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S.B. 46, 2017 Leg., Reg. Sess. (Kan. 2017)

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SB 252, he claimed, will pit communities against each other rather than requiring them to work together to share water basins.[9] Additionally, Vidak proposes that making too many changes to SGMA, such as this, will cause SGMA to collapse.[10] Permit authorizers worried that the bill would move their authorizations from ministerial–approval conditioned on meeting predetermined criteria–to discretionary–approval requiring collection of information and a decision of whether to authorize the well. However, the authorizers did not strictly oppose SB 252.

SB 252's supporters, however, explained that SB 252 is necessary for SGMA. They argued that without the transparency provided by SB 252, well users simply do not have information about other people with basin access. The Union of Concerned Scientists suggested that this lack of information meant that well users could not make informed decisions about the water they rely on.[11] Senator Dodd stated that, while some believe California should wait for local sustainable groundwater agencies to prepare plans, SB 252 represents the minimum that any of these agencies would do. He also argues that stakeholders may not be able to wait any longer to protect critically overdrafted basins.[12] Dodd concluded one committee hearing by ensuring permit authorizers that this did not represent a trend towards granting them discretionary, rather than ministerial, power.

SB 252 does not solve California's water problems, and critically overdrafted basins continue to be of great concern for legislators and water users alike. While the state waits for SGMA to take effect, SB 252 at least provides information that may protect critically overdrafted basins and the people who rely on them.

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S.B. 46, 2017 Leg., Reg. Sess. (Kan. 2017) (clarifying the statutes governing Water Conservation Areas and altering the remedies and procedures available to water right holders for water impairment).

Kansas Senate Bill 46 ("SB 46") grew out of discussions among stakeholders–including the Kansas Department of Agriculture, Kansas Farm Bureau, and groundwater management districts–following the implementation of the state's newly established Water Conservation Areas ("WCAs"). In 2015, the Kansas Legislature created WCAs as a means to extend the useable lifetime of water supplies, specifically the Ogallala-High Plains aquifer. WCAs incentivize water rights owners in areas with particularly strong conservation needs to voluntarily decrease the total amount of water they use. The initial statute authorizing WCAs provided that the Chief Engineer of the Division of Water

9. *Id.*

10. *Id.*

11. Juliet Christian-Smith, *California's Water Bill Will Tell Us Who's Tapping Depleted Groundwater Basins*, UNION OF CONCERNED SCIENTISTS (May 30, 2017, 8:50 AM), https://blog.ucsusa.org/juliet-christian-smith/californias-water-well-bill-will-tell-us-whos-tapping-depleted-groundwater-basins.

12. *Id.*

Resources ("DWR") could approve plans for individual rights holders participating in the WCAs, allowing the rights holders greater flexibility in the use of their water rights.

Several impacted parties worried that the provisions describing these increased flexibility measures were unclear. The Senate Committee on Agriculture and Natural Resources directly sponsored SB 46 to address these concerns.

As introduced, the bill contained several significant changes. The bill provided more details about the flexibility for water rights owners who join WCAs. Specifically, the Chief Engineer may authorize management plans for rights holders participating in WCAs. The management plans can allow right holders to stretch their allotments over years, apply for new use types, and draw more water from one right than previously allocated, so long as the total use does not exceed their total rights under the management plan. Acknowledging the potential impacts of allowing participants to exceed some allocations, the bill also required neighboring rights owners to be notified about the WCA plan. Additionally, the bill expanded the potential areas eligible for WCAs to include areas closed to new appropriations.

The bill was generally supported, and numerous groups testified in support before both the House and the Senate including: the Kansas Livestock Association, the Kansas Department of Agriculture, Southwest Kansas Ground Water Management District 3, Kansas Water Office, the Kansas Farm Bureau, and the Kansas Corn Growers Association. No groups or legislators offered testimony in opposition to the bill. The supporters highlighted the significance of the amendments to farmers and livestock owners. They explained, for example, that farmers with multiple wells and integrated water distributions systems could draw from a more optimal well, while choosing not to draw from a well with pressure issues, thus using the same amount of water but in a more efficient manner.

Several supporters, however, voiced minor concerns. One worried that the bill failed to dictate a sufficient notice process. Another suggested that the lauded efficiencies of flexible rights could result in an increase in water usage and was troubled that the definition of the WCAs no longer required the area to have conservation needs.

Most of the key components of the initial proposal remained in the final version. The Senate Committee on Agriculture and Natural Resources heard testimony on February 14, 2017 and made one significant change. As initially introduced, SB 46 would have removed the requirement for the adoption of rules and regulations to effectuate and administer the provisions of the WCA statute. The Senate Committee on Agriculture and Natural Resources amended the bill and restored the requirement to adopt rules and regulations.

The House Committee on Agriculture amended the bill to include a secondary function: altering the administrative remedy for owners of water rights who allege their rights are being impaired by another entity's water use. The amendment requires owners to take the new first step to exhaust their administrative remedies before seeking the traditional remedy of a court injunction to stop the offending entity from using water within the owner's rights. Specifically, the right or permit owner must submit complaints to the Chief Engineer, who

will initiate a two-week investigation during which the parties will have the opportunity to submit relevant information. The bill requires the investigation to be completed within a year of the date the complaint was received. The Chief Engineer may extend the investigation for good cause and notify the parties of the additional time needed. While the investigation is ongoing, the parties may petition the Chief Engineer to issue a temporary order to prevent, limit, or curtail the impairment.

The House amended SB 46 to define many of the terms in the bill. However, a conference committee created to reach a final version for both houses removed these amendments. The bill was approved by former Governor Samuel Brownback on April 18, 2017.

Liz Trower

H.B. 2312, 2017 Leg., Reg. Sess. (Kan. 2017) (concerning (i) codification and clarification of the administrative procedures for appealing orders or inactions of the Chief Engineer of the Division of Water Resources; and (ii) the classification of such appeal to fall under the Kansas Administrative Procedure Act).

House Bill 2312 ("HB 2312") came before the Kansas 2017 Regular Legislative Session to clarify and codify the administrative procedures for aggrieved water users to appeal orders or inactions of the Chief Engineer of the Division of Water Resources ("DWR") of the Department of Agriculture. The House Committee on Water and Environment sponsored the bill, and the legislature passed the original version with no changes, amendments, or opposition. Former Governor Sam Brownback approved the bill on April 7, 2017 and it took effect on July 1, 2017.

Before passage of HB 2312, water users aggrieved by orders or inaction of the chief engineer had two paths for appeal. The first option was to appeal directly to the Chief Engineer for review of the order. The rules and regulations of the DWR provided this option, but it had no statutory backing. This review consisted of an evidentiary administrative hearing. The second option was to appeal to the Secretary of Agriculture, as provided by state statute. This option did not entail an evidentiary hearing.

There were two problems with this dual scheme. First, it was unclear whether aggrieved users should appeal to the Chief Engineer—as provided by the DWR rules and regulations—or to the Secretary—as provided by statute. Either option was available to the water users. Second, for those users who first requested review by the Secretary, rather than the Chief Engineer, there was no evidentiary record for the Secretary to review to aid the decision-making. Thus, in those cases, the secretary would refer the matter back to the Chief Engineer to create a record through an evidentiary hearing. Once the Chief Engineer had held the evidentiary hearing, the Chief Engineer would then send the record to the Secretary for review and decision.

HB 2312 clarified and streamlined the administrative process for water users choosing to appeal an order or inaction of the Chief Engineer. The bill provides that, when users aggrieved by orders issued or any inaction by the Chief Engineer wish to appeal such order or inaction, the initial appeal is made directly to the Chief Engineer. The user must make this appeal within fifteen