

Approved: July 13, 2014

(Date)

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairperson Kinzer at 3:40 p.m. Wednesday, February 29, 2012 in 346-S of the Capitol.

All members were present except:

Mitch Holmes
Ron Ryckman
Melanie Meier

Committee staff present:

Katherine Thompson, Office of Revisor of Statutes
Jason Thompson, Office of Revisor of Statutes
Lauren Douglass, Kansas Legislative Research Department
Robert Allison-Gallimore, Kansas Legislative Research Department
Nancy Lister, Committee Assistant

Conferees appearing before the Committee:

Representative Randy Garber
Herb Graves, State Association of Kansas Watersheds
David Traster, Attorney representing Nemaha-Brown Watershed Joint District #7
Steve Cadue, Tribal Chairman, Kickapoo Tribe in Kansas
Whitney Damron, on behalf of the Kickapoo Tribe in Kansas

Others in attendance:

See attached.

Chairman Kinzer stated the Committee would first hear **HB 2553- Tort claims act; attorney general representation; Nemaha-Brown watershed district**. Katherine McBride provided an overview of the bill content.

Representative Randy Garber testified in support of **HB 2553**, stating the bill directs the Attorney General to provide representation to Kansas Watershed District #7. Currently, the board members of the watershed district are being sued by the Kickapoo Tribe for not exercising eminent domain rights given to the district board. While the Kickapoo Tribe is and has been in need of a reliable drinking water source, there are other alternatives available that would not infringe upon the private property rights of local farmers and landowners. (Attachment 1)

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

Continuation Sheet

Minutes of the HOUSE JUDICIARY Committee at 3:30 PM on Wednesday, February 29, 2012 in 346-S of the Capitol.

Herb Graves testified in support of **HB 2553**, advising two different Attorney General Opinions specifically stated that Watershed Districts would be represented by the State of Kansas in Tort Claim cases. These opinions were reversed by the current Attorney General. The power stated in K.S.A. 24-1209 of the Watershed District Act allowing the Nemaha-Brown to use eminent domain to obtain land rights for the Plum Creek project is what brought on this law suit, even though it now contains much broader water right issues. The state of Kansas needs to support the intent of the Tort Claim Act and represent watershed districts and their employees as subdivisions of State government. ([Attachment 2](#))

David Traster testified in support of **HB 2553**, stating he was an attorney with Foulston Siefkin LLP representing the Nemaha Brown Watershed Joint District No. 7 and its nine individual Board members in a lawsuit that was filed in the U.S. District Court for the District of Kansas by the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas. There are two main claims the Tribe currently asserts. First, it is entitled to a previously undefined water right, called a “federally reserved water right” or a “Winters Doctrine water right,” pursuant to the holding in a 1908 U.S. Supreme Court case. That portion of the lawsuit has been stayed and is not at issue here. Second, the Tribe seeks enforcement of an alleged Watershed district promise to exercise its power of eminent domain on behalf of the Tribe to acquire approximately 1,200 acres of land, both on and off of the Tribes’ Reservation, for a multi-purpose reservoir, generally referred to as the Plum Creek Reservoir, as described in a document called the 1994 Watershed Plan and Environmental Impact Statement. ([Attachment 3](#))

Jeffrey Chanay testified as a neutral on **HB 2553**, on behalf of the Office of the Attorney General. Between 2006 and 2011, the Nemaha-Brown Watershed Joint District No. 7 was provided a Kansas Tort Claims Act (KTCA) defense for the litigation *Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas v. Michael Black, et al.*, in the United States District Court for the District of Kansas Case No. 06-CV-2248-CM/DJW. The cost of this defense to the State was approximately \$550,000. Shortly after taking office, Attorney General Schmidt ordered a review of all outsourced KTCA legal work. After the review was completed, it was determined by the Attorney General the original 2006 decision to provide KTCA funding was erroneous as a Watershed District is not an instrumentality of the State of Kansas. Consequently, the Office of the Attorney General officially discontinued funding to the Watershed District in September, 2011. ([Attachment 4](#))

Steve Cadue testified in opposition of **HB 2553** on behalf of the Kickapoo Tribe of Kansas, a federally recognized Indian tribe. Mr. Cadue is the elected Tribal Chairman since 1966. The native Kickapoo Tribe was using the water long before the coming of the White man. Without the full benefit of water the tribe would perish. Mr. Cadue was present when in 1977 there was a

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

Continuation Sheet

Minutes of the HOUSE JUDICIARY Committee at 3:30 PM on Wednesday, February 29, 2012 in 346-S of the Capitol.

challenge to the Tribe's right to use the water in the Delaware River. He met with Governor Bennett who sought Attorney General Kurt Snyder's opinion. The opinion was the Kickapoo tribe does not need a permit to use the water. They were here first, before Kansas got statehood in 1861, as they were on the banks of the river in 1832. The Kickapoo tribe will appeal their rights to the U.S. Supreme Court if necessary. Mr. Cadue asked the Committee to take no action on **HB 2553**. (Attachment 5)

Whitney Damron testified in opposition of **HB 2553** stating he was appearing on behalf of the Kickapoo Tribe in Kansas to express the Tribe's strong opposition to the bill, 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. Mr. Damron provided 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. (Attachment 6)

Chairman Kinzer advised he usually does not discuss a bill, and the Committee is not working the bill today. To some extent we are looking at a narrow bill- do we want to pay for this Watershed District's legal fees. The legal issues have been presented on both sides. The policy of including Watershed in tort claims act is appropriate, but he is troubled about doing this in a legislative bill that picks out a case number. In fairness to the proponents and opponents, in terms of moving forward, Chairman Kinzer expressed the Committee may not be able to do justice. The broader issue is if Watershed districts should be included gives him pause. It is a unique bill in the way it is drafted, and he will have to talk with the Committee members more about it before deciding if they will take further action.

Chairman Kinzer announced they would not work **HB 2521** today, as there is a balloon that will be making significant changes. The Committee will be meeting next on Monday, and action on bills previously heard will include **HB 2521**.

The next meeting will be Monday, March 5, 2012.

The meeting was adjourned at 4:55 p.m.