

Testimony RE: SB 510
Senate Natural Resources Committee

Provided By:

Kansas Groundwater Management Districts No.'s 1, 2, 3, 4 and 5

February 17, 2010

SB 510

An ACT concerning water; relating to the beneficial use of water.

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. SB 510 is one of these conservation-oriented approaches.

SB 510 is simple in that it adds “conservation use” as a beneficial use of water in Kansas. This bill is necessary to support a replacement WRCP program being developed by the division of water resources, Kansas department of agriculture, to be implemented via regulations. This proposal has been introduced for comment in a bulleted outline form – attached to this testimony as Attachment 1.

Other conservation-oriented efforts include a currently pending regulation being promulgated by the division of water resources, Kansas Department of Agriculture that adds another due and sufficient cause for nonuse under existing KAR 5-7-1, and HB 2565 which if passed will make not pumping a well in closed areas of the state a due and sufficient cause for nonuse as long as the well is maintained.

Each of these efforts and approaches has its own advantages and disadvantages. None of them seem to cover all six of the most important issues raised during the discussions on eliminating WRCP which are considered necessary to being an effective conservation program that current water right owners will participate in – which were: 1) a definite time period a water right could be enrolled in a conservation program; 2) a fee funded program design; 3) the authority for the well owner to safely cap the well and store the equipment during the well's nonuse; 4) being applied to closed areas of the state where conservation most positively affects existing water rights and does not affect the right of others to obtain rights to unappropriated water; 5) certainty on behalf of the water right owner of the validity and extent of the water right when entering and coming out of the conservation program; and 6) restricting the status of any administration call by a water right holder whose water right is in conservation status.

SB 510 CONCERNS & COMMENTS:

1. While the new conservation use authorized by SB 510 is a clever, direct and simple way to approach a new conservation ethic in Kansas, and we support its development, the bill draft itself only addresses one of the six issue concerns cited above – the fee funded design. These six concerns should either be included in the statutory language

of SB 510, or, accommodated by promulgated regulations for whatever program(s) is developed by DWR to implement SB 510. The current program being proposed by DWR (see Attachment 1) does not address three of the six issues as follows:

- a) There is no time limit a water right can be maintained in the conservation program being proposed by DWR once SB 510 is passed; and
- b) Water rights from every area of the state – closed, open, over-appropriated and under-appropriated - can be changed in the DWR program proposal if SB 510 is passed; and
- c) The uncertainty of what a water right will be allowed to be by the chief engineer when it is changed from conservation to some other use type in the future is a disincentive for use of this program. If such assurance is what the new language being offered by DWR accomplishes, then this concern goes away.

RECOMMENDATIONS:

1) SB 510 should be passed in such a manner that can support one or more conservation programs that can be implemented by regulation, and which statutorily includes language to address at least the following three issues:

- a) “Conservation” shall be a beneficial use eligible in areas closed by regulation or order of the chief engineer; or within the boundaries of a groundwater management district at the recommendation of the district’s board of directors; and
- b) certainty on behalf of the water right owner of the validity and extent of the water right when entering and coming out of the conservation program; and
- c) restrict the status of any administration call by a water right holder whose water right is in conservation status.

2) DWR regulations generated to implement SB 510 following its passage should address the three remaining issues.

With these two actions, and effective rule promulgation by DWR, Kansas will have a new beneficial use type of “conservation use” that supports the DWR proposed conservation alternative for water right holders which is most likely to be utilized by Kansas Water right owners.

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.

Further details will be worked out in rules and regulations, in cooperation with stakeholders. (highlight added by DWR/KDA)