

MINUTES

SPECIAL COMMITTEE ON ENERGY, NATURAL RESOURCES, AND THE ENVIRONMENT

August 27, 2001
Room 526-S—Statehouse

Members Present

Representative Joanne Freeborn, Chairman
Senator Robert Tyson, Vice-Chair
Representative Judy Showalter, Ranking Minority
Senator Christine Downey
Senator Lana Oleen
Senator Jean Schordorf
Representative Garry Boston
Representative Ruby Gilbert
Representative Becky Hutchins
Representative Bill Levinson
Representative Carlos Mayans
Representative Ray Merrick

Members Absent

Senator Tim Huelskamp

Staff Present

Raney Gilliland, Kansas Legislative Research Department
Deb Hollon, Kansas Legislative Research Department
Mary Torrence, Revisor of Statutes Office
Nikki Feuerborn, Committee Secretary

Morning Session

Chairman Freeborn called the meeting to order at 10:15 a.m. and announced the next meeting on the issue of the Equus beds and water quality would be held on October 22 and 23 in Topeka. She noted that meeting originally scheduled for November 1 has been rescheduled for Friday, November 16, 2001. Committee members introduced themselves to the audience ([Attachment 1](#)).

Arkansas River Lawsuit Update

Attorney General Carla Stovall began her presentation with a brief review of the Colorado lawsuit. The issues of damages, prejudgment interest and other issues were argued on March 18, 2001. The U.S. Supreme Court has handed down its decision on the third report of the Special Master on June 11, 2001. This decision set precedents in several ways:

- It was the very first time the U.S. Supreme Court said that a state can base its losses on individual losses *i.e.*, whatever individual farmers in southwest Kansas lost can be part of the damages the state receives. Colorado said that the 11th amendment preventing individuals from suing government was relevant to this case but the U.S. Supreme Court overruled this in water litigation.
- The U.S. Supreme Court upheld the way Kansas measures its damages, not the method used by Colorado. The Court said they agreed with the Special Master. "Accepting Colorado's argument requires a good deal of speculation. Given Colorado's inability to mount an effective challenge to Kansas' expert's on their own terms and its complete failure to provide a plausible alternative estimate of the crop damage that resulted from its violations of the Compact, we conclude that it's attack on Kansas' conclusions is unpersuasive." The losses maintained by Kansas were at least \$14 million; Colorado said that they were \$6 million. The damage calculations come from four sources.
 - The cost the farmers paid to pump water to replace what should have been in the river.
 - The cost the farmers paid to pump because even if they had planned to pump from underground, they had to pump from farther down because of the depletion of water in the Arkansas River.
 - The cost suffered by farmers from crop losses. In some years there was not enough surface water to sufficiently irrigate and some farmers had no backup wells.

- The secondary economic effects on the Kansas economy. The farmers in SW Kansas were not earning as much money, therefore, they could not spend as much money so there was an effect on the economy in general.
- The U.S. Supreme Court stated that Colorado should pay and be liable for prejudgment interest. Even though Kansas has not known how much Colorado owes Kansas as it has not been a set amount, the interest that has been accumulating on this unknown amount can be required for Colorado to pay. The Special Master has said that Colorado should pay pre-judgment interest on everything before 1969, as that is when Colorado was notified that Kansas believed their rights within the Compact were being violated. Unfortunately, the U.S. Supreme Court did not agree with the recommendations from the Special Master. They held that Colorado should only be held liable for prejudgment interest from the time Kansas actually filed the lawsuit against Colorado in 1985. The combined damages and the amount of prejudgment interest Kansas felt it was owed was approximately \$62.5 million if the 1969 date held. It did not. However, this is the first time in the history of the court that pre-judgment interest has been awarded from one state to another for an interstate river compact violation.
- The Court said for the first time over a party's objection that one state owes money damages to another state. Whatever the final amount is, it will be the most money that the Supreme Court has ever awarded one state against another state. This case will be cited as crucial in future water litigation cases between the states.

Attorney General Stovall reported there had been attempts from October 2000 through March 2001 to discuss with the Colorado Attorney General and Chief Engineer possible settlements. Money was not the primary issue, but rather future compliance was the issue. Kansas needs to make sure it receives all the water it is entitled to from the Arkansas River. She noted that when former Attorney General Robert Stephen sued Colorado in 1985, it was not for money but rather for the water to which Kansas was entitled through the Compact. At that time Kansas requested a River Master be appointed by the U.S. Supreme Court who would sit for all time to gauge disputes over the River on a regular basis. This was to insure that Colorado is in compliance and that there are standards in place to assure that Kansas is receiving the water to which it is entitled.

The Attorney General said that another issue was the presumed depletion factors. Colorado has passed regulations which requires its irrigators to replace some of the water in the Arkansas River to be sure that Kansas receives its entitlement of water. She noted that Kansas does not agree that the regulations are adequate because Colorado irrigators are not putting back enough water into the River to actually guarantee the amount of water to which Kansas is entitled.

A third issue is how much water Colorado is to store in John Martin Reservoir. The plan was that a certain amount would be stored in the reservoir at all times and Kansas could call upon it in times of need when the Arkansas River had a lower flow than necessary for consumption in Kansas. The states disagreed on the amount of water which should be stored in the reservoir and how much should be available to Kansas.

The fourth disagreement concerns the power conversion co-efficient monitoring system. It is a method of calculating the water usage based on the electric pumping bills. Because of the number of wells being powered by electricity, the electric bill is used in calculating how much water is being pumped. Kansas has a problem with the rate Colorado wants to use as it appears they are using less water than they really are based on their co-efficient. One of the better ways to account for water would be to put meters on wells so there is an actual means of determining usage rather than calculating it through an electric bill.

There are new and on-going procedures now before the Special Master that will be dealt with including:

- Future Compliance—How do we make sure we are going to receive in five or ten years the amount of water to which Kansas is entitled?
- Amount of Total Damages including Pre-judgement Interest—Colorado's Attorney General has stated that it is \$22 million and that amount is in dispute with Kansas. The Special Master must decide upon the amount and when and how Kansas should be paid.

The Special Master will issue another report and, after input from each side, he will issue a final report which will go one more time to the U.S. Supreme Court. At that time, each side will have an opportunity to object or take exception to the report and also probably to argue before the Court. The Court will then issue a decision and it is hoped that will resolve the issues that are pending.

In response to a question, the Attorney General stated that payment to Kansas is subject to the Colorado Legislature appropriating the funding as determined by the U.S. Supreme Court. If Colorado does not make the payment settlement, it would be in contempt of the U.S. Supreme Court. The Court may issue a decision which only gives the amount due and owing to Kansas and not address the scheduling and amount of payments. It would then be up to both governors to make some determination for the appropriate payment plan.

Nebraska Republican River Lawsuit

Attorney General Stovall reported that the Special Master (former Supreme Court Justice from Maine) assigned to the Nebraska lawsuit has ruled on the following:

- Groundwater pumping along the river absolutely is governed by the Compact.
- Even if Kansas does not use all the water that is sent over the state line to Kansas, that does not mean that Nebraska does not have the obligation to send all the water that the Compact states it should.
- Kansas is not required to show injury in order to force compact compliance by Nebraska in the future.

Attorney General Stovall said she believed that three times as much water is involved in this litigation than in the Colorado case. The Republican River supplies recreational, industrial, and municipal water for Manhattan, Junction City, Topeka, Lawrence, and Kansas City. In addition, there are significant irrigated cropland acres which are dependent upon water in the Republican River. The case is now in the discovery process which means the lawsuit has been filed, Nebraska has said it is not at fault, and now both states are researching each other's records for data and information pertinent to the case. The federal agencies involved include the Bureau of the Interior, Bureau of Reclamation, Corps of Engineers, US Fish and Wildlife Service, and the US Geological Survey. These agencies have been visited and requested to provide documents which will be needed. Colorado also is involved in this case in a small way because the Republican River actually begins in Colorado. The three states have agreed to hire a company which can take images of the documents and have them on CD and indexed for efficiency. There will be at least 150,000 documents involved.

The Special Master has identified at least fourteen additional legal issues on which he wants briefs prepared by November. General Stovall shared a concern that the Special Master is 80 years old and has set the trial for March 15, 2003, and that it is imperative to stick to that schedule. She noted that the Special Master does not want to listen to complaints from states regarding lack of appropriations for payment to legal teams and experts. He has threatened to call respective legislators if this should occur and explain that this is not acceptable to him.

David Pope, Division of Water Resources, explained the issues in various water disputes and water litigations which are occurring throughout the Midwest.

In response to questions, General Stovall explained that winning the Nebraska lawsuit would definitely cause an increase in the flow of the Republican River into Kansas and may involve monetary damages. Several reservoirs in Nebraska affect the flow in the Republican River with the largest being the Harlan County Reservoir which is immediately across the state line. Irrigation projects in Nebraska and Kansas have contracts with the Bureau of Reclamation for storage in this reservoir. It is the opinion of Kansas that the reservoirs in Nebraska are being adversely impacted by reductions in flow above the reservoir. Attorney fees are being paid on a monthly basis to the John Draper firm out of New Mexico. Staff supplied copies of how any money received from Colorado would be allocated according to the current Kansas law (Attachment 2).

Representative Levinson moved that this Committee recess into Executive Session for 30 minutes (the Committee was to reconvene in public session at 11:30 a.m.). The purpose of the Executive Session was to consult with the Attorney General in privileged attorney-client communications regarding pending interstate river compact litigation. The motion was seconded by Representative Gilbert. The motion carried (Attachment 3).

The Committee reconvened at 11:35 a.m. Chairperson Freeborn announced that it was the consensus that the Committee direct staff to prepare a statement supporting the actions of the Attorney General in the Nebraska Republican River litigation in the Committee Report.

Chairman Freeborn recessed the Committee at 11:40 a.m., for lunch.

Afternoon Session

Chairman Freeborn called the meeting back to order at 1:35 p.m. and announced there would be a review of the Army Corps of Engineers plans for maintenance of federal reservoirs affected by fault lines.

Brian McNulty, US Corps of Engineers of Manhattan, offered a slide presentation on the Tuttle Creek Dam Safety Assurance Program (Attachment 4). The main problem appears to be the sand foundation of the existing dam. Stabilization of the dam would require deep soil mixing, installing columns of concrete, and adding stone columns. The option of removal of the dam altogether also was to be considered.

Bill Empson, Dam Safety Project Manager, explained the likelihood of an upcoming earthquake in the Wamego area within the next 100 years, the effect it would have on the Tuttle Creek Dam area, and the damage which would occur in the area (see Pages 36-38 of Attachment 4). He stated that if such an earthquake were to occur, the dam would not crumble immediately. He speculated that the water would likely come through the cracks, and it is estimated it would take six days to drain the lake. Options to avoid catastrophic reactions to the earthquake were detailed along with a time line and schedule of projected costs which were included. The alternative of doing nothing also was explained as the lake pool which holds Tuttle Creek Dam may silt in on its own. He noted that the life expectancy of the lake is 2075 or the usual 100 years.

Terry Olson, Manhattan Chamber of Commerce Public Affairs Committee and business owner, explained their position and plan of action in the Dam Safety Assurance Program (Attachment 5). She suspected there would be very little reaction from the community regarding the impending risk of an earthquake but the business community would certainly be supportive of any improvements that could be made to the dam and definitely were in favor of retaining the Tuttle Creek Reservoir in their community.

Dr. Lee Allison, State Geologist and Director of the Kansas Geological Survey at the University of Kansas, presented his credentials to the Committee stressing his expertise in structural geology ([Attachment 6](#)). Dr. Allison listed the seismic hazards of the Tuttle Creek Dam area and stated that the probability of a large earthquake in the region grows each year.

Earl Lewis, Manager of the Kansas Water Office's Hydrology and Evaluation Unit, explained that the Corps of Engineers' charge to assess possible impact of seismic activity on the stability of the Tuttle Creek Dam and Reservoirs cannot be ignored ([Attachment 7](#)). In his statement, Mr. Lewis reminded the Committee that at the time the dam was built, the safety issues regarding seismic activity and impact were not in place. He detailed the importance of the dam to the Kansas River and the persons living in the Midwest. The state would be required to pay \$900,000 for their portion of the repair of the dam at this point.

Kent Weatherby, The Kansas River Water Assurance District No. 1, provided testimony in opposition to the option of the removal of the Tuttle Creek Dam ([Attachment 8](#)). The removal of the dam would jeopardize the drinking water for 1.5 million citizens of Kansas. He urged the Committee to not propose any action until there had been an opportunity for full input from all citizens involved.

In response to questions, Mr. Empson said that the lake might have to be drawn down for four to six years during the repair stage. This could cause a major problem if the work occurs during a drought period. He noted that if this were to occur that it might require the calling for uncommitted storage at Milford during the construction phase. He stated that stabilizing foundation soil would have to be brought in which would be very expensive. The idea of working with the existing silt as a part of the repair also has been explored as well as the digging of an eight mile tunnel for overflow which would be extremely expensive (\$250 million). If the original dam site is used, the work would fluctuate from one side to the other.

In adjourning the meeting, Chairman Freeborn said the Committee would wait to make its recommendations at the next meeting on October 22 and 23, 2001. The meeting was adjourned at 3:30 p.m.

Prepared by Nikki Feuerborn
Edited by Raney Gilliland and Deb Hollon

Approved by Committee on:

November 16, 2001