

Testimony RE: HB 2565

Provided By:

Equus Beds Groundwater Management District No. 2
Northwest Kansas Groundwater Management District No. 4
Big Bend Groundwater Management District No. 5

February 11, 2010

HB 2565

An ACT concerning water resources; relating to abandonment and termination; creating a water conservation exception.

BACKGROUND:

With the elimination of the Water Rights Conservation Program (WRCP), and because conservation is so important, there has been a flurry of activity to find an acceptable replacement. HB 2565 is one of these conservation-oriented approaches.

HB 2565 is simple in that it provides due and sufficient cause for any year of nonuse for any well whose local supply is from within a closed area - so long as the well is properly (environmentally) maintained. Under this statutory authorization any qualifying well that does not pump would automatically have due and sufficient cause for the nonuse, and would retain the water right in its entirety.

Other conservation-oriented efforts include currently pending regulations being promulgated by the division of water resources, Kansas Department of Agriculture that: a) add a new due and sufficient cause for nonuse; and b) craft a new water right conservation program pending passage of SB 510 which authorizes a new beneficial use of water – Conservation Use.

Each of these efforts and approaches has its own advantages and disadvantages.

CONCERNS & COMMENTS:

1. GMD's 2, 4 and 5 have always felt that there must be a reasonable process to determine when a water right has been abandoned and to forfeit that right if it has truly been abandoned. In the absence of such a process, only volunteer abandonments would occur. Some would argue that in a closed area where any abandoned water right cannot be re-appropriated anyway, what is the harm in this situation. There is no immediate harm, but the biggest problems may occur down the road. For example, if and when it comes time to administer a water-resource area, the unused water rights resulting from HB 2565 participation will still be valid rights and will be part of any administration solution. This simply means less water for every water right in the administered area – both those being used and those not being used.
2. Our second concern is the terms “closed to new appropriations” and “lawfully maintained well”. We have already experienced difference of opinions on both terms during the entire water conservation process.

RECOMMENDATIONS:

- 1) A combined, holistic approach to crafting a new water/water rights conservation program in Kansas be considered that incorporates the best elements of all the individual efforts. A suggested proposal is:
 - a) Pass SB 510 with the following 3 concepts added to the statutory language: (1) the diversion works (pump, gear head and power source) will not have to be maintained; (2) the change TO conservation will not be subject to consumptive use rules; and (3) consumptive use rules will not apply to changes FROM conservation only when the change is back to the original use type AND there is no change in point of diversion in excess of 300 feet (a short move re-drill).
 - b) Urge DWR to promulgate regulations required to implement their conservation use program in accordance with the appropriate summary concepts they have already expressed and which have been attached to this testimony as Attachment 1.
 - c) Add a second conservation use alternative (also requiring passage of SB 510) providing for a multi-year conservation term permit of 5 to 10 years with controlled extension(s) which: (1) prohibits all use under the groundwater term permit; (2) does not require the diversion works to be maintained but requires the well to be maintained per Article 12; and (3) is patterned after the multi-year flex account term permit (KSA 82a-736) such that it requires a filing fee for administrative costs. This additional alternative could be authorized statutorily within SB 510 or entirely by regulation of the chief engineer. It could even exist instead of the first alternative, although GMD's 2, 4 and 5 are not recommending this.
 - d) Withdraw HB 2565 – no longer needed if the above, holistic approach is implemented.

With these four actions, Kansas will have a new beneficial use type of “conservation use” that has two conservation alternatives for water right holders – a broad term (including long term) and a limited term choice. While one choice has less certainty on the ultimate condition of the water right because it is a formal change of the right, it has the benefit of significant longevity. The other choice is a definite, shorter term conservation option, but being a term permit has the certainty of the status of the water right when its term expires and it converts back to the original water right. Both insure no water use while the right is in the conservation mode. The added multi-year conservation use term permit also fits hand-in-glove with the federal EQIP conservation program – thus allowing some participants to utilize this program.

This holistic approach appropriately fee funds the entire conservation process. For those opting for the multi-year conservation option there is a definite and controllable term to the conservation status.

- 2) GMD's 2, 4 and 5 thus support the important intention of HB 2565 – an effective water conservation program for Kansas - but are hoping a more holistic approach can be implemented.
-

Attachment 1:

Kansas Department of Agriculture – Conservation Use Bill Summary – February 2, 2010

1. What does the bill do?

- a. Recognizes conservation as a distinct beneficial use of water, statewide, with no time limit.
- b. Because conservation use is a beneficial use, a conservation use water right that is properly maintained is not subject to abandonment actions.
- c. While a water right's use is designated as conservation, the diversion of water is prohibited. Like other water rights, it does not guarantee the future availability of water supplies.
- d. Substantially improves upon WRCP in three ways:
 - i. Gives legal status to conservation, providing protections not available under the WRCP or the Kansas water banking act, K.S.A. 82a-761 *et seq.*
 - ii. Allows flexibility. The owner can choose how long to keep his water right in conservation use. He's not tied into a term contract, as in WRCP.
 - iii. Pays its own way through the change fee process.

2. If enacted, how will a conservation use water right work in practice?

- a. Because it is limited to vested and certified rights, the attributes of a conservation right are known and established up front.
- b. When a right (such as an irrigation right) is changed to a conservation use right, diversion will be prohibited, but the water right, properly maintained, will be protected from abandonment.
- c. Under rules yet to be developed, it is expected that:
 - i. Annual water use reports will be required;
 - ii. Diversion works such as the pump, gear head, and power source will not have to be maintained, but water level measuring devices will be required; and
 - iii. The change to conservation use will not be subject to consumptive use rules.
- d. When a conservation use right is changed to a different right:
 - i. Per existing law, changes cannot impair existing rights.
 - ii. It is expected that the consumptive use rules regarding change in use made of water will be applied to the former, diverting use, and as otherwise appropriate under law.
- e. How will a conservation use water right affect other rights?
 - i. It may benefit them, by reducing groundwater drawdown and improving streamflows.
 - ii. Owners of rights have the same protections under the common law as before.
- f. Further details will be worked out in rules and regulations, in cooperation with stakeholders. (highlight added by DWR/KDA)