

MINUTES OF THE HOUSE COMMITTEE ON ENVIRONMENT.

The meeting was called to order by Chairperson Representative Joann Freeborn at 3:30 p.m. on January 30, 2003 in Room 231-N of the Capitol.

All members were present except: Representative Tom Sloan - excused

Committee staff present: Raney Gilliland, Legislative Research  
Emalene Correll, Legislative Research  
Mary Torrence, Revisor of Statutes  
Mary Ann Graham, Secretary

Conferees appearing before the committee: Professor James Wadley, Washburn University School of Law,  
1700 SW College Avenue, Topeka, KS 66621

Others attending: See attached sheet

Chairperson Joann Freeborn called the meeting to order at 3:30 p.m. She asked if there was a vote to approve committee minutes for January 16.

Rep. Gary Hayzlett made a motion the minutes for January 16 be approved. Rep. Mary Compton seconded the motion. Motion carried

The Chairperson announced that there would be a tour of Ash Grove Cement Company in Chanute, Kansas, on Monday, February 3. Anyone wishing to attend can contact Rep. Gary Hayzlett's secretary to make the necessary arrangements.

Chairperson Freeborn asked if anyone wished to request a bill at this time.

Tom Whitaker, Executive Director, Kansas Motor Carriers Association, requested a bill that would amend KSA 65-34, 109, the unlawful acts section of the Kansas Storage Tank Act. (See attachment 1)

Rep. Gary Hayzlett made a motion the bill to amend KSA 65-34, 109, be introduced. Rep. Vaughn Flora seconded the motion. Motion carried.

The Chairperson welcomed Professor James Wadley, Washburn University School of Law, to the committee. He addressed the committee on Kansas Water Law and distributed an outline on the "Consumptive Use of Water in Kansas: What You Should Know". (1) How law of water rights is structured: Rules vary depending on: 1) location of water (surface and ground); 2) status of water (surface and confined); 3) nature of use (consumptive and non consumptive). (2) Major tension in system is derived from: 1) fact that structure was developed largely without regard to accurate scientific knowledge; 2) system wants to keep structure but wants/needs to conform to what is known to be rational. (3) Fundamental nature of the water right itself: 1) limited; 2) usufructary right which is protected as a; 3) real property right; 4) by which access is secured; 5) to a particular quantity of water; 6) to be used; 7) for particular; 8) acceptable purposes. The outline includes the mechanics of the Kansas system. (See attachment 2)

Professor Wadley stated that Kansas is relatively abundantly blessed with water compared to a lot of the states further west of us but compared to a lot of states further east of us are not. So we have to struggle with the same concept that water is scarce and has to be carefully managed. Kansas problems are further compounded because the water is not evenly allocated across the state. In some ways western Kansas has better ground water resources than eastern Kansas. Typically, eastern Kansas has better surface water resources. Looking at water distribution maps for Kansas there are lots of places where it is going to be very difficult to find water on the surface or underground. That puts a lot of responsibility on the legislature to make wise decisions about how the water is going to be allocated. The issues that the legislature will probably increasingly have to deal with are the resource of the water right. Back in the 1970's the Legislature adopted a policy that is now

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON ENVIRONMENT at 3:30 p.m. on January 30, 2003 in Room 231-N of the Capitol.

used by groundwater management districts. The Legislature wanted to give the locals some measure of input into how the water is being used. The Legislature choose to give the Chief Engineer the power to make rules and regulations and to the groundwater management districts the power to make policies and recommendations as to what the rules and regulations should be. Discussion and committee questions followed.

David Pope, Chief Engineer, Water Resources, Kansas Department of Agriculture, was in attendance and addressed committee questions.

Chairperson Freeborn thanked Professor Wadley for addressing the committee today.

The meeting adjourned at 4:45 p.m. The next meeting is scheduled for Tuesday, February 4, 2003.

# HOUSE ENVIRONMENT COMMITTEE GUEST LIST

DATE: January 30, 2003

NAME	REPRESENTING
Tanner Lucas	Rep. Heydler
John C. Botterby	Botterby & Assoc.
Mike Dhrst	Pinegar Smith & Assoc
Tom Whitaker	Ks Motor Carriers Assn.
Carole Jordan	KBA
Edward R. Moses	Ks. Pkg Prod. Assn.
Susan Stow	KANSAS WATER OFFICE
Margaret East	Ks Water office
Charles Byrnes	KS Sierra Club
Eric Bremer	Rep. Carlin
Jim Wadley	Washington env.
U Habutzel	KS Sierra Club
Mary Jane Stattelman	KGFA/ KARA
Ladd Johnson	KLA
Pat Lehman	GMD #4
WAYNE BOSSERT	GMA #4
Brian Shepard	Rep. Miller
David Pope	KDA
Chris Wilson	GMA 3



# KANSAS MOTOR CARRIERS ASSOCIATION

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Member Emeritus

TOM WHITAKER  
Executive Director

## Legislative Bill Request

Before the

### **HOUSE ENVIRONMENT COMMITTEE**

Representative Joann Freeborn, Chairman

Wednesday, January 30, 2003

### **MADAM CHAIRMAN AND MEMBERS OF THE HOUSE ENVIRONMENT COMMITTEE:**

I am Tom Whitaker, executive director of the Kansas Motor Carriers Association. We appear before you today to request legislation to amend K.S.A. 65-34,109, the unlawful acts section of the Kansas Storage Tank Act.

Current law allows the Kansas Department of Health and Environment (KDHE) to assess civil penalties on any person that places motor fuel in an unregistered storage tank. This assessment is over and above the misdemeanor penalty in the statutes. Trucking companies and truck drivers can, and have, been assessed penalties for delivering fuel to unregistered storage tanks. We believe it is the tank owner's responsibility to make sure the storage tank is properly registered prior to ordering the fuel delivery. Trucking companies and their drivers merely receive an order to pick fuel up at a pipeline rack or refinery and deliver the fuel to a specified location. The truck driver is not an enforcement arm of KDHE to make sure all tanks in the state are properly registered.

Madam Chairman, we request that the House Environment Committee introduce legislation to limit KDHE's enforcement actions to the tank owner, as it relates to placing fuel in an unregistered storage tank.

Thank you for the opportunity to present our request to you. I would be pleased to respond to any questions the Committee may have.

*House Environment  
1-30-03  
Attachment 1*

## CONSUMPTIVE USE OF WATER IN KANSAS:

### WHAT YOU SHOULD KNOW

#### GENERAL

##### 1. How law of water rights is structured:

Rules vary depending on

1. location of water (surface and ground)
2. status of water (surface and confined)
3. nature of use (consumptive and nonconsumptive)

##### 2. major tension in system is derived from:

1. fact that structure was developed largely without regard to accurate scientific knowledge
2. system wants to keep structure but wants/needs to conform to what is known to be rational
3. system needs flexibility to adjust to changing needs

##### 3. Fundamental nature of the water right itself:

1. limited
2. usufructuary right which is protected as a
3. real property right
4. by which access is secured
5. to a particular quantity of water
6. to be used
7. for particular
8. acceptable purposes

#### CONSUMPTIVE USE OF SURFACE WATER

HISTORIC: RIPARIAN UNTIL 1945

NOW: Allocate water rights on the basis of

- 1) availability of unappropriated water
- 2) diversion
- 3) application to beneficial use
  - a. Quantity determined by actual use
  - b. Rights are correlative but as determined largely by priority system:  
first in time, first in right
  - c. Current tough issues
    - 1) waste
    - 2) transfers
    - 3) nonuse
    - 4) how to modernize the system without injecting too much

*House Environment  
1-30-03  
Attachment 2*

"insecurity" into the utility of the water right

## CONSUMPTIVE USE OF GROUNDWATER

HISTORIC: Absolute ownership before 1945 (Williams v. City of Wichita)

- 1) water deemed as part of soil
- 2) no limitation on amount or purpose of use
- 3) not really "absolute" since no right to compel water to arrive at property

NOW: UNIFIED SYSTEM: SAME RULES SURFACE AND GROUND

Difficult recurring issues

- 1) well interference  
response: well drilling permits/ well spacing
- 2) Water shortage  
response: "mining" or "safe yield"
- 3) Conjunctive use  
response: reduce user that causes problem
- 4) underground storage  
response: injection well permit/ treat as owned by injector
- 5) critical overuse  
response: adopt general area-wide or intensive use area-wide measures (GMD's)

## MECHANICS OF THE KANSAS SYSTEM

BASIC FRAMEWORK: K.S.A. § 82a-701 et. Seq. Especially K.S.A. 82a-728

### 1. Permits

- a. application must be filed. K.S.A. 82a-709
- b. any person may apply. K.S.A. 82a-708a
- c. must be on forms provided by chief engineer K.A.R. 5-3-4
- d. must pay filing fee. K.A.R.5-3-1(a),K.S.A. 82a-708(a), K.S.A. 82a-727(a)
- e. must show source of water, place of use, maximum rate of use or diversion and total annual quantity of water to be used. K.A.R.5-3-1

f. must show estimated time of completion of proposed works, date of first application of water to use, information justifying rate and quantity sought, location of other users within half mile. K.S.A. 82a-709, K.S.A. 82a-707, K.A.R. 5-3-4.

g. MUST BE FILED BEFORE ANY WORK OF DIVERSION OR STORAGE COMMENCED. K.S.A. 82a-709.

## 2. Criteria

a. application must be made in good faith K.S.A. 82a-711.

b. proposed use must be beneficial K.S.A. 82a-711, K.A.R. 5-1-1

c. proposed rate of diversion AND QUANTITY must be reasonable. K.S.A. 82a-711, 82a-707(d).

d. proposed use must not impair existing use, not prejudicially or unreasonably affect public interest, and will not use fresh water if poorer quality water is technologically and economically feasible. K.S.A. 82a-711.

e. upon completion of work, notice given to chief engineer, certificate issued

## 3. Conditions

a. maximum annual quantity K.S.A. 82a-711

b. maximum rate of diversion

c. specific type of use (domestic, municipal, irrigation, industrial, recreational, water power, stockwater)

d. specific point of diversion

e. specific place of use

f. time limit of less than two years to construct diversion works

g. five years to actually apply water to beneficial use.

h. must allow for the reasonable raising and lowering of static water level or reasonable increase or decrease in stream flow. K.S.A. 82a-711a

i. can require meters or other measurement devices at point of diversion. K.A.R. 5-3-5, K.S.A. 82a-706c

j. cannot perfect water right for more than actually used or quantity actually approved.

4. transfers and changes in place of use must be approved. K.S.A. 82a-708b

5. temporary permits may be issued. K.S.A. 82a-727.

( cannot exceed 6 months nor be granted for more than 1 million gallons. K.A.R 5-9-3

6. Loss and termination

a. abandonment

- 1). intent
- 2). nonuse

b. forfeiture for nonuse

- 1). nonuse for 3 successive years K.S.A. 82a-718
- 2). nonuse without due and sufficient cause
  - a). adequate moisture for crop production
  - b). other preferred supply used but likely to be depleted by drought
  - c). no water available from authorized source
  - d). purpose of use temporarily discontinued to permit soil or water conservation
  - e). management and conservation practices require less water
  - f). CRP

c. Shortage

- 1). general rule: cut back uses with lower priority first. K.S.A. 82a-707(c)
- 2). general rule not followed if
  - a). claims are of equal timing . K.S.A. 82a-707(b)
  - b). area is designated Intensive Groundwater Management Areas K.S.A. 82a-1083(b)
  - c). chief engineer flexibility.
  - d). Failure to maintain beneficial use status. K.S.A. 82a707(a)
  - e). waste. 82a-707(d), -706d,

7. Storage

- a. covered by K.S.A. 24-313
- b. same requirements as for appropriation. K.A.R.5-6-1



c. data required on capacity of reservoir, drainage area, lands that will be inundated, etc.

d. separate permit required for dam if impounds more than 30 acre feet of water. If for non-domestic use, must have water right application approved prior to dam permit being issued.

8. Use of stream channel to conduct water K.S.A. 42-303

9. Liability for unlawful diversion

a. Chief Engineer may request Attorney General to enjoin unlawful diversion. K.S.A. 82a-706d

b. Chief engineer can prevent unauthorized diversions. K.S.A. 82a-706b

c. appropriator can seek injunctive relief against unauthorized user. K.S.A. 82a-716, 82a-725.