

## MINUTES OF THE HOUSE ENVIRONMENT COMMITTEE

The meeting was called to order by Chairman Joann Freeborn at 3:30 P.M. on February 22, 2005 in Room 231-N of the Capitol.

All members were present.

Committee staff present:

Raney Gilliland, Legislative Research Department  
Emalene Correll, Legislative Research Department  
Lisa Montgomery, Revisor of Statutes Office  
Pam Shaffer, Committee Secretary

Conferees appearing before the committee:

Others attending:

See attached list.

Chairperson Freeborn called the meeting to order. Guests were reminded to sign the guest log. The agenda for next Thursday, March 3rd's meeting is a presentation by the Kansas Water Office. Fiscal notes for **HB 2390 - Allows the Kansas Corporation Commission to increase financial assurance responsibilities for operators drilling wells after 1996** and **HB 2400 - Establishes the irrigation transition assistance program** were passed out to all Committee members. A written "rebuttal testimony" from John Fierro on **HB 2393 - Controlling the release of water from Cedar Bluff Reservoir** also was passed out to each Committee member. (See attachment 1)

Chairperson Freeborn opened **HB 2390** for final action.

Representative Sloan motioned and Representative Johnson seconded recommending **HB 2390** favorable for passage. Raney Gilliland, Legislative Research explained the bill. Committee discussion followed. Motion carried. Representative Light will carry the bill.

Chairperson Freeborn opened **HB 2400** for final action. A proposed balloon was passed out to each committee member (See attachment 2) Representative Sloan motioned and Representative Johnson seconded the motion to adopt the balloon. Motion carried.

Representative Schwartz made a motion to strike from the bill the sentence dealing with rules and regulations in place on April 1, seconded. Committee discussion followed. Motion failed.

Representative Sloan made a motion to provide that there would be no prohibition for land being irrigated by another source even if the water right originally associated with the land was dismissed and returned to that state. Representative Johnson seconded, Committee discussion followed. Motion carried.

Representative Hayzlett made a motion, seconded by Rep Olson to limit this to the Rattlesnake Creek area. Committee discussion followed. Motion failed.

Representative Powers motioned to table **HB 2400**, Representative Thull seconded the motion. Motion failed.

Representative Johnson motioned, seconded by Representative Sloan to recommend **HB 2400**, as amended favorable for passage. Motion carried. Chairperson Freeborn will announce later who will carry the bill.

Representative Freeborn adjourned the meeting at 4:46. The next meeting is scheduled for March 3.

HOUSE ENVIRONMENT COMMITTEE GUEST LIST

DATE: 02/22

NAME	REPRESENTING
Mary Jane Staniewicz	KGFA
Leslie Kaufman	Ks Coop Council
Jack Henderson	Pawnee CO. Economic Development Commission
Kim Barnes	✓ ✓
Dave Brenn	K.W.C.
Robin Jennison	GMD #1
Don Reza	KACD
Dan Ward	KS Wildlife Federation
Kent Weatherby	KS River Water Assur. District
Mark Heim	SCC
SEAN MILLER	KS Dairy Assoc
CV Cotsoradis	KS Dept Ag
Shelley	Hem Law Firm
<b>GREG A. FOLEY</b>	<b>JCC</b>
SCOTT B. CARLSON	SCC

REBUTTAL TESTIMONY  
SUBMITTED TO COMMITTEE  
ON ENVIRONMENT BY  
PROponents OF H.B. 2393

Date: February 22, 2005

Proponents of HB 2393 were not afforded time to rebut remarks made by the opponents due to time constraints. Please note that the only opponents were state agencies. No one else appeared opposed to the Bill.

1. Mr. Pope stated that this Bill would take water rights in violation of the Water Appropriations Act. Nothing could be farther from the truth.

The water we're talking about is the water owned by the State of Kansas stored in Cedar Bluff Reservoir and managed by KWO and KDWP. It doesn't belong to anyone else and no one else has a right to it. (See Joe Harkins' letter attached) It represents the old irrigation district's water rights that you (the Legislature) authorized the State to purchase for \$360,000 from the Bureau of Reclamation in 1989. Please recall that the irrigation district ruined the Lake by indiscriminate releases and didn't even pay for the water. The Bureau shut the district down in 1978.

All we're asking the Legislature to do is order the transfer of this water storage, that you purchased, to the management of one state agency (KDWP) rather than two (KDWP and KWO). This is not taking anyone's rights, it simply changes management and does not violate any law.

2. The Bill also would change the use of the KWO stored water from "artificial recharge" to "water-based recreation". This can be done and has been done in procedures permitted in the Kansas Water Appropriations Act and the Kansas Water Plan. The KWAA processes applications for changes to water rights and the type of use. The Division of Water Resources administers the KWAA and can be ordered by you to implement the procedure.

3. In 1994 KWO and KDWP entered into an Operations Agreement and arbitrarily decided between themselves who could and would do what with the stored water; it also discusses release procedure and public notification. This Legislature may very easily order these two agencies to change that Operations Agreement to do whatever you order. In fact, you already ordered some changes by your 2003 Session Laws Proviso, but that was totally ignored by KWO and KDWP. (See Proviso language).

4. What is so inexplicable to us is how KWO and KDWP can claim this Bill would change existing law, when these agencies violated the law and their own policies? For example:

A. Director of KWO Harkins says "Hays has no right to the water stored in the Lake", yet after 15 secret meetings, he virtually turns over the keys to that stored water (5110 acre feet) to Hays.

B. The 5110 acre feet was to be used for artificial recharge, yet the secret agreement of 9/22/04 clearly reveals that it is designed for municipal use which is not permitted. Only Hays and Russell can call for releases; no one else below the dam.

C. Instead of following the legislative intent plainly expressed in the 2003 Proviso and exploring the possibility of KWO transferring its water to KDWP, KWO gives the 5110 acre feet to Hays "for the life of the Lake".

5. Secretary Hayden warned you that, as much as he would like to have control of KWO water, he would have to raise hunting and fishing fees to pay the Bureau the "operation and maintenance" expenses presently being paid by KWO. The Secretary must have overlooked the possibility that the money you appropriated to KWO for that expense could be transferred to his budget with no pr...

Don't you all think that if this legislation was going to take away or change other people's water rights that this meeting room would be filled with opponents? In fact 15% of the membership of Western Kansas Water Watchers consists of Hays citizens. This Bill protects our water for the most beneficial use-Recreation.

Just give us a minute on the issue of "depletion". A very big item in Kansas Water Law. A "depletion situation" exists when the amount of water withdrawn from an aquifer continually exceeds the recharge. Groundwater depletion may contribute to stream flow depletion and ecosystem disruption. No one will deny that not only the water in the reservoir, but all the water above and below the dam in the Smoky Hill River aquifer is being depleted. Mr. Pope has in fact, placed all of that area including Hays in Intensive Groundwater Use Control Areas (IGUCA). This means his Division can place restrictions on existing water rights or shut them down until the situation changes. Instead of releasing state owned water from a depleted lake and allowing it to travel about 40 miles downstream, with tremendous loss along the way, wouldn't it be a greater beneficial use to keep the stored water for a dire emergency and administer the water rights west of the Lake in an attempt to increase inflow into the Lake. You can order Mr. Pope to do so.

Releasing water from a depleted Lake is a dead end. Not only will the Lake be gone in a few years, but Hays will still be looking for water. This policy doesn't make sense. After all, the KWAA, defended so jealously by Mr. Pope, has six (6) components:

#6 The Administration and enforcement of water rights, minimum desirable stream flows (MDSF) and protection of releases from reservoir storage.

We might add that while the State almost always imposes MDSFs on all Kansas Rivers, there are none imposed on the western section of the Smoky Hill because 80% of the time there is no flow.

Please help us to keep what we have here.

Respectfully submitted Proponents

By: \_\_\_\_\_  
John Fierro

P.S. We were all very dismayed at the way committee member Johnson disrespected Senator Ostmeyer. Representative Johnson acted like a bully.

STATE OF KANSAS

KANSAS WATER OFFICE

Clark Duffy  
Director



Kathleen Sebelius, Governor

901 S. Kansas Avenue  
Topeka, Kansas 66612-1249

785-296-3185  
FAX 785-296-0878

January 30, 2003

Glen Riggs  
PO Box 223  
Wakeeney, KS 67672

*LETTER BROUGHT IN FROM SUBSCRIBER*

Dear Mr. Riggs:

Thank you for your letter concerning utilization of Cedar Bluff Lake for public water supply to Russell and Hays.

\* The Kansas Water Office has completed an analysis that indicates that Cedar Bluff Lake is not a viable option for a sustainable, significant, long-term public water supply. This analysis and public discussion in 1999 led the Kansas legislature to pass a proviso that prohibits the use of Cedar Bluff Lake for public water supply. The Kansas Water Office has no intention of violating this legislative direction by selling public water supply from Cedar Bluff Lake. \*

The City of Russell does have an existing right for storage and release of water from Cedar Bluff Lake. Russell's water right allows the storage of up to 2,700 acre-feet of water and the release of up to 2,000 acre-feet in any one year. These quantities are contingent upon the water being available in the City's portion of Cedar Bluff Lake storage.

The Kansas Water Office is the State's water planning agency. As such, we have a responsibility to assist local communities with planning and identification of source water for public water supply. The Kansas Water Office has worked with the cities of Hays and Russell for 20 years to find an acceptable long term supply of water. Currently, the Kansas Water Office is working with the Corps of Engineers on a study to identify the feasibility and most cost effective solution of providing water to the area from Kanopolis Lake. We believe that this is the best long term solution for all involved.

In 1996 and 1997, the Kansas Water Office held meetings with public water suppliers in the Smoky Hill-Saline Basin. Several of the public water suppliers, including Hays and Russell, expressed interest in using Kanopolis Lake as a water source. As a result of these discussions, the Kansas Water Office asked the Corps of Engineers to study reallocation of storage to water supply purposes. In 2002, the Kansas Water Office and the Corps of Engineers finalized a \$4.2 million contract for the purchase of water storage in Kanopolis Lake in order to have water available for public water supply in the region.



Glen Riggs  
January 30, 2003  
Page 2

As a result of the Kanopolis Lake storage purchase, public water supply is available from this source. Post Rock Rural Water District is currently using Kanopolis Lake as its sole source. Public Wholesale Water Supply District No. 15 reaffirmed their interest in Kanopolis Lake by application for a water marketing contract on June 17, 2002. The Kansas Water Office completed preliminary findings authorizing negotiations with Public Wholesale Water Supply District No. 15 in July of last year. My staff stands ready to begin negotiations for a contract from Kanopolis Lake.

Thank you again for your interest in and comments concerning Cedar Bluff Lake.

Sincerely,



Clark Duffy  
Director

CD:cb

CC: President Public Wholesale Water Supply District No.15  
City Manager  
City of Hays



K A N S A S

KANSAS WATER OFFICE

KATHLEEN SEBELIUS, GOVERNOR

May 23, 2003

John T. Bird, Attorney  
City of Hays  
113 W. 13<sup>th</sup> St.  
Hays, Kansas 67601-6313

RE: Water supply for the City of Hays, Kansas

Dear Mr. Bird:

I am writing in response to your letter of April 28, 2003, which discusses the City of Hays' need to expeditiously obtain an adequate water supply, not only for its current uses, but also for future growth in the City of Hays. Governor Sebelius fully supports the City of Hays' goal.

To begin that process of cooperation between the City of Hays and the State, I met with you and Randy Gustafson on Friday, May 16, 2003. The state of Kansas will do everything that it can to assist the City of Hays in obtaining an adequate water supply insofar as it is able to do so within the powers and jurisdiction of the State.

All this having been said, I would like to respond to some of the points that you have raised in your letter in an attempt to clear up some apparent misunderstandings.

*Kansas Water Law*

Kansas has one of the most comprehensive and efficient water administration systems in the 17 western states, and one of the most important principles of the Kansas water appropriation act is the principle of "first in time is first in right." K.S.A. 82a-707(b) provides in part, "...the date of priority of an appropriation right, and not the purpose of use, determines the right to divert and use water at any time when the supply is not sufficient to satisfy all water rights that attach to it."

901 S. KANSAS AVENUE, TOPEKA, KS 66612-1249

Voice 785-296-3185 Fax 785-296-0878



John T. Bird, Attorney  
RE: City of Hays water supply  
May 23, 2003  
Page 6

Since 1978, the chief engineer has had a regulation, K.A.R. 5-4-1, setting forth the procedures for a water right owner to file a complaint that its water right is being impaired. To our knowledge, the City of Hays has never filed a formal request to have its water right administered in priority on the Smoky Hill River. If such a request were filed, the chief engineer would act on that request and determine whether the City of Hays' water rights were being impaired. If they were, he would determine whether administration of junior water rights would provide any significant benefit to the City of Hays at the time that the City of Hays needed the water. It should be noted at this point that determination of whether water rights above a reservoir could be administered to provide benefits to a well field below the reservoir is not a simple matter, and considerable time and expense would be necessary to make such a determination. At this time that the City of Hays has no water right of any kind in Cedar Bluff Reservoir, nor does it have any contract with the Bureau of Reclamation for storage of water in Cedar Bluff. At this time the City of Hays has no legal right to call for releases of stored water. The city's only apparent option is to call for water entering Cedar Bluff Reservoir to be by-passed through the reservoir. This assumes water is flowing into the reservoir at a time when the City of Hays' use of water is being impaired by junior water right holders, and administration of those water rights will actually provide the City of Hays with a significant increase of water. \*

#### *KWO roadblocks*

Neither the chief engineer nor the Kansas Water Office has denied any request from the City of Hays or the City of Russell to utilize any source of water. They have however, explained to the City of Hays on numerous occasions the legal processes and requirements necessary to obtain and use water from various sources. These were not new requirements that were imposed on the City of Hays. The chief engineer and the Kansas Water Office were merely explaining the statutory and regulatory restrictions that apply to all water users in the State.

Kansas Water Office does have a desire to sell water to users with a need. The Kansas Water Office has had long-term discussions with Public Wholesale Water Supply District No. 15 regarding the use of Kanopolis Reservoir. The discussions predate June 10, 1996, when the District filed an application to negotiate a water supply contract.

The Kansas Water Authority must provide final approval of water marketing contracts. Their longstanding policy has been focused on preventing the sale of water until the need for water is documented. The Authority has never had a policy of actively promoting the sale of water from State storage.

#### *Wildlife and Parks Roadblocks*

Interest by the State in acquiring the Edwards County Ranch has not waned. The State is still willing to negotiate a possible purchase of the ranch.



John T. Bird, Attorney  
RE: City of Hays water supply  
May 23, 2003  
Page 7

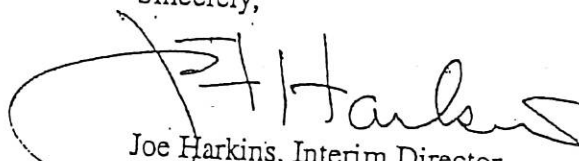
*Legal issues and remedies*

Finally, you raised the issue of whether the reduction of a water right constitutes a compensable taking. The State would agree that the takings clause of the Fifth Amendment to the United States Constitution prohibits the State from taking private property for public use without compensation and is made applicable to the states through the Fourteenth Amendment. Granting of a water right does not guarantee that waters will be available and water is subject to appropriation only upon legal and physical availability. The State does not agree that the partial reduction in "water usage" imposed upon the City of Hays by the lawful IGUCA proceedings is a compensable taking. The IGUCA order was issued in May, 1984, and was not timely appealed. For this and many other reasons, the State believes that the City of Hays is not entitled to compensation for water that it may not have diverted since 1984.

*Conclusion*

I assure you that the state of Kansas, including the Kansas Water Office, Kansas Department of Agriculture Division of Water Resources, and the Kansas Department of Wildlife and Parks, and any other appropriate state agencies, will work together with the City of Hays to resolve its water supply problem. I will be your contact person for this joint effort.

Sincerely,

  
Joe Harkins, Interim Director  
Kansas Water Office

cc: Governor Kathleen Sebelius  
Adrian Polansky, Secretary of Agriculture  
Mike Hayden, Secretary of Wildlife and Parks  
David L. Pope, Chief Engineer, Division of Water Resource, Kansas Department of  
Agriculture  
Randy Gustafson, City Manager, Hays, Kansas  
Rod Bremby, Secretary of Health & Environment  
Lt. Governor John Moore, Secretary of Commerce and Housing

# HOUSE BILL No. 2400

By Committee on Environment

2-9

9 AN ACT concerning water; relating to the irrigation transition assistance  
10 program; ~~amending K.S.A. 2-1010 and K.S.A. 2004 Supp. 2-1015 and~~  
11 ~~repealing the existing sections.~~

12  
13 *Be it enacted by the Legislature of the State of Kansas:*

14 ~~Section 1. K.S.A. 2004 Supp. 2-1015 is hereby amended to read as~~  
15 ~~follows: 2-1015. (a) Appropriations may be made for grants out of funds~~  
16 ~~in the treasury of this state for terraces, terrace outlets, check dams, dikes,~~  
17 ~~ponds, ditches, critical area planting, grassed waterways, tailwater recov-~~  
18 ~~ery irrigation systems, precision land forming, range seeding, detention~~  
19 ~~and grade stabilization structures and other enduring water conservation~~  
20 ~~practices installed on public lands and on privately owned lands and, the~~  
21 ~~control and eradication of sericea lespedeza as provided in subsection (a)~~  
22 ~~of K.S.A. 2-1908, and amendments thereto, on public lands and on pri-~~  
23 ~~vately owned lands. Except as provided by the multipurpose small lakes~~  
24 ~~program act, any such grant shall not exceed 80% of the total cost of any~~  
25 ~~such practice.~~

26 ~~(b) A program for protection of riparian and wetland areas shall be~~  
27 ~~developed by the state conservation commission and implemented by the~~  
28 ~~conservation districts. The conservation districts shall prepare district pro-~~  
29 ~~grams to address resource management concerns of water quality, erosion~~  
30 ~~and sediment control and wildlife habitat as part of the conservation dis-~~  
31 ~~trict long range and annual work plans. Preparation and implementation~~  
32 ~~of conservation district programs shall be accomplished with assistance~~  
33 ~~from appropriate state and federal agencies involved in resource~~  
34 ~~management.~~

35 ~~(c) Subject to the provisions of K.S.A. 2-1010, and amendments~~  
36 ~~thereto, any holder of a water right, as defined by subsection (c) of K.S.A.~~  
37 ~~52a-701, and amendments thereto, who is willing to voluntarily return all~~  
38 ~~or a part of the water right to the state shall be eligible for a grant not to~~  
39 ~~exceed 80% of the total cost of the purchase price for such water right.~~  
40 ~~The state conservation commission shall administer this cost share pro-~~  
41 ~~gram with funds appropriated by the legislature for such purpose. The~~  
42 ~~chief engineer shall certify to the state conservation commission that any~~  
43 ~~water right for which application for cost share is received under this~~

1 ~~section is eligible in accordance with the criteria established in K.S.A. 2-~~  
2 ~~1919, and amendments thereto.~~

3 ~~(1) (1) Subject to appropriation acts therefor, the state conservation~~  
4 ~~commission shall develop the Kansas water quality buffer initiative for~~  
5 ~~the purpose of restoring riparian areas using best management practices.~~  
6 ~~The executive director of the state conservation commission shall ensure~~  
7 ~~that the initiative is complementary to the federal conservation reserve~~  
8 ~~program.~~

9 ~~(2) There is hereby created in the state treasury the Kansas water~~  
10 ~~quality buffer initiative fund. All expenditures from such fund shall be~~  
11 ~~made in accordance with appropriation acts upon warrants of the director~~  
12 ~~of accounts and reports issued pursuant to vouchers approved by the~~  
13 ~~executive director of the state conservation commission or the executive~~  
14 ~~director's designee. Money credited to the fund shall be used for the~~  
15 ~~purpose of making grants to install water quality best management prac-~~  
16 ~~tices pursuant to the initiative.~~

17 ~~(3) The county or district appraiser shall identify and map riparian~~  
18 ~~buffers consisting of at least one contiguous acre per parcel of real prop-~~  
19 ~~erty located in the appraiser's county. Notwithstanding any other provi-~~  
20 ~~sions of law, riparian buffers shall be valued by the county or district~~  
21 ~~appraiser as tame grass land, native grass land or waste land, as appro-~~  
22 ~~priate. As used in this subsection (3), "riparian buffer" means an area of~~  
23 ~~stream-side vegetation that: (A) Consists of tame or native grass and may~~  
24 ~~include forbs and woody plants, (B) is located along a perennial or inter-~~  
25 ~~mittent stream, including the stream bank and adjoining floodplain, and~~  
26 ~~(C) is a minimum of 66 feet wide and a maximum of 180 feet wide.~~

27 ~~(c) The state conservation commission shall adopt rules and regula-~~  
28 ~~tions to administer such grant and protection programs.~~

29 ~~(f) Any district is authorized to make use of any assistance whatsoever~~  
30 ~~given by the United States, or any agency thereof, or derived from any~~  
31 ~~other source, for the planning and installation of such practices. The state~~  
32 ~~conservation commission may enter into agreements with other state and~~  
33 ~~federal agencies to implement the Kansas water quality buffer initiative.~~

34 ~~Sec. 2. K.S.A. 2-1919 is hereby amended to read as follows: 2-1919.~~

35 ~~(a) Except as provided by subsection (b), any application for cost share~~  
36 ~~for the purchase of the water right under the provisions of K.S.A. 2-1915,~~  
37 ~~and amendments thereto, shall be subject to the following limitations:~~

38 ~~(1) The water right is an active vested or certified water appropriation~~  
39 ~~right that has not been abandoned under the provisions of K.S.A. 92a-~~  
40 ~~719, and amendments thereto.~~

41 ~~(2) (A) in the case of a water right for diverting groundwater, such~~  
42 ~~water right is in an area where the rate of withdrawal of groundwater~~  
43 ~~equals or exceeds the rate of recharge and the chief engineer has closed~~

1 the area to further appropriations and designated the area as being in  
 2 need of aquifer restoration; (B) in the case of a water right for diverting  
 3 groundwater or surface water, such water right is within a stream reach  
 4 where the chief engineer has closed the stream reach to further appro-  
 5 priations and designated the stream reach as being in need of stream  
 6 recovery;

7 (3) a local entity has provided an assurance that it will pay at least  
 8 20% of the purchase price negotiated by the entity and the holder of the  
 9 water right; and

10 (4) the holder of the water right participates in the cost share pro-  
 11 gram and agrees to return the water right to the custodial care of the  
 12 state; and

13 (1) water rights returned to the custodial care of the state through  
 14 participation in the irrigation transition assistance program shall be per-  
 15 manently dismissed by the chief engineer of the division of water resources  
 16 of the Kansas Department of agriculture.

17 (b) In the case of a purchase of a surface water right from outside  
 18 the state, such purchase shall be considered and evaluated by the chief  
 19 engineer on the basis of the potential of the water right to provide stream  
 20 recovery within a designated stream reach.

21 New Sec. 3: (a) There is hereby established the irrigation transition  
 22 assistance program. Such program shall be administered by the state con-  
 23 servation commission for the purposes of issuing irrigation transition  
 24 grants for privately owned lands, subject to the provisions set forth in  
 25 K.S.A. 2-1915 and 2-1919, and amendments thereto.

26 (b) The state conservation may receive and expend from the federal  
 27 government, or any public or private source, for the purpose of carrying  
 28 out the provisions of this section.

29 (c) The state conservation commission shall adopt rules and regula-  
 30 tions as necessary for the administration of this section. All rules and  
 31 regulations in existence on March 1, 2005, shall continue to be effective  
 32 and shall be deemed to be duly adopted rules and regulations of the state  
 33 conservation commission until revised, amended, revoked or nullified  
 34 pursuant to law.

35 Sec. 4, K.S.A. 2-1919 and K.S.A. 2004 Supp. 2-1915 are hereby  
 36 repealed.

37 Sec. 5: This act shall take effect and be in force from and after its  
 38 publication in the statute book.

New Section. 1.

only

water rights

The irrigation transition assistance program shall expire three years from the effective date of the first fiscal year for which moneys are appropriated therefor.

commission

April 1, 2005

(d) Water rights returned through participation in the irrigation transition assistance program shall be permanently dismissed by the chief engineer of the division of water resources of the Kansas department of agriculture.

2