

# **Report of the Special Committee on Natural Resources to the 2018 Kansas Legislature**

**CHAIRPERSON:** Representative Tom Sloan

**VICE-CHAIRPERSON:** Senator Dan Kerschen

**OTHER MEMBERS:** Senators Rick Billinger (replacing Bud Estes) and Marci Francisco; and Representatives Doug Blex, Ken Rahjes, and Ponka-We Victors

## **STUDY TOPIC**

### ***Study and Make Recommendations Regarding the Funding of the State Water Plan Fund***

The Committee is directed to:

- Review current and historical State Water Plan funding, projects, and recommendations of the Governor's Blue-Ribbon Water Funding Task Force;
- Discuss possible funding options based on statewide needs, priorities, and realistic funding options with agency officials, stakeholders, and interested members of the public; and
- Propose introduction of legislation for the 2018 Session.

# Special Committee on Natural Resources

## REPORT

### Conclusions and Recommendations

The Committee recommends the Legislature fully fund the \$8.0 million statutory transfer to the State Water Plan Fund, including \$6.0 million from the State General Fund and \$2.0 million from the Economic Development Initiatives Fund.

**Proposed Legislation:** The Committee recommends the introduction of legislation calling for a legal study of the water laws of the state.

### BACKGROUND

The Legislative Coordinating Council (LCC) appointed a Special Committee on Natural Resources, comprised of seven members. The Committee was tasked by the LCC to study and make recommendations regarding the funding of the State Water Plan Fund. The Committee was directed to:

- Review current and historical State Water Plan funding, projects, and recommendations of the Governor's Blue-Ribbon Water Funding Task Force;
- Discuss possible funding options based on statewide needs, priorities, and realistic funding options with agency officials, stakeholders, and interested members of the public; and
- Propose introduction of legislation for the 2018 Session.

The Committee was granted two meeting days by the LCC.

### COMMITTEE ACTIVITIES

The Committee held all-day meetings on October 31 and November 13, 2017, at the Statehouse.

October 31, 2017

#### *Kansas Water Law and Water Rights*

The Committee received an overview of the legal history of water rights in Kansas by an Associate Professor of Law at Washburn University. The Professor explained that, prior to 1945, groundwater in Kansas was relatively unimportant and water law was based on English and American common law and the Prior Appropriation doctrine. In the 1940s, however, the U.S. Supreme Court and Kansas Supreme Court heard several cases that made clear Kansas water law was not sufficient to regulate groundwater pumping, which was becoming prevalent.

In response to the courts' rulings, a committee was formed to recommend reforms to Kansas water law. Those recommendations became the Kansas Water Appropriation Act (KWAA). The KWAA dedicates the waters of the State to the public; outlines jurisdiction and power of the Chief Engineer; and provides for the Water Law Doctrine, including how new water rights are granted, how to change existing water rights, and how to administer rights in times of shortage.

The Professor explained a Kansas water right is a vested right or an appropriation right under which a person may lawfully divert and use water. In Kansas, a water right is a real property right. In addition, the Professor detailed the attributes of a Kansas water right, including priority, authorized

quantities, place of use, point of diversion, and the type of use made of water.

The Professor reviewed laws enacted since 1972 that have attempted to address the problem of groundwater depletion, including the Groundwater Management District Act; Intensive Groundwater Use Control Areas; Local Enhanced Management Areas; Multi-year Flex Accounts; and Water Conservation Areas. The Professor also highlighted the State Water Plan Storage Act and Water Assurance Program Act, which allow for storage capacity in federal reservoirs.

The presentation to the Committee concluded with several questions posed to the Committee, including:

- Should the Legislature impose upon the Division of Water Resources, Kansas Department of Agriculture, and the Chief Engineer the explicit duty to preserve and conserve, or both, the water resources in Kansas?;
- Should the State reconsider the public and private value of water stored in federal reservoirs?; and
- Should the State commission another legal study of Kansas water law and its problems, as occurred in 1945, 1957, and 1978?

### ***Presentations by State Agencies***

#### ***Kansas Water Office***

The Assistant Director, Kansas Water Office (KWO), provided an overview on the agency's funding and reported on the recommendations from the Governor's Blue-Ribbon Task Force. The Assistant Director explained agency funding includes local, state, and federal sources from a variety of entities; however, the State is not carrying its fair share, an assertion he illustrated with various data and statistics. The Assistant Director also discussed the relationships and coordination among different agency programs regarding water. Finally, he detailed the future use storage in U.S. Army Corps of Engineers

reservoirs in the State and the estimated cost to call this storage into use in 2017.

The Executive Director, KWO, explained how the wise use of data and technologies helps monitor water use and measure the economic impact of water conservation initiatives. He explained it is difficult to implement strategies in the State with such varied stakeholder interests and that the key is to establish priorities through coordination and collaboration. In addition, the Executive Director stated the KWO is considering future-use storage policies if unused reservoir storage needs to be called into service.

#### ***Kansas Department of Health and Environment***

The Director, Bureau of Water, Kansas Department of Health and Environment (KDHE), provided the agency's water quality projects and programs in order of priority for budget enhancement funding, including the Harmful Algal Bloom Program (pilot program); Kansas Watershed Restoration and Protection Strategy program (existing); streambank stabilization (existing); Drinking Water Protection Program (existing); Total Maximum Daily Load (TMDL) – Harmful Algal Bloom Response Program (existing); contamination remediation (existing); lead and copper testing assistance for schools and daycare facilities (new); Small Community Infrastructure Program (pilot program); on-site wastewater financial assistance (new); and Livestock Waste Closure Program (new). The Director also reviewed groundwater research and implementation coordination strategies between the water-related state agencies.

#### ***Kansas Biological Survey***

The State Biologist and Director of the Kansas Biological Survey (KBS) outlined the areas in which the KBS can contribute to the State's water vision, including continuing work with the KWO bathymetrically mapping federal and state reservoirs, particularly ones that provide drinking water supply or those identified by Kansas Department of Wildlife, Parks and Tourism that may be of concern; increased coring of sediment deposits in select federal and state reservoirs; continued work on harmful-algal blooms (HABs) to determine the cause of occurrence, develop and

test HAB management solutions, and work with KDHE to seek effective management actions; work with the Kansas Geological Survey (KGS) and with KWO to examine stream channel erosion and restoration; and other challenges for Kansas surface water supply.

### *Kansas Geological Survey*

The Director of the KGS presented a priority list of programs and projects for which additional funding would be necessary, including continuation and expansion of the Ogallala-High Plains Aquifer Assessment Program, continuation and expansion of the Index Well Program, hydrostratigraphic survey of the Ogallala Aquifer in Western Kansas, Aquifer Modeling Maintenance Project, Observation Well Network in the Kansas River Alluvial Aquifer, development of a groundwater model of the Kansas River Alluvial Aquifer, and assessment of the effectiveness of streambank stabilization projects.

### ***Presentations by Organizations and Stakeholders***

#### *Water Advocacy Team*

A representative of the Water Advocacy Team stated, for water to be sustainable, there must be balance among the following four types of factors: environmental, social-cultural, economic, and political. The representative encouraged the Committee to advocate for water legislation; coordinate with local, state, and federal agencies and officials; and support fees and increased revenue for water conservation and sustainability.

#### *Kansas Center for Agricultural Resources and the Environment and the Kansas Water Resources Institute, Kansas State University*

The Director of the Kansas Center for Agricultural Resources and the Environment and the Kansas Water Resources Institute discussed how the value of research improves agency program effectiveness, and he indicated a complete understanding of problems and issues helps people determine the most cost-effective methods of sustaining water resources while minimizing adverse economic impacts. The Director then outlined the two research programs on which his two institutions are focused.

The first program is research to sustain the Ogallala-High Plains Aquifer and the economy of Kansas, which includes emphasis on enhanced research efforts with grain sorghum; increased research in wheat breeding and genomics; development, evaluation, and implementation of new irrigation technologies; and research into advanced dryland production systems and conversion from irrigated to limited or dryland agriculture. The second program is research to develop and implement practices to improve and sustain water quality, with an emphasis on research to develop and validate new crop management practices that reduce the impact on surface water and groundwater quality.

#### *Kansas Farm Bureau*

The Director of Public Policy for Kansas Farm Bureau (KFB) stated the organization supports the State's water planning process by regional advisory committees that make recommendations to the Kansas Water Authority, which then makes recommendations to the Governor and Legislature. The Director stated KFB policy identifies and prioritizes the following programs and projects: prevention of groundwater and surface water contamination, developing crop and livestock management practices that protect natural resources, implementing TMDL requirements, installing stream buffers, treating highly erodible lands, plugging abandoned wells, upgrading rural septic systems, and promoting conservation of water by all users. In addition, he stated the KFB supports fully funding the State Water Plan Fund as statutorily required.

#### *Kansas Livestock Association*

The Vice President of Legal and Governmental Affairs for the Kansas Livestock Association (KLA) stated the organization supports the Kansas water planning process, but if the Legislature were to discuss increasing funding to the State Water Plan Fund, the increases should come from a broad-based revenue stream and not from increased water user fees, such as the stockwater, pesticide, and fertilizer fees that are assessed on the agriculture sector. He added the KLA would be against the creation of a fee on irrigation users. The Vice President stated the KLA supports the existing fee structure for the State

Water Plan Fund and supports fully funding the State Water Plan Fund as statutorily required.

### *The League of Kansas Municipalities*

The Executive Director of the League of Kansas Municipalities (LKM) testified the LKM supports fully funding the State Water Plan Fund as statutorily required. He stated significant issues exist with both water quality and quantity in Kansas and priorities and solutions vary across the state; however, the State must first fully fund the State Water Plan Fund before increasing any fees upon municipalities that use no more than 15.0 percent of the water in the State.

**November 13, 2017**

### ***Presentations by Organizations and Stakeholders***

#### *Arkansas River Research Study*

The Committee received testimony from a Professor of Geology, University of Kansas, who spoke about the Governor's Water Conference that was held the week prior to the Committee meeting. She updated the Committee on a research project she is conducting regarding the Arkansas River. The Professor stated, although extensive data traces back 60 years, the data has not been collated effectively to give stakeholders a broader understanding of Arkansas River issues. She stated that by using data and interactive visualization, one can trace the effects of groundwater pumping, streamflow, changes in groundwater levels and wet and dry periods. She cited for the Committee key hydrological points from 1954-forward. The Professor stated, using the data from this project, knowledge can be expanded to help understand hydrology, HABs, and reservoir sedimentation.

#### *Kansas River Water Assurance District #1*

A representative of the Kansas River Water Assurance District #1 provided the Committee with background and history of water assurance districts, stating the Water Assurance Program Act was passed by the Legislature in 1986. The Act enables municipal and industrial water appropriation right holders on regulated rivers and streams to organize for the purpose of supplying water from reservoir storage to the members of the

organization in times of drought. The representative also identified the three water assurance districts that are organized and in operation: Kansas River Water Assurance District #1, Marais des Cygne River Water Assurance District #2, and Cottonwood and Neosho Rivers Water Assurance District #3. He then discussed the differences between water assurance districts and water marketing contracts.

### ***Follow-up Information***

The Committee received follow-up information from representatives of the KBS, KDHE, KGS, KWO, the Associate Professor of Law from Washburn University, and committee staff.

In addition, the Secretary of Agriculture was recognized to provide information on various questions from the October meeting and the Secretary also provided information regarding a joint letter that was sent in October to the Kansas congressional delegation from the Secretary, the Executive Director of the KWO, the Commissioner of the Colorado Department of Agriculture, the State Engineer of the Colorado Division of Water Resources, and the Director of the Nebraska Department of Natural Resources. The letter detailed the three states' interstate water issues and agreements, concerns about the Conservation Reserve Program, funding and support of the Conservation Technical Assistance Program, support for water conservation and management technology and programs, and consultation with states on water management actions.

### **CONCLUSION AND RECOMMENDATIONS**

The Committee discussed the information it had received during the two meetings and came to the following conclusions:

- The Committee recommends the Legislature fully fund the \$8.0 million statutory transfer to the State Water Plan Fund (SWPF), including \$6.0 million from the State General Fund and \$2.0 million from the Economic Development Initiatives Fund (EDIF). The Committee notes, since FY 2008, a total of \$72.0

million in statutory transfers from the SGF and EDIF to the SWPF have not been made. The Committee believes that by fully funding the SWPF in the coming fiscal years, current water programs and projects will be able to expand their efforts, along with funding valuable research projects that will provide data and information. This data and information will allow state agencies to select the most cost-effective projects and programs that will help with water quantity and quality issues across the State.

- The Committee recommends introduction of legislation that calls for a legal study covering the following topics:
  - A review of the KWAA, as it has been amended since 1945, with particular focus on the problem of permanent water supply depletion;
  - A review of the Groundwater Management District Act, both on its own and in regards to its relationship with the KWAA;
  - A review of the principal acts concerning the storage of water in federal reservoirs: the State Water Plan Storage Act and the Water Assurance Program Act;
  - A review of the Kansas Water Transfer Act;
  - An examination of every statutory section of the above-listed acts to unearth and bring attention to the many ambiguities and other textual problems that have arisen since 1957;

- Changes in federal water law since 1957 that affect the protection and enforcement of Kansas water rights, including Kansas' rights to interstate water resources, such as its interstate streams, rivers, and aquifers;
- Changes in federal and state environmental law, most notably the Endangered Species Act and other legislation that have substantially complicated western states' water law regimes;
- An analysis of takings issues under Kansas water law; and
- An analysis of whether Kansas should consider conducting water rights adjudication proceedings throughout the State.

In addition, the legislation should contain recommendations on who should serve as principal investigators or auditors and who should serve on a planning and review committee:

- Principal investigators or auditors should include three legal experts on Kansas water law; and
- The planning and review committee should include the Chief Engineer, the Executive Director of the KWO, an assistant or special assistant Attorney General knowledgeable in water law, one lawyer with experience representing one or more groundwater management districts, one lawyer from the U.S. Department of Interior Office of the Solicitor, and one lawyer from the Kansas Legislative Research Department.