

MINUTES

SPECIAL COMMITTEE ON ENERGY, NATURAL RESOURCES, AND ENVIRONMENT

October 22, 2007
Room 241-N—Statehouse

Members Present

Representative Carl Holmes, Chairperson
Representative Josh Svaty, Ranking Minority Member
Senator Marci Francisco
Senator Carolyn McGinn
Senator Mark Taddiken
Representative Ty Masterson
Representative Terry McLachlan
Representative Larry Powell
Representative Gene Rardin
Representative Don Schroeder

Member Absent

Senator Jay Emler, Vice-Chairperson

Staff

Mary Galligan, Kansas Legislative Research Department
Raney Gilliland, Kansas Legislative Research Department
Cindy Lash, Kansas Legislative Research Department
Matt Todd, Office of the Revisor of Statutes
Jason Thompson, Office of the Revisor of Statutes
Renaë Hansen, Committee Assistant

Others Present

Representative Joe Hummerickhouse
See attached list.

Morning Session

The Chairperson called the meeting to order at 9:40 a.m.

The Chairperson noted that minutes of the September meeting had been distributed. *Representative Powell made and Senator Taddiken seconded a motion to approve the September minutes with a change on page 2 of the September 17 minutes so that the minutes reflect information provided to the Committee. That change would make the summer temperature 78 degrees and the winter temperature 65 degrees. The motion passed.*

The Chairperson opened the hearing on the topic "Intensive Groundwater Use Control Areas" and recognized Professor John Peck from the University of Kansas School of Law. Professor Peck described to the Committee the statutes governing water and their use in Kansas (Attachments 1 and 2). He provided background information on the geology and hydrology of the State and the relationship between groundwater and surface water. He described the difference between water, a personal property in a legal context, and a "water right" which is considered real property. He reviewed the history of water law in Kansas noting that from the time of statehood until 1945 Kansas surface water was allocated under the Riparian Doctrine that is commonly applied in eastern states. During that same period the Absolute Ownership Doctrine was applied to groundwater in Kansas.

Professor Peck explained that in 1945, when the Legislature enacted the Water Appropriation Act (KSA 82a-701, *et seq.*) the legal philosophy governing water use changed completely. Under the Act, all water is dedicated to the use of the public and an individual must obtain a right, in the form of a permit, to use water in most instances. The permit does not convey an absolute right to use water, but is conditioned by the law. In addition, a water right may be considered abandoned if it is not utilized within the parameters of the Act.

Professor Peck reviewed the five existing Groundwater Management Districts (GMDs) created under the Groundwater Management District Act (KSA 82a-1020, *et seq.*). Each of those districts applies management techniques that may be unique to the situation in the area comprising the district. The Act also provides for creation of intensive groundwater use control areas (IGUCAs). He reviewed the history of the Walnut Creek IGUCA which was created in the early 1990s, at the request of the Department of Wildlife and Parks and the Big Bend GMD No. 5.

Senator McGinn asked about the significance of 1965 as the demarcation between junior and senior irrigation water rights in the Walnut Creek IGUCA. Professor Peck explained that a mathematical formula based on water use was developed to identify the date.

Senator McGinn asked about other states' water allocation laws. Professor Peck responded that most western states apply the concept of prior appropriation for allocation of groundwater. He noted that Nebraska uses a mixed approach. She also asked about the shutting down of water rights. Professor Peck noted that currently there was just one district court case in Marshall County that resulted from water rights being shut down. That decision was not appealed, so there is no definitive case law on the issue.

Senator Taddiken noted that junior water rights have been taken away in some instances. He asked about the definition of waste. Professor Peck responded that there was a special finding defining the term "waste" in the order for Walnut Creek.

Chairperson Holmes asked about junior rights-holders being able to utilize a five-year average enabling them to use dryland farming techniques occasionally. Professor Peck responded that the averaging technique would enable farmers to do that. Representative Holmes also said that a lawsuit brought in Haskell County was withdrawn when the plaintiffs were threatened. Professor Peck

observed that disputes among water rights holders might be settled by the Chief Engineer as well as through the courts.

The Chairperson recognized Dave Barfield, Acting Chief Engineer of the Division of Water Resources in the Kansas Department of Agriculture. Mr. Barfield presented information to the Committee regarding IGUCAs, noting the impact on the water-level changes due to the permits that were given. He reviewed in detail the IGUCA process used when water rights are being challenged. He described the reasons for creation of the existing IGUCAs and the corrective measures established in each of them ([Attachment 3](#)).

The Chairperson recognized Adrian Polansky, Secretary of Agriculture, who described the Department's IGUCA review process and proposed improvements to that process. One of the proposed improvements is a draft regulation that would require the Chief Engineer to designate an advisory committee for all new IGUCAs created after July 1, 2008. The advisory committee would be required to review the IGUCAs at intervals established in the IGUCA order ([Attachment 4](#)).

Representative Powell asked about the IGUCA statutes conflicting with the Water Appropriations Act. Secretary Polansky stated the two laws do not conflict and referred the Committee to Attorney General Opinion 2007-32 that discusses how the two acts work together ([Attachments 5 and 6](#)). Mr. Barfield noted that the right to use water is not a guarantee that water will be available. Secretary Polansky noted the IGUCA process is in place to deal with areas where unmanaged water use is not sustainable, so that water resources of the state can be protected and the economy of those areas can be stable for as long as possible.

Senator Taddiken asked whether the geographical boundaries of a GMD could be expanded. Mr. Barfield responded that there was nothing in statute to prevent expansion of a GMD. He noted that currently a GMD that requests an IGUCA does not control the proceedings. The Department's proposed draft regulation would require the Chief Engineer to hold a periodic review with an advisory group.

Senator McGinn noted that every groundwater right is uniquely based on the make up of the different users of the water. She asked how many people would be in the advisory groups that would be created under the proposed regulation. Secretary Polansky said there was no predetermined number, but that it would be flexible so the size could be determined based on the need in the area. Secretary Polansky noted that the Department is seeking input regarding how to make the review process fair.

Senator Francisco asked whether the intent was to have a single review or to have other periodic reviews. Secretary Polansky stated that the intent is to create a continuous review process. The seven-year review is based on the fact that seven years of data are required to make a valid recommendation for any changes in management practices.

The Committee recessed at 12:00 noon.

Afternoon Session

The Chairperson reconvened the meeting at 1:00 p.m.

The Chairperson recognized Allie Devine, Kansas Livestock Association (KLA), who described involvement of the KLA in various legislative and administrative hearings regarding IGUCAs in recent years, including the request for introduction of 2007 HB 2070 ([Attachment 7](#)). She noted that KLA would like to see an independent review if a second review is necessary. Ms. Devine

enumerated three items that KLA is interested in having included in any amendments to the IGUCA statutes:

- Establishing an independent hearing officer or review panel for implementing new IGUCA orders or for reviewing existing orders;
- Placing limitations on IGUCA orders by creating either termination dates or periodic reviews with statutory standards for continuation and placing the burden on the state, not the water right holder; and
- Requiring that IGUCAs incorporate the seniority principle of "first in time, first in right" and that restrictions apply to all water right holders.

The Chairperson recognized David Traster, who also represented the KLA. Mr. Traster informed the Committee that he represented KLA in the Pawnee River Valley IGUCA proceeding instituted by the Division of Water Resources in 2006. Mr. Traster stated that KLA's observation is that in the Walnut Creek IGUCA in particular, the Division of Water Resources has not followed the priority system required by the Kansas Water Appropriation Act ([Attachment 8](#)). He noted that KLA is asking either for the Department of Agriculture to follow the Prior Appropriations Doctrine or for the Legislature to clarify how the process is to be administered. In KLA's opinion, clarification is required to synchronize implementation of the statute and the statutory language.

Senator Francisco asked about "reasonable use" and whether that can change over time. Mr. Traster responded that water rights in excess of "reasonable use" are not permissible, and that a user cannot waste water in order to prevent someone else from using it. Senator Francisco asked whether, over time, the amount of water allowed to be used could be reduced to make it remain reasonable. Mr. Traster commented that reductions could be accommodated within the confines of the Water Appropriation Act. He noted that senior water rights holders need to be asked to use what is reasonable for their allotted amount to enable usage by a few more junior water rights holders.

Senator Taddiken asked specifically how Mr. Traster reads the statute in regard to seniority. Mr. Traster responded that the statute says that senior rights holders get their full allocation. They cannot waste it. Then the next person gets what is left over.

Senator McGinn asked about the illegality of wasting water, the sale of water to cities, and the wasting of water by individuals. Mr. Traster noted that Hays has addressed those issues with water conservation rules.

Representative Holmes asked about the date of 1965 as the demarcation between senior and junior water rights. Mr. Traster responded that, based upon current law, the water rights of anyone after that date should be cut off.

Representative Holmes described a scenario in which the water rights had been perfected, but the rights holder decides to not pump. He asked how much water must be pumped to prevent abandonment of a water right. Mr. Traster responded that he does not know. The law has not been established or interpreted by the courts yet.

The Chairperson recognized Robin Jennison, representing the Kansas Water Congress. Mr. Jennison presented testimony in opposition to HB 2070 and addressed other issues concerning the IGUCA process. Included in his testimony was a white paper entitled, "Kansas Water Congress White Paper to Special Committee on Energy, Natural Resources, and Environment" ([Attachment 9](#)). Mr. Jennison stated that the Kansas Water Congress is prepared to support legislation that would:

- Amend KSA 82a-1038(b) to require that a periodic review process be included as a condition of any order of the Chief Engineer establishing an IGUCA; and
- Clarify that the initiation of an IGUCA within a GMD must be requested by the GMD or by the statutorily prescribed number of GMD members.

The Chairperson recognized Sharon Falk, GMD No. 5, who presented testimony noting that some IGUCA rules need to be reviewed and significant changes made due to the many existing interpretations of the law ([Attachment 10](#)). She observed that HB 2070, as introduced by the 2007 Legislature, included a sunset provision that her Board does not support. The Board would like to have a mandatory IGUCA review process established.

Representative Powell asked if the Chief Engineer should always agree with his staff. Ms. Falk responded that in her opinion the Chief Engineer should base his findings on the staff recommendation.

Representative Holmes asked about the Pawnee-Buckner IGUCA, and whether GMD No. 5 had initiated that IGUCA. Ms. Falk responded that it did, but it did not initiate an IGUCA outside of that area. Representative Holmes asked about well metering, and whether the residents of Hodgeman County had asked to be removed from the GMD due to reluctance to having their wells metered in 1988. She answered that Hodgeman County residents requested to be excluded from GMD No. 5.

The Chairperson recognized Secretary Adrian Polansky, to present testimony on behalf of the Governor's Natural Resources Subcabinet in the form of a letter prepared by Secretary Mike Hayden, who chairs the Subcabinet ([Attachment 11](#)). The letter stated that the IGUCA mechanism is intended to provide a clear mechanism for addressing groundwater problems. The letter also stated that most of the IGUCAs do not restrict water use, but rather manage water by requiring the use of meters or by closing areas to new water appropriation. Two IGUCAs do restrict water use and those two illustrate the value of the IGUCA mechanism over strict administration under the Water Appropriation Act alone. As a result of the IGUCA initiated at the request of Big Bend GMD No. 5, there are currently 467 active water rights. If the Chief Engineer had not been able to use the IGUCA tool, there would be only 78 active groundwater rights pumping during critical dry periods. The Natural Resources Subcabinet believes the IGUCA statutes are being administered appropriately and legally.

Representative Powell asked about the membership of the Subcabinet. Secretary Polansky responded that membership included representatives from the Water Office; the Departments of Agriculture, Health and Environment, and Wildlife and Parks; the State Conservation Commission; and the Kansas Corporation Commission (KCC).

Representative Powell asked whether an independent hearing officer might be utilized in the IGUCA process. Secretary Polansky responded that possibility might be explored.

Senator Taddiken asked whether additional IGUCAs are being considered, and if so, whether any new ones are located in GMDs. Secretary Polansky answered that the Department is looking at a number of different areas, but he did not have specifics at hand. Senator Taddiken also asked if potential IGUCAs would be initiated at the request of the Chief Engineer or the GMDs. Secretary Polansky responded that the potential Solomon IGUCA is outside of a GMD. The Secretary explained that if a potential IGUCA is outside a GMD, the Chief Engineer initiates the process of determining whether an IGUCA should be established using public hearings.

Representative Powell asked for a list of the processes that have been put in place. Secretary Polansky stated that they were gathering data from a number of different areas, which may

or may not have anything to do with initiating an IGUCA. The Secretary said that the Committee would be informed of locations from which information is being gathered concerning potential IGUCAs.

The Chairperson recognized Mark Rude, Manager, Southwest Kansas GMD No. 3, Garden City. Mr. Rude informed the Committee that half of the land in the GMD is irrigated, so there are many water users. Attached to his testimony is a draft agreement between the Chief Engineer, Division of Water Resources, and the Southwest Kansas GMD No. 3 to further implement the GMD Act ([Attachment 12](#)). GWD No. 3 officials believe that the person who sets the goals makes a lot of difference. Local residents must understand why an IGUCA is necessary.

Senator Taddiken asked Mr. Rude to describe his understanding of the legislative intent for the groundwater management legislation. He also asked why the Act would establish GMDs if the Chief Engineer could essentially override them by establishing an IGUCA. Mr. Rude answered that the language of the Act states that the Chief Engineer shall initiate an IGUCA when requested by a local GMD and says, outside of the GMD, the Chief Engineer can begin the process of establishing an IGUCA.

Representative Holmes asked if the memorandum presented was approved by the Department of Agriculture. Mr. Rude answered that they had discussed it and, as of this date, the language is being discussed.

The Chairperson recognized David Brenn, on behalf of Greg Graff, Western Kansas GMD No. 1. Mr. Brenn presented testimony regarding the determination and protocol of the IGUCA ([Attachment 13](#)). The GMD Board supports clarification of the GMD Act regarding the role of the Chief Engineer in the determination of an IGUCA within a GMD.

The Chairperson recognized Tim Boese, Interim Manager, GMD No. 2. Mr. Boese presented testimony in opposition to HB 2070 ([Attachment 14](#)). He said that by including an IGUCA sunset provision, management tools that help keep the McPherson and Burton IGUCAs in place would be removed. He said IGUCAs are very important tools for proper management of the Equus Beds Aquifer, and that they help prevent impairment of existing groundwater rights in the district.

The Chairperson recognized Wayne Bossert, Manager, NW Kansas GMD No. 4. Mr. Bossert presented testimony in opposition to HB 2070, as introduced, which would effectively end the IGUCA process ([Attachment 15](#)). The GMD Board also is opposed to strict administration of water rights under the Kansas Water Appropriation Act. Mr. Bossert made suggestions for improvement of the current statutes (included in Attachment 15). Those improvements include establishing a guaranteed review of any IGUCA, clarification of the role of a GMD in establishment of an IGUCA within the GMD, and clarification of the goal-setting process for IGUCAs.

Representative Powell asked if there was a conflict between the Water Appropriation Act and the IGUCA statutes. Mr. Bossert stated that he did not believe there was a conflict. Representative Powell asked who votes on GMD business. Mr. Bossert responded that the Board of Directors votes, and a successful motion must receive a majority of "yes" votes. Representative Powell asked whether a water rights holder needs to be compensated for loss of rights. Mr. Bossert responded that water rights are subject to many rules. If those are compromised, there is no water right.

The Chairperson recognized Sue Schulte, Director of Communications for the Kansas Corn Growers Association. Ms. Schulte told the Committee that the Association does not currently have a policy specifically related to IGUCAs, but that a resolution speaking to the matter may be presented at the annual meeting in November ([Attachment 16](#)). In general, the Association believes that water use restrictions should apply to all users, municipal and industrial, not just agricultural.

The Chairperson recognized Steve Swaffar, Director of Natural Resources for the Kansas Farm Bureau (KFB). Mr. Swaffar told the Committee that the Farm Bureau does not have an official policy specifically addressing IGUCAs. He noted that existing Farm Bureau policy supports the Prior Appropriation Doctrine ([Attachment 17](#)).

Senator Taddiken asked if their discussion was addressing issues of eminent domain and economic development with questions such as: Is an IGUCA beneficial for the economy of the entire community, instead of a few senior water rights owners; and should those owners then be compensated for their rights being taken? Mr. Swaffar noted that if it is for the good of the community, then those owners who lost their rights probably should be compensated.

The Chairperson recognized Tracy Streeter, Kansas Water Office, who asked that Kirk Larson, a member of the Water Authority, be allowed to present testimony.

The Chairperson recognized Mr. Larson, who represents GMDs No. 2 and No. 5 on the Water Authority. Mr. Larson presented testimony in support of the IGUCA process as a means of administering areas of water shortage in the state ([Attachment 18](#)).

The Chairperson pointed out to the Committee that written testimony was submitted by J. Neil Jednoralski, Salina, ([Attachment 19](#)). Mr. Jednoralski's testimony supported the use of IGUCAs.

Chairperson Holmes asked the Committee to consider making a recommendation on HB 2070.

Representative Powell stated that he believes the idea of an independent hearing officer is a good idea. He does not like the "use it or lose it" idea.

Senator Taddiken stated that he believes the Committee should consider creating a mandatory review process. Additionally, he stated he believes that as water users become more efficient and use less water and their average declines, they are identified as not needing as much water. Then, during dry years, if their right is reduced, they may not have the water they need. He noted that all classes of users need to be treated the same.

Chairperson Holmes asked Mark Rude how many users in GMD No. 3 are able to pump their full right. Mr. Rude noted that many cannot because the water is not there anymore. It was noted that part of the "use it or lose it" practice, as far as perfecting a water right, is a very different issue than maintaining the right once it has been perfected. If the water supply is not available, that is sufficient reason for not using the allotment. The reasons for not using water need to be consistent.

Chairperson Holmes asked the Department of Agriculture when the Committee would be able to look at proposed rules and regulations.

The Chairperson asked staff of the Office of the Revisor of Statutes to look through all the comments made today and determine what is appropriate and what is not appropriate for possible legislation next session. The staff was asked to come back with that information at the next meeting when the Committee would discuss recommendations for the 2008 Legislature.

Senator McGinn asked for clarification of who would review the water permits and the time frame of the review.

Senator Taddiken asked whether IGUCAs are initiated only at the request of the GMD.

Representative Svaty asked that the Committee take a very serious look at the statute.

Chairperson Holmes noted that the issue of telecommunication and the universal service fund had been added to the Committee's list of topics for review and that the Legislative Coordinating Council authorized an additional meeting day. He said that a decision regarding when the Committee might meet again would depend on progress made at the November meeting.

Representative Rardin said he will be absent on November 8 and Representative Holmes said he will be late arriving on that date, but that the Committee would meet as scheduled.

The meeting adjourned at 4:16 p.m. The Committee will meet at 10:00 a.m., November 7, 2007.

Prepared by Renae Hansen
Edited by Mary Galligan

Approved by Committee on:

November 8, 2007

(Date)