



TESTIMONY

TO: Chairman Lance Kinzer
And Members of the House Judiciary Committee

FROM: Whitney Damron
On behalf of the Kickapoo Tribe in Kansas

RE: HB 2553
Tort Claims Act; Attorney General Representation; Nemaha-Brown Watershed District

DATE: February 29, 2012

Good afternoon Chairman Kinzer and Members of the House Judiciary Committee. I am Whitney Damron and I appear before you today on behalf of the Kickapoo Tribe in Kansas to express the Tribe's strong opposition to HB 2553, which would effectively require the State to again pick up the litigation costs for the Nemaha-Brown Watershed District No. 7 relating to their ongoing dispute with the Kickapoo Tribe over water rights in Brown County.

Kickapoo Tribal Chairman Steve Cadue has already provided the Committee with an overview of the Tribe's efforts to secure a stable source of water for its residents and interests located on and around the Reservation, both tribal and non-tribal alike. I would like to provide the Committee with a summary of the Tribe's objections to using state tax dollars and resources to finance what are the responsibility and the obligation of the Nemaha-Brown Watershed District No. 7 and its members.

First of all, let's review the controlling statutes:

- The Nemaha-Brown Watershed District was created under the authority and operates under K.S.A. 24-1209 et. seq. Under these statutes the District has, among other powers, the authority to:
 - o Sue and be sued by its corporate name;
 - o Employ professional services as deemed appropriate (i.e., legal counsel);
 - o Acquire land and interests in land by... eminent domain;
 - o Levy taxes and assessments, issue bonds, incur indebtedness...

Litigation between the Kickapoo Tribe and the Nemaha-Brown Watershed Board No. 7 is not a legal matter with a state interest. As noted in the Fiscal Note provided to the Legislature, *the Kansas Attorney General has previously determined that the Watershed District is not an instrumentality of the State of Kansas and is therefore not entitled to Kansas Tort Claims Act defense.* Accordingly, the Board should not be afforded legal representation, costs, indemnity or legal assistance in this matter.

The Board has the ability to secure its own legal counsel, pay for the costs, assess its members for such costs and other powers and duties enumerated in their controlling statutes.

For far too long the state's bank account has financed litigation against the Kickapoo Tribe and the resulting subsidy has encouraged the Board to continue litigating this matter, rather than resolve its differences with the Tribe. As late as March, 2011 the Tribe was led to believe the Nemaha-Brown Watershed District No. 7 would finally move forward as agreed upon in a settlement document negotiated with assistance from the Kansas Attorney General, but such was not the case following public hearings on the proposed settlement held on March 22, 2011 and the Board rejected the settlement agreement after the State had expended more than \$500,000.00 in legal costs to craft the agreement.

By way of information to the Committee, we are aware that at least two members of the Board own real property or have an ownership in real property in the area proposed for the Plum Creek Reservoir. One would logically observe that it may be somewhat difficult for the Tribe to reach an agreement with the Nemaha-Brown Watershed Board No. 7 with two of its members having a personal vested interest in the outcome of any negotiations, particularly as long as the State is picking up the tab for their legal defense irrespective of the cost or merits of their argument.

The fiscal note for HB 2553 indicated the costs for FY 2013 could be as much as \$200,000.00. No cost estimate is made for subsequent years. Given the history of this case, the Board's resistance to settlement and the timeline for an ultimate decision in this matter, legal counsel for the Kickapoo Tribe predicts this case most certainly will not be concluded in FY 2013 and highly unlikely for \$200,000.00.

No one takes the use of eminent domain or condemnation authority lightly in this case or any other for that matter and that is what the proponents are trying to make this issue all about. The Tribe has successfully purchased several tracts of land in fee and has made offers for the remainder of property necessary to site the Plum Creek project at market or greater prices. While it does not mitigate matters for the property owners, it should be noted there are no more than twelve landowners in the area proposed for the Plum Creek project and it does not impact any residential property.

The fact that condemnation authority is an option does not make this a state issue that justifies state funding of litigation appropriately born by the watershed district. When the State made changes to condemnation and eminent domain laws following the U. S. Supreme Court decision in the *Kelo vs. New London* case several years ago, I believe it is safe to say all parties recognized there is some need for this authority, particularly in cases of public right-of-way, utility services and the furtherance of appropriate public interests.

If it is to be the policy of the State of Kansas that it will no longer consider water rights, reservoir and watershed construction to be for the public good and no longer allow for the use of eminent domain and condemnation authority to secure such rights, then that is a discussion that we should have with all parties on notice of what is being contemplated and proposed. I cannot imagine the State of Kansas, with its agricultural history would sustain such a dramatic departure from current law.

What appears to be happening here with HB 2553 is a local watershed district doesn't want to make the decisions they agreed to make when they voluntarily created the Nemaha-Brown Watershed District No. 7 and its members agreed to serve and furthermore, they want to continue to be subsidized by the taxpayers of Kansas as they refuse to negotiate in good faith for a resolution of matters of disagreement between the watershed district and the Kickapoo Tribe.

Time and time again the Nemaha-Brown Watershed District No. 7 has failed to live up to its commitments, namely to work with the Kickapoo Tribe and others in the area to enable the Plum Creek Project to move forward. If anything, the State should demand the return of more than \$500,000.00 already provided to the district for failure to live up to their past commitments and certainly HB 2553 should not be passed as further reward for their egregious behavior.

Under K.S.A. 22-1209, the Nemaha-Brown Watershed District No. 7 has all the power and authority it needs to fund its litigation costs, pay any subsequent settlement costs, damages or remedies ordered by the Court and equitably assess its members for the costs thereof. Such should not be borne by the citizens of Kansas any longer.

On behalf of the Kickapoo Tribe in Kansas, we ask you to take no action on HB 2553.

I would be pleased to stand for questions at the appropriate time.

WBD

Attachments:

- K.S.A. 14-1209
- Timeline of Kickapoo Tribe's efforts to secure water rights.

House Status: [Adjourned until Wednesday, 29 February 2012 at 11:00 a.m.](#)

Senate Status: [Adjourned until Wednesday, 29 February 2012 at 02:30 p.m.](#)

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24-1209. Corporate powers and duties. Each watershed district incorporated under the provisions of this act shall be a body politic and corporate and shall have the power:

First. To adopt a seal.

Second. To sue and be sued by its corporate name.

Third. To purchase, hold, sell and convey land and personal property and to execute such contracts as may, by its board of directors, be deemed necessary or convenient to enable it to properly carry out the purpose for which organized.

Fourth. To construct, improve, maintain and operate works of improvement including such facilities and appurtenances as necessary for the conservation of soil, prevention of floods, disposal of water and the conservation, development and utilization of water for domestic, municipal, agricultural, industrial, recreational purposes and such other uses as may be authorized by the provisions of K.S.A. 82a-701 to 82a-725, inclusive, and any amendments thereto; and in any case where the construction, improvement or operation of such works causes the substantial displacement of a wildlife habitat and when required by the soil conservation service of the United States department of agriculture as a condition precedent to the release of federal funds for such works, to acquire land for the purpose of restoring such wildlife habitat. The power of eminent domain shall not be used for any such acquisition.

Fifth. To operate or lease any and all district properties and facilities associated with the use of water and to collect reasonable fees, rentals, tolls, and charges for the use of such facilities, said revenue to be placed in the maintenance fund of the district. Where the property is leased the lessee or anyone authorized to collect such fees, rentals, tolls and charges shall conform to a schedule approved by the board of directors of the district.

Sixth. To employ such professional services and other assistance as is, by its board of directors, deemed essential. Soil conservation engineering services may be used whenever available.

Seventh. To acquire personal property by gift or purchase.

Eighth. To acquire land and interests in land by gift, purchase, exchange or eminent domain; such power of eminent domain to be exercised within or without the boundaries of the district in like manner as provided by K.S.A. 26-501 to 26-516, inclusive, or any amendments thereto.

Ninth. To levy taxes and assessments, issue bonds and incur indebtedness within the limitations prescribed by this act.

Tenth. To cooperate and contract with persons, firms, associations, partnerships and private corporations, and with other watershed districts, drainage districts, and cities of all classes of this state, and with drainage districts, watershed districts, or other public corporations organized for similar purposes in any adjoining state and with other local, state and federal governmental agencies and to enter into co-operative contracts and agreements with any such districts, corporations or agencies.

Eleventh. (a) To take appropriate actions to extend and transfer the territory of the district, receive territory transferred from other districts, and dissolve all or a portion of the district as provided for in this act; (b) to merge with adjoining watershed districts, subject to approval of a majority of the qualified voters voting on the proposition in each of the districts proposing to merge.

Twelfth. To select a residence or home office for the watershed district, which shall be at a place in a county in which the watershed district or any part thereof is located and may be either within or without the watershed district as may be designated by the board of directors. The board shall thereupon designate the county in which said residence or home office is located as the official county for the filing of all official acts and levies. After an official county has been so designated, said county designation shall not be changed even though the residence or home office of said watershed district may be changed at a later date.

History: L. 1953, ch. 477, § 9; L. 1955, ch. 201, § 6; L. 1957, ch. 226, § 5; L. 1959, ch. 172, § 8; L. 1961, ch. 193, § 8; L. 1963, ch. 234, § 69; L. 1976, ch. 175, § 1; July 1.

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TIMELINE OF KEY EVENTS RELATING TO THE PLUM CREEK PROJECT

- **1960s:** As recent as the late 1960s the Kickapoo Reservation homes, about 20 in number, had no water service other than shallow domestic wells.
- **1970s:** The first housing project with HUD monies consisted of 40 homes developed in the 1970s. HUD required a developed water supply. It had to be hooked up temporarily to the City of Horton water supply, a distance of 5 miles from the housing projects. IHS and BIA funded exploratory investigations for groundwater and found no reliable sources of groundwater within the Kickapoo Reservation.
- **1976-78:** Tribe awarded \$1.3 million grant from the federal Economic Development Administration. Constructed low head weir, water intake structure and water treatment plant to serve the Reservation housing and governmental offices at the Tribal administration complex. Completed in 1978; Tribe still relies on it today.
- **1978:** Nemaha Brown Watershed Joint District No. 7 completed "General Plan" under Kansas law for the development of various water storage, flood control, soil erosion and land treatment activities in the Upper Delaware and Tributaries Watershed. The 1978 General Plan was prepared in part by consultants retained through a \$150,000 grant from the Bureau of Indian Affairs. Plan expressly mentioned that the Kickapoo Tribe was looking to develop a domestic, municipal, industrial and fire protection water supply for its Reservation.
- **1981:** A 25-year comprehensive plan for reservation growth and development prepared by the Topeka engineering firm of Van Doren, Hazard & Stallings identified 5 possible sites within the reservation for the development of a reservoir storage project. The most viable site is located on Plum Creek, a tributary to the Delaware River that flows through the Kickapoo Reservation. Other sites proved infeasible for hydrologic, geologic and engineering reasons.
- **1981:** The P.L. 83-566 Small Watershed Development Program law was changed by Congress in 1981 to enable Indian tribes for the first time to become local sponsors of watershed development plans, and to be eligible for funding from SCS for those purposes. The Tribe and Nemaha Brown traveled to Washington, D.C. together in February of 1983 to explore the advantages of joint sponsorship of a watershed development plan for the Upper Delaware River watershed. Tribe told by SCS that it could not be the sole sponsor for a project since it did not have the legal authority to condemn fee lands.
- **1983:** The Tribe and Nemaha created a Joint Watershed Board. The Kickapoo Tribe was the first – and only – Indian Tribe to become a local sponsor under the Small Watersheds Program. The 1983 Joint Watershed Board Agreement states that "[i]t is the understanding of the District and the Tribe that the goal of the two local agencies is the ultimate construction of all needed structures within the watershed." SCS and the Kansas State Conservation Commission officially endorsed the joint co-sponsorship agreement.

- **1983-1993:** With additional funding from the BIA, planning work began with SCS staff and other private technical experts for about a decade with studies of the watershed, and fine-tuning the site locations for the flood retention dams and various land treatment methods which would form the eventual plan for which Congressional approval and authorization for funding under the PL-566 program would be sought.
- **May 1994:** Watershed Agreement and EIS finalized, and signed with Nemaha Brown, SCS, the State of Kansas, and the four [Atchison, Jackson, Brown and Nemaha] county conservation districts, for the development of the watershed under the PL-566 program. Under the 1994 Agreement, the Tribe is responsible for the cost of land rights for the Plum Creek Project and for three smaller flood retention dams on Indian land.
- **1994:** Nemaha Brown issued a §404 Clean Water Act permit from the U.S. Army Corps of Engineers, for the Plum Creek project and other projects in the watershed.
- **June 1994:** NRCS Kansas sends Watershed Agreement and Plan to NRCS National Headquarters for review. The Record of Decision is issued by NRCS, itemizing the multiple public purposes of the Plum Creek Project, including the creation of a dependable water supply for the Tribe, its members, and other Reservation residents; flood control and soil erosion benefits; and improved recreation opportunities.
- **August 1995:** NRCS NHQ sends Plan to Office of Management and Budget (OMB) for review and transmittal to Congress.
- **May 1996:** OMB sends Plan to Congress for Authorization.
- **July 1996:** U.S. Senate approves Upper Delaware and Tributaries PL-566 Watershed Plan, providing authorization for funding.
- **May 1998:** Congressman Ryun testifies before the Water Resources & Environment Subcommittee in support of plan.
- **June 1998:** U.S. House approves Upper Delaware and Tributaries PL-566 watershed plan, providing authorization for funding.
- **March 12, 2003:** Meeting with Kickapoo Tribal Representatives and Nemaha-Brown Watershed Board President to discuss process for obtaining land rights.
- **April 2002:** NRCS 5-year feasibility analysis reaffirmed the viability of the project under the PL-566 UDT Watershed Agreement.
- **January 2003:** Kickapoo Tribe holds a public meeting/tour with Congressman Ryun on site and at the Kickapoo Tribe Community Center.
- **April 2003:** Kickapoo Tribe opened a Land Office for the purpose of purchasing the land needed for the Plum Creek Reservoir.
- **July 24, 2003:** Nemaha-Brown Watershed Board meets and passes resolution to “not proceed with condemnation” until the Tribe made an effort with negotiating with the landowners without eminent domain.
- **October 2003:** The Kickapoo Tribe Land Office begins extensive efforts to purchase the land needed for the Plum Creek Reservoir. Multiple letters are sent to involved land owners and a variety of incentives are offered. One of the landowners, Stuckey, accepted the offer of purchase and sold his 240 acres.

- **January 2004:** Nemaha-Brown Watershed board meets and tables indefinitely a resolution to proceed with condemnation. The Tribe continues efforts to purchase the land for a fair price.
- **2000s:** Kickapoo Tribe and its members, and the non-Indian families served by the Tribe's water system, continue to be beset with dependable water supply problems, facing shortages for domestic and commercial purposes, and water quality problems (Safe Drinking Water Act violations). The Tribe's current water system also continues to limit housing and economic development opportunities for the Kickapoo Tribe and its members. The Tribe also provides basic fire protection to all Reservation residents, both Kickapoo tribal members and non-Indians alike, under mutual aid agreements executed with neighboring jurisdictions. The Tribe's ability to do so, however, is impaired by the lack of water.
- **June 2006:** After exhausting all other possible avenues, a lawsuit is filed by the Tribe in Federal District Court against Nemaha Brown and other State and Federal entities.
- **August 2007:** State of Kansas asks Tribe and the United States to agree to ask the Federal Court to stay the litigation and attempt to negotiate a settlement and resolution of all issues. Tribe and U.S. agree. Litigation continues to be stayed.
- **December 2010:** The Tribe, the Kansas State Conservation Commission, and the Nemaha and Brown County Conservation Districts meet independently and all vote to approve a partial settlement agreement which provides a mechanism for using Nemaha Brown's condemnation authority to acquire the project lands for the Plum Creek Project.
- **March 2011:** Nemaha Brown holds a public hearing and votes to reject the partial settlement agreement.
- **CONDEMNATION:** The federal PL-566 Program has been used in the 1980s and 1990s to build many water storage projects in Kansas and throughout the rest of the country. The Banner Creek Project near Holton is one of the most recent of such projects to be built in Kansas. Most of these projects have required some utilization of condemnation powers to acquire land rights. For the smaller flood retention structures, and the Plum Creek Project is designed with 20 of them, it is usually the case that only an easement has to be acquired, and not the entire underlying fee simple title to the land.
- **POSITIVE OUTCOMES FOR ALL IN NORTHEAST KANSAS:** Economic benefits will accrue to northeast Kansas as a result of the development of the Project. The Tribe is a major employer – employing many non-Tribal members at its Casino, within Tribal Administration, and at the Kickapoo Tribal School – and farmer in Brown County. Increased employment opportunities will result from the Project, as the Tribe works to add other forms of recreation, commerce and industry, and housing stock, to the Reservation. All of these opportunities require a reliable supply of water.

- **BOTTOM LINE – THE PLUM CREEK PROJECT IS A WIN-WIN FOR THE TRIBE AND ALL RESIDENTS OF BROWN COUNTY AND NORTHEAST KANSAS.**