health and welfare and other impacts of approving or denying the transfer of the water;

(5) alternative sources of water available to the applicant and present or future users for any beneficial use;

(6) whether the applicant has taken all appropriate measures to preserve the quality and remediate any contamination of water currently available for use by the applicant;

(7) the proposed plan of design, construction and operation of any works or facilities used in conjunction with carrying the water from the point of diversion, which plan shall be in sufficient detail to enable all parties to understand the impacts of the proposed water transfer; and

(7) (8) ~~the~~ conservation plans and practices adopted and implemented by any persons protesting or potentially affected by the proposed transfer, which plans and practices shall be consistent with the guidelines for conservation plans and practices developed and maintained by the Kansas water office pursuant to K.S.A. 74-2608 and amendments thereto; and

~~(9)~~ any applicable management program, standards, policies and rules and regulations of a groundwater management district].

Sec. 4. K.S.A. 82a-1503 is hereby amended to read as follows: 82a-1503. (a) Any person desiring to make a water transfer shall file;

if the transfer is for use by a public water supply system, the applicant must have implemented a rate structure which encourages the efficient use of water that is determined by the hearing officer to be effective and, if designed, implemented and maintained properly, will result in wise use and responsible conservation and management of the water to be transferred.

the effectiveness of conservation plans and practices adopted and implemented by the applicant and any other entities to be supplied with water by the applicant.

1 with the chief engineer, an application in the form required by rules  
2 and regulations adopted by the chief engineer. If the *chief engineer*  
3 *finds* the application is found to be insufficient to enable the panel  
4 *chief engineer* to determine the source, nature and amount of the  
5 proposed transfer, *it or if the application is not complete, the ap-*  
6 *plication* shall be returned for correction or completion or for any  
7 other necessary information. This act shall not be construed as  
8 to exempt the applicant from complying with the provisions of  
9 the Kansas water appropriation act or the state water plan stor-  
10 age act, whichever is applicable.

11 (b) No water transfer shall be approved unless the applicant  
12 has adopted and implemented conservation plans and practices.  
13 Such plans and practices shall be consistent with the guidelines  
14 for conservation plans and practices developed and maintained  
15 by the Kansas water office pursuant to subsection (c) of K.S.A.  
16 74-2608, and amendments thereto. Prior to approval of an ap-  
17 plication for a water transfer, the panel shall determine whether  
18 such plans and practices are consistent with the guidelines  
19 adopted by the Kansas water office.

20 (c) Within 60 days of receipt of a sufficient application for  
21 a water transfer pursuant to this act, the chief engineer shall  
22 convene and conduct a hearing thereon. At such hearing, the  
23 panel shall consider the application and determine whether to  
24 approve the proposed water transfer in accordance with the  
25 provisions of the Kansas administrative procedure act.

26 If it is determined to be in the best interest of the state, the  
27 chief engineer may convene and conduct such a hearing within  
28 60 days of receipt of (1) an application to appropriate water  
29 pursuant to the Kansas water appropriation act or (2) a proposed  
30 contract for the sale of water from the state's conservation stor-  
31 age water supply capacity even though such diversion and  
32 transportation of water is not a water transfer as defined by  
33 K.S.A. 82a-1501, and amendments thereto.

34 (d) The panel shall consist of the chief engineer, the di-  
35 rector and the secretary or the director of the division of en-  
36 vironment of the department of health and environment if  
37 designated by the secretary. The chief engineer shall serve as  
38 the chairperson of the panel. All actions of the panel shall be  
39 taken by a majority of the members thereof. The panel shall  
40 have all powers necessary to conduct the hearings, make its  
41 findings and implement the provisions of this act. The hearing  
42 shall be conducted in a prudent and timely manner.

43 (e) To determine whether the benefits to the state for ap-

1 proving the transfer outweigh the benefits to the state for not  
2 approving the transfer, the panel shall consider all matters per-  
3 taining thereto, including specifically:

4 (1) Any current beneficial use being made of the water pro-  
5 posed to be diverted, including minimum desirable streamflow  
6 requirements;

7 (2) any reasonably foreseeable future beneficial use of the  
8 water;

9 (3) the economic, environmental, public health and welfare  
10 and other impacts of approving or denying the transfer of the  
11 water;

12 (4) alternative sources of water available to the applicant  
13 and present or future users for any beneficial use;

14 (5) the proposed plan of design, construction and operation  
15 of any works or facilities used in conjunction with carrying the  
16 water from the point of diversion. The plan shall be in sufficient  
17 detail to enable all parties to understand the impacts of the  
18 proposed water transfer; and

19 (6) conservation plans and practices or the need for such  
20 plans and practices of persons protesting or potentially affected  
21 by the proposed transfer. Such plans and practices shall be  
22 consistent with the guidelines for conservation plans and prac-  
23 tices developed and maintained by the Kansas water office  
24 pursuant to subsection (c) of K.S.A. 74-2608, and amendments  
25 thereto.

26 (b) The hearing officer shall commence the hearing process by  
27 giving notice of the prehearing conference to the applicant and  
28 the appropriate commenting agencies by mail. Notice of the  
29 prehearing conference shall also be published in the Kansas  
30 register and in at least one paper of not more than 14 days after  
31 the panel employs the hearing officer. Such notice shall be given  
32 by mail to the applicant, any other parties who have intervened  
33 and the appropriate commenting agencies and shall be published  
34 in the Kansas register and in at least two newspapers having general  
35 circulation in the area where the proposed point of diversion is  
36 located. The hearing officer shall hold a prehearing conference not  
37 later than 120 days after receipt of the complete application  
38 and shall commence a formal public hearing not later than 90  
41 days after completing the prehearing conference, except that  
42 the time limits may be extended by the hearing officer with  
43 the consent of all parties. A which shall commence not less than  
90 and not more than 120 days after the required notice has been  
given and shall conclude not later than 45 days after commence-

ment. Not less than 90 and not more than 120 days after the conclusion of the prehearing conference, the hearing officer shall commence a formal public hearing. The formal public hearing shall be held in the basin of origin and, if deemed necessary by the hearing officer, a public comment hearing shall be held in the basin of use. The formal public hearing shall conclude not later than 120 days after commencement and the initial order of the hearing officer approving or disapproving the water transfer shall be issued not later than 90 days after receipt of briefs and oral argument unless the 90-day limit is waived or extended conclusion of the formal public hearing. The hearing officer may extend a time limit provided by this subsection, but only with the written consent of all parties or for good cause shown.

(e) Any person may seek to become a party prior to the hearing at any time after a complete water transfer application is filed and before the deadline set by the hearing officer. Any person seeking to become a party shall petition the hearing officer for intervention. The hearing officer shall allow any person to become a party if the person demonstrates that that person's legal rights, duties, privileges, immunities or other legal interests may be substantially affected by the proceeding.

(c) Intervention in the hearing shall be in accordance with the Kansas administrative procedure act, except that any petition for intervention must be submitted and copies mailed to all parties not later than 60 days before the formal hearing.

(f) (d) Any person shall be permitted to appear and testify at any such hearing under this act upon the terms and conditions determined by the chief engineer hearing officer.

(g) In addition to notice to the parties, notice of any such hearing shall be published in the Kansas register. Such notice shall be published at least 15 days prior to the date of the hearing.

(h) The record of the hearing and findings of fact shall be public records and open for inspection at the office of the chief engineer. Certified transcripts of the hearing shall be provided at the expense of those requesting same. A transcript shall be provided to the chairperson of the authority.

(e) The At intervals during or at the conclusion of the hearing, the hearing officer shall fairly and equitably assess the following costs of the hearing among the applicant and other parties: The hearing facility, the court reporter, the salary of a hearing officer who is not paid for services as a hearing officer by state funds, the travel expenses of the hearing officer and other reasonable costs.

associated with the hearing. The hearing officer may assess any or all anticipated costs to the applicant before the hearing and may order reimbursement of the applicant by other parties for the parties' fair and equitable portion of the costs assessed the applicant. Amounts assessed pursuant to this subsection shall be paid to the chief engineer. Upon receipt thereof, the chief engineer shall remit the entire amount to the state treasurer. The state treasurer shall deposit the entire amount in the state treasury and credit it to the water transfer hearing fund established by subsection (f).

(f) (1) There is hereby established in the state treasury the water transfer hearing fund.

(2) Moneys credited to the water transfer hearing fund shall be used only to pay costs of hearings conducted pursuant to the water transfer act or refunds of unused moneys assessed as anticipated costs before the hearing. Expenditures from such fund shall be made in accordance with appropriation acts upon warrants of the director of accounts and reports, or a person designated by the director of accounts and reports pursuant to K.S.A. 75-3732 and amendments thereto, issued pursuant to vouchers approved by the chief engineer, or a person designated by the chief engineer.

(3) On the 10th of each month, the director of accounts and reports shall transfer from the state general fund to the water transfer hearing fund, the amount of money certified by the pooled money investment board in accordance with this subsection. Prior to the 10th of each month, the pooled money investment board shall certify to the director of accounts and reports the amount of money equal to the proportionate amount of all the interest credited to the state general fund for the preceding period of time specified under this subsection, pursuant to K.S.A. 75-4210a, and amendments thereto, that is attributable to money in the water transfer hearing fund. Such amount of money shall be determined by the pooled money investment board based on:

(1) The average daily balance of moneys in the water transfer hearing fund during the period of time specified under this subsection as certified to the board by the director of accounts and reports; and

(2) the average interest rate on repurchase agreements of less than 30 days duration entered into by the pooled money investment board for that period of time. On or before the fifth day of the month for the preceding month, the director of accounts and reports shall certify to the pooled money investment board the average daily balance of moneys in the water transfer hearing fund for the period of time specified under this subsection

1 Sec. 5. K.S.A. 82a-1504 is hereby amended to read as follows:  
2 82a-1504. (a) The *panel hearing officer* shall render an order either  
3 approving or disapproving the proposed water transfer. The *panel's*  
4 *hearing officer's* order shall include findings of fact relating to each  
5 of the factors set forth in subsection (d) of K.S.A. 82a-1503 (c) of  
6 K.S.A. 82a-1502 and amendments thereto. The *panel hearing officer*  
7 may order approval of a transfer of a smaller amount of water than  
8 requested upon such terms, conditions and limitations as *it the hear-*  
9 *ing officer* deems necessary for the protection of the public interest  
10 of the state as a whole.

11 (b) An order of the panel disapproving the transfer *hearing*  
12 *officer disapproving or approving a water transfer, in whole or in*  
13 *part, shall be deemed a final order. An order of the panel ap-*  
14 *proving a transfer shall be deemed an initial order. The authority*  
15 *panel shall be deemed the agency head for the purpose of reviewing*  
16 *an initial order of the panel hearing officer and shall review*  
17 *all such initial orders the Kansas administrative procedure act*  
18 *and shall review all initial orders of the hearing officer in accor-*  
19 *dance with the Kansas administrative procedure act. Review by the*  
20 *panel shall be in accordance with the standards provided by this*  
21 *act for the hearing officer's initial order and shall be based on the*  
22 *record of the hearing. The final order of the panel shall be entered*  
23 *not later than 90 days after entry of the hearing officer's initial*  
24 *order, except that the panel may extend the 90-day limit, but only*  
25 *with the written consent of all parties or for good cause shown.*

26 (c) If the authority approves the water transfer and if there  
27 is no judicial review pending therefrom, the chief engineer  
28 shall submit the same to the legislature for review as provided  
29 for in K.S.A. 82a-1301 *et seq.*, and amendments thereto. Absent  
30 legislative disapproval, the chief engineer shall issue the order  
31 approving the transfer.

32 (c) *Any hearings or other proceedings held pursuant to this*  
33 *act shall be held* proceedings pursuant to this act and notice of  
34 such proceedings shall be *in accordance with the provisions of the*  
35 *Kansas administrative procedure act except as herein provided spe-*  
36 *cifically provided by this act.*

37 (d) The record of any hearing or other proceeding held pursuant  
38 to this act shall be maintained in the office of the chief engineer.

39 Sec. 6. K.S.A. 82a-1505 is hereby amended to read as follows:  
40 82a-1505. (a) Any action of the panel or authority is subject to review  
41 in accordance with the act for judicial review and civil enforcement  
42 of agency actions.

43 (b) The attorney general of the state of Kansas shall rep-

3-9  
available for public examination



1 resent the panel or the authority in any appellate procedure.  
2 (e) (b) The review proceedings shall have precedence in the  
3 district court. Appellate proceedings shall have precedence in the  
4 court of appeals and in the state supreme court *under such terms*  
5 *and conditions as the supreme court may fix by rule.*

6 New Sec. 7. (a) K.S.A. 82a-1501 through 82a-1506, section 2 and  
7 this section shall be known and may be cited as the water transfer  
8 act.

9 (b) ~~This act shall not be construed as to exempt the applicant~~  
10 ~~from first complying with the provisions of:~~ (1) ~~Any applicable man-~~  
11 ~~agement program adopted by a groundwater management district~~  
12 ~~pursuant to K.S.A. 82a-1020 and amendments thereto; or (2) the~~  
13 ~~Kansas water appropriation act or the state water plan storage act,~~  
14 ~~whichever is applicable.~~

15 New Sec. 8. If any provision of this act or the application  
16 thereof to any person or circumstances is held invalid, the invalidity  
17 does not affect other provisions or applications of this act which  
18 can be given effect without the invalid provision or application. To  
19 this end the provisions of this act are severable.

20 Sec. 8 9. K.S.A. 82a-1501 through 82a-1505 are hereby repealed.

21 Sec. 9 10. This act shall take effect and be in force from and  
22 after its publication in the statute book.

3-10  
The act shall not be construed to exempt the applicant  
from first complying with either: (1) the Kansas Water  
Appropriation Act, including any applicable rules and  
regulations of a groundwater management district, or  
(2) the State Water Plan Storage Act, whichever is  
applicable.



# Kansas Association of Wheat Growers

ONE STRONG VOICE FOR WHEAT

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## TESTIMONY

SENATE COMMITTEE ON ENERGY & NATURAL RESOURCES  
Senator Don Sallee, Chairman

House Bill 2070

Presented by Howard W. Tice, Executive Director

We regret that an aggressive membership and information meeting schedule has severely limited our physical presence in Topeka this year, but we appreciate the indulgence of the committee in allowing us to present the following written testimony on HB-2070.

Many of our members are very much concerned about the issue of transferring water from one basin to another. They also recognize that it is not a simple issue. The need for water is paramount to farming, industry, municipalities and our homes. We all must share the finite resources with which our state has been blessed. However, we must exercise good judgement, common sense and fairness as we establish new policies to meet changing circumstances.

In years of drought, it seems that everyone either turns to conservation measures, or to find ways to bring water in from other locations. When water is plentiful, no one wants to think about future needs. Consequently, we applaud the Kansas Legislature for this attempt to address this touchy issue at a time when our reservoirs are refilling from generous rains and melting snow.

While there are many facets to the water transfer issue, we feel that none is more important than the needs of the basin of origin. The Kansas Association of Wheat Growers has two resolutions that apply to issues addressed by this bill. They are as follows:

RESOLUTION: The KAWG opposes the transfer or allocation of water from reservoirs until a realistic evaluation of the water available is conducted. Transfer or allocation could be made outside of the basin only after the needs of the basin have been met. Such needs should include, but not be limited to, domestic use, irrigation, stream flow and recreation. The KAWG believes that basins should not be consolidated.

RESOLUTION: The KAWG feels that restrictions on water use and conservation requirements should be applied equally to all users.

We understand that some urban areas would like to transfer water from other parts of the state in order to support growth in their industrial base. Others may wish to replace water from wells that have become contaminated. In the future, a community may find its local wells depleted and wish to replace that water from another source.

Whatever the cause for seeking water from another basin, we cannot state it strongly enough, that the needs of the basin of origin must be considered first and foremost. Once it has been determined that the needs of the originating basin will be met, any surplus water could be made available to others within a reasonable distance.

We strongly agree with the stipulation that any locality seeking a transfer of water, should be required to implement responsible conservation measures to obtain the greatest possible use of normal water supplies. If they have contaminated their local wells, it is their responsibility to clean up the problem before they look to other basins for additional water.

As distasteful as it may seem to some of the larger communities seeking continued growth, perhaps they should limit that increase to available resources. If nothing else, we should be able to learn, from the federal deficit, that we all have to live within our means.

Therefore, if additional water is available from a nearby basin, to solve the needs of a community, then fair, common sense arrangements should be made to transfer that water. If that cannot be done, other solutions must be found. If that means one community's growth must be stifled in order to live within the limits of available natural resources, that bitter pill must be swallowed.

Under no circumstances should one area of the state be deprived of its own water, or other natural resources, in order to meet the growth desires of another area, or to replace resources another area has squandered.

HB 2070 is a step in the right direction. However, as we understand it, the bill currently decreases the importance of the needs of the originating basin. With that in mind, we would respectfully request that the committee ask the revisor's office to prepare an amendment which would clearly state that the needs of the basin of origin must be met before any transfer is considered.

With the addition of the above mentioned amendment, we would give our support to HB 2070.