

MINUTES

SPECIAL COMMITTEE ON ENVIRONMENT

November 30, 2004
Room 519-S—Statehouse

Members Present

Representative Joann Freeborn, Chairman
Senator Mark Taddiken, Vice Chairman
Senator Christine Downey
Senator Larry Salmans
Senator Ruth Teichman
Representative Don Dahl
Representative Larry Powell
Representative Kathleen Reardon
Representative Sharon Schwartz
Representative Jan Scoggins-Waite
Representative Josh Svaty

Staff Present

Raney Gilliland, Kansas Legislative Research Department
Amy VanHouse, Kansas Legislative Research Department
Mary Galligan, Kansas Legislative Research Department
Mary Torrence, Revisor of Statutes Office

Others Present

See attached sign-in sheet.

The Chairman called the meeting to order at 10:15 a.m. The Committee approved the minutes of the September meeting. The Committee was informed that minutes of today's meeting and final reports including recommendations made today will be mailed to members for approval.

The Committee reviewed the draft Committee report regarding Kansas Water Authority voting procedures ([Attachment 1](#)). The Chairman directed the Committee's attention to a bill draft pertinent to the Kansas Water Authority topic ([Attachment 2](#)). Senator Downey asked why a bill would be necessary if the bulk of the testimony at the hearing indicated that the current procedures do not present a problem for the Authority. *Representative Dahl moved that the draft bill be adopted for purposes of discussion. Representative Powell seconded the motion.*

Amy VanHouse, Kansas Legislative Research Department, explained that the bill draft would specifically preclude any *ex officio* member from voting in any Authority meeting or any meeting of

a sub-group of the Authority. The Chairman directed the Committee's attention to the amendatory language on page three of the bill draft which embodies the policy change regarding voting by *ex officio* members of the Water Authority. Mary Torrence, Revisor of Statutes Office, explained that the term "*ex officio*" does not, in and of itself, determine whether the member can vote. The term simply indicates members who serve by virtue of their office. When a statute is silent regarding the authority to vote, *ex officio* members may vote.

Representative Powell expressed the opinion that the bill should preclude *ex officio* members from making or seconding motions in Authority Committee meetings. Representative Schwartz expressed support for that change to the bill draft.

Senator Taddiken asked whether a simple majority could approve a motion in an Authority meeting. Joe Fund, Kansas Water Office, responded, yes.

Senator Teichman made a substitute motion to introduce the bill draft. The motion was seconded by Representative Powell. Discussion of the motion followed. Senator Downey spoke in opposition to the motion. *The motion passed 6-4.*

Representative Powell moved to amend the draft bill to prohibit ex officio members from making or seconding motions in committee meetings. The motion was seconded by Representative Schwartz. Discussion of the motion followed. Representative Powell clarified that, under the policy embodied in his motion, *ex officio* members of the Authority would serve only as sources of information. Senator Taddiken expressed the opinion that he does not object to *ex officio* members making motions, but that he objects to *ex officio* members seconding motions. *The motion failed.*

The Chairman asked the Committee whether it had a recommendation regarding whether the bill recommended for introduction should start in the House or in the Senate. The Committee did not express a preference.

The Chairman directed the Committee's attention to the Irrigation Transition issue. She reported that the State Conservation Commission requested additional time to develop rules and regulations before any legislation is introduced creating an irrigation transition program.

The Chairman recognized Ms. VanHouse who reviewed for the Committee the draft report on conversion of irrigated land to non-irrigated use (Attachment 3). The Committee discussed conclusions and recommendations to be included in the report to the 2005 Legislature.

The Chairman recognized Greg Foley, Executive Director of the State Conservation Commission (SCC), to respond to a question regarding whether landowners or lessees would receive payments under the pilot program. He responded that the SCC would not become involved in a matter best addressed in the terms of a lease. The SCC's position is that it should not be involved in how the landowner and lessee arrange their business. Mr. Foley stated that the SCC would like to have an opportunity to review all comments on its proposed rules and regulations before recommending statutory language. An example of a detail that needs to be explored is the maximum amount of land in a county that could be enrolled in the program. The SCC's proposed regulations would limit enrollment to 10 percent of a county's total farmed acres.

Mr. Foley explained that the FY 2006 budget request would be financed by the State Water Plan Fund. Senator Taddiken asked whether landowners would be required to share payments with their lessee in the pilot program. Mr. Foley responded "no." Representative Powell asked for clarification of who could apply for the payments. Mr. Foley responded that any landowner in a priority area who is using irrigation could apply for and receive payment. He stated that if the objective is protecting water, land ownership should not be an issue.

Senator Salmans asked Mr. Foley why there is a need to buy back water rights when the state has in place a mechanism designed to control or reduce water use. Mr. Foley stated that, in some instances, it might be more efficient and less expensive to buy back water rights than to use a regulatory mechanism for reducing water use. The latter may result in higher costs to the state to monitor, litigate, and regulate than the purchase arrangement.

Senator Teichman asked whether any other state is conducting a similar program. Tracy Streeter, Kansas Water Office, deferred to David Pope, Chief Engineer, Department of Agriculture. Mr. Pope noted that similar programs are seriously being considered in parts of Colorado and Nebraska in response to the Republican River Compact settlement. He stated that none are in place yet and that those states are very interested in the approach Kansas is taking. The question before policymakers is which mix of approaches is best. He said that he continually hears resistance to the use of regulatory power. The state's water regulators have tried to find the appropriate mix between voluntary and regulatory approaches. The voluntary program may be more effective in areas where use of regulatory authority would not be effective. They see this pilot program as complimentary to regulatory authority that currently exists. He also cited a program that is being implemented in Texas.

The Chairman asked whether the proposed regulations will be in effect statewide, or whether they would only apply to those portions of the Ogallala Aquifer that are not rechargeable. Mr. Foley responded that eligibility requirements in the proposed rules effectively limit those areas of the state where landowners can participate in this program.

Senator Salmans asked the SCC to keep an eye on how many absentee landowners take advantage of this program to the detriment of Kansas residents entering the farming economy.

The Chairman asked for Committee discussion and recommendations on this topic. Representative Dahl suggested that the report include an expression of support for the pilot program, and a statement that the program should not be implemented until federal money becomes available. He said that it's advisable to have rules and regulations in place in anticipation of the availability of funding. Representative Dahl asked whether any additional personnel would be required in the SCC to implement the program. Mr. Foley responded that at the level of funding requested for FY 2006, no additional personnel would be required by the Commission. He noted that the Chief Engineer would experience a sufficient work load increase as a result of adoption of the proposed regulations, and he may need assistance of an additional 0.5 FTE.

Senator Salmans recommended that payments should be made only to private landowners who enroll in the pilot project. He expressed concern that public entities who hold water rights would enroll in the program.

Senator Taddiken moved that the Committee report express support for legislation creating an ongoing assistance grant program pending receipt of federal funds. The proposed legislation would include authority to adopt rules and regulations. The motion was seconded by Senator Downey. Discussion of the motion followed. Questions were raised regarding whether the pilot program could be used to determine the impact of a transition program on local communities. The Committee discussed whether such a determination could be made if the pilot program was conducted for three years. The maker of the motion and the second agreed to amending the motion to require such an impact assessment and to impose a three-year sunset on the program. Senator Downey suggested that the Committee report indicate that the program should assign a priority to non-public lands. The motion of Senator Taddiken passed. Representative Reardon asked to be recorded as a "no" on the motion because she thinks the review should be conducted in fewer than three years.

Representative Powell moved that any payments from the program should be made to non-

public landowners. The motion was seconded by Senator Salmans. Discussion followed. The motion passed 6-5.

The Chairman recognized Representative Ostmeyer in the gallery.

The Committee recessed until 1:30 p.m.

Afternoon Session

The Chairman recognized Ms. VanHouse, who reviewed the draft report on the “Economic Impact of Not Maintaining the Recreational Water Pool Level at Cedar Bluff Reservoir” (Attachment 4). Committee discussion followed the review.

The Committee asked about the intent of the second exception in the *proviso* in 2004 HB 2675. Joe Harkins, Governor’s office, was recognized to respond. He informed the Committee that the Water Office requested the second exception during the 2004 Session specifically to enable completion of negotiation of the agreement recently entered into with Russell and Hays. Those negotiations resulted in the operations agreement reached in September. Senator Downey confirmed that, as a member of the Senate subcommittee and the Conference Committee that acted on that *proviso*, it was her intent that the operations agreement with Hays be completed under authority of the *proviso*.

Representative Powell asked whether there was a *proviso* addressing this issue in the 2003 appropriation bill. Ms. VanHouse responded that there was, but that it was worded differently. Representative Powell asked whether the 2003 *proviso* directed what should be done with the 5,100 acre feet of water in contention. Ms. VanHouse responded that the *proviso* prevented expenditure of funds for the release of water for purposes enumerated in the *proviso*. She explained that the 2004 Conference Committee on HB 2675 added the two exceptions to the language initially crafted during the 2003 Session. The exceptions were created in response to the Water Office’s request to the Conference Committee for clarification of the 2003 language that would allow improved management of the water in the reservoir. Senator Downey said beneficiaries of the 2004 language would be the cities of Hays and Russell and the Water Office. Mr. Harkins said the stream was the primary beneficiary while secondary beneficiaries were those cities that obtain water from the stream. Mr. Harkins pointed out to the Committee that during 2003 no releases were made from the reservoir.

Representative Powell stated that he was unclear regarding how the Legislature could have provided an exception pertinent to an agreement that did not exist at the time. He stated that the Legislature never acts on something it has not seen or does not understand.

Senator Salmans stated that the Senate Ways and Means Committee in 2004 did not discuss allowing releases. He understood the exception to be only those operating agreements in effect at the time. Senator Downey stated that the Committee approved the exception because it was approving the discussion among willing parties. She stated that the Committee did not ask about specific situations to which the exceptions might apply.

Senator Taddiken asked whether the artificial recharge pool is part of the joint use pool. He observed that the *proviso* does not appear to address the artificial recharge pool.

The Chairman pointed out that members have copies of a Water Office Memorandum documenting a request from the Smoky Hill-Saline Basin Advisory Committee (BAC) regarding use

of water for artificial recharge ([Attachment 5](#)). She observed that the Smoky Hill-Saline BAC request is moot if the Attorney General finds the current operating agreement to be valid. Tracy Streeter, Kansas Water Office, informed the Committee that the Office has approached the Federal Bureau of Reclamation regarding reallocation of storage in the reservoir for recreation. He stated that any such reallocation would involve negotiation with the federal agency and might require Congressional action. The upshot of that action might be elimination of any return flows that would have occurred if the reservoir waters had continued to be used for irrigation.

Mr. Harkins stated that three percent of the water in the reservoir was set aside to recharge the river below the dam when the state initially became involved. He stated that the designated amount has not been released over the years. He also said that the Committee has been told releases from the reservoir will go to cities when, indeed, it will not help cities in a period of drought. During this latest drought, it became apparent that the three percent had not been released over the years, and that fact led to the latest agreement. Hays and Russell have entered into agreements to get water from Wilson Reservoir, because they know Cedar Bluff is not a stable source of water.

The Chairman directed the Committee's attention to a document provided by the Water Office regarding the history of Cedar Bluff Reservoir ([Attachment 6](#)). Earl Lewis, Kansas Water Office, reviewed the Chronology of Cedar Bluff Reservoir. He observed that since the 1992 reformulation, there have been no releases from the joint-use pool. He described the purpose of the artificial recharge pool (3 percent) is to keep downstream rights-holders whole via return flow. He said that was recognized in the 1987 memorandum of understanding. Subsequent to reaching that agreement, there were four or five years of drought, so no water was available in the artificial recharge pool. When the amount of rain increased during the early 1990s, the artificial recharge pool became available for its original purpose, but since there was sufficient rain, no releases were required.

Representative Scoggins-Waite asked whether the problem was that Hays was not part of the reservoir water use agreement from the beginning. Mr. Lewis responded that it certainly would have been beneficial to the city of Hays to have been involved from the beginning. Hays has some interest because it developed its water rights at a time when there was return flow from irrigation. So, the city has recently called upon rights it developed anticipating that return flow.

Representative Schwartz asked why the draft operation agreement that was in place a year ago was not made public, so the Committee could have seen what was being contemplated. Mr. Lewis responded that from the legislative perspective there was not a request to see the draft agreement. More importantly, the agreement was actively being negotiated, so it was not in a state appropriate to share. Mr. Lewis stated that part of the reason that the 2003 *proviso* was no longer needed was because of the accounting agreement reached in 2003. Representative Schwartz stated that no information was provided to the Appropriations Committee regarding the agreement.

Senator Taddiken asked what the triggers are to a release under the most recent agreement. Mr. Lewis stated that there are two triggers: stream flow above and below the Hays and Russell well fields. He stated that the reservoir cannot provide water at all times because the artificial recharge pool's volume is insufficient for all the needs even when it contains water. It is that set of facts that led to the 1984 agreement.

Senator Salmans asked whether anyone other than Hays has complained about water rights infringement. Mr. Pope stated that a number of water rights holders complained in the mid-1980s about the lack of streamflow. When restrictions were applied to people below the Cedar Bluff dam, there were complaints regarding treatment of people above the reservoir. As a result, the controls were imposed on the upper portion of the stream.

Mr. Pope explained that the Water Appropriations Act governs distribution of water, but that the expectation at the time of the reformulation was that the water would be there. So, he did not

require creation of an operation plan in the 1980s. He said that was a mistake. He explained that Hays' water right is senior to the creation of the Cedar Bluff reservoir. He observed that water can either be allocated in accordance with an operation agreement or by allowing the water in the lake to be released to Hays in accordance with the city's senior right.

Senator Taddiken asked how large Hays' water right is. Mr. Pope replied that Hays has three:

1. 1600 acre feet;
2. 900 acre feet; and
3. a more junior right for 300 acre feet (which did not add net quantity).

He stated that another senior right is located below the reservoir, but that it gets water because of seepage.

Mr. Lewis stated that the most recent operating agreement is a solution entered into in good faith. He stated that the agreement has limited impact on Cedar Bluff Reservoir.

Senator Taddiken observed that with or without the agreement, there are other rights holders below the dam that might claim an impairment. Mr. Pope said that was true. He stated that building a reservoir and stopping water flows that would have gone through the system can cause problems.

Representative Schwartz asked how short Hays has been on its water rights the last several years. Mr. Pope responded that the city has diverted less than half the water to which it is entitled. He explained that was in part because the water has not always been there. The intensive control area reduced the amount to which the city was entitled by about 2,250 acre feet. Water use in general is below the levels reached in the 1980s.

Senator Salmans commented on replacing stream flow with underground water. Mr. Pope stated that if the reservoir had not been created there always would have been stream flow. Various wells would have reduced that flow, but there would have been recharge from users of that well water. During periods of increased rainfall, water was stored to be released at certain times. That provided recharge. This may be the only place in the state where the downstream right is a well field. Generally, the more senior rights are to surface water. Senator Salmans asked if it is correct that cities are not subject to the general "use it or lose it" rule. Mr. Pope responded that all water rights holders are subject to that statute. He stated that abandonment is not an issue in this situation.

The Chairman recognized Representative Ostmeyer who thanked the Committee for meeting in WaKeeney. He provided the Committee with background on discussions held during the 2003 Session. He stated that he and other legislators attended a meeting in July. He and Senator Clark made it clear that Trego County representatives needed to be present at any meeting regarding Cedar Bluff. He said that the County did not receive notice of meetings as requested. He said that state employees dropped the ball on that request. Representative Ostmeyer referred to written questions he provided to the Committee ([Attachment 7](#)).

The Chairman directed the Committee's attention to other communications that had been distributed ([Attachments 8-12](#)).

Senator Taddiken stated that the Committee has heard loud and clear that failure to maintain the recreational level of the reservoir would be devastating to those communities near Cedar Bluff. *Senator Taddiken moved that the Committee report include a statement to that effect summarizing from Secretary Hayden's testimony at the October meeting.* In particular, Senator Taddiken said the

report should state that there would be a significant negative impact on communities surrounding Cedar Bluff Reservoir of failure to maintain the recreational lake level. *The motion was seconded by Representative Powell. The motion passed.*

Senator Taddiken moved that the report include a recommendation that the standing environment committees review the Attorney General's Opinion requested in October by this Committee. The motion was seconded by Representative Dahl. The motion passed.

Representative Powell moved to include in the Committee report a request that the Kansas Water Office not release any water from Cedar Bluff Reservoir pursuant to the recently signed operations agreement until after the Legislature has had an opportunity to review the Attorney General's Opinion. The motion was seconded by Representative Dahl. Representative Schwartz asked whether the Committee knew when the opinion would be available. The Chairman responded that she had been advised that the Attorney General does not have sufficient information to issue an opinion at this time. Representative Powell stated that his intention is to hold off action until the Attorney General's Opinion is available. Representative Svaty spoke in opposition to the motion. The motion passed 5-4.

Representative Reardon asked that the minutes reflect that the 2004 *proviso* was not written the way Mr. Harkins wanted it. Representative Schwartz stated that the Budget Committee included the *proviso*, and that it was written as directed by the Committee.

The Chairman stated that staff would prepare the committee reports including conclusions and recommendations discussed at this meeting and distribute those reports and meeting minutes for approval via mail. She stated that staff would set a date after which both the reports and minutes would be finalized and filed. Committee members were reminded to take with them any testimony or other material they wished to keep.

The meeting was adjourned at 3:45 p.m.

Prepared by Mary Galligan
Edited by Raney Gilliland and Amy VanHouse

Approved by Committee:

December 29, 2004
(date)