



# **Kansas Natural** **Resource Council**

## **Spring 2010 Journal**

### **Flint Hills Federal Conservation** **Easement Program**

By Pete Ferrell  
KNRC Board Member

The Kansas Natural Resource Council is generally supportive of the idea of using conservation easements to preserve wildlife habitat in Kansas. However, we have some concern about how the US Fish & Wildlife Service plans to implement the program they are proposing for the Flint Hills.

After reading the Proposed Flint Hills Legacy Conservation Area (FHLCA) material (September 2009) and attending scoping meetings held last fall, several issues come to mind. They can be sorted into three categories: ecology, economics and cultural.

#### **Regarding the Ecology ...**

1. Although the material mentions flora and fauna that may benefit from said easements, no metrics are mentioned that would actually substantiate this claim over time. Further, there appears to be no level of accountability regarding range health asked of land owners who participate in the program.

2. The effects of annual and excessive range burning in the Flint Hills have come into question. There was a time (1950's) when the practice was discouraged. Preserving "ranching lifestyles and economies" may be in direct contradiction to the stated "preserve and protect" mission of the USFWS. More specifically, there appears to be a direct correlation between Early Intensive Stocking, which began in the 1980's, and the decline of the Greater Prairie Chicken.

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3. The easements prohibit residential and commercial development, but do not prohibit further extraction of petroleum resources as they are grandfathered as a 'traditional' use. This also contradicts a stated purpose of the FHLCA which is "to help maintain the integrity of ... stream water quality ..."

#### **Regarding the Economics ...**

4. If an easement permanently severs and removes distinct economic values from the landscape, it is short sighted to allow that event to benefit the initial generation only. An easement that is perpetual should pay in perpetuity. The same money currently designated to make one-time payments for easements could be pooled, invested wisely, and made to produce an enduring stream of income for the current and future land owners.

5. Stripping off development rights in one generation will depress the value of land carrying an easement and therefore the easement will negatively affect local tax rolls. However, land that has kept this value intact through a pre-established flow of easement funds (as suggested in item #4) will have an elevated value just as land sold with an ongoing mineral royalty is more highly valued.

6. If there are measurable improvements in the flora and fauna due to the implementation of an easement, an enhanced recreational value will emerge. Many 'traditional' ranches in Texas now garner more return from hunting and fishing than from cattle (the 'historic' use). FHLCA easements now being considered would make it more difficult, if not impossible, for a land owner to develop any additional infrastructure to capture the economic benefit of an enriched landscape.

7. KNRC has policy supporting siting restrictions of wind farms in the Flint Hills. It has come to our attention, however, that FHCLA easements will disallow all local and regional power of eminent domain regarding transmission lines. Only the Federal Department of Energy would have the authority to require a transmission easement across affected property. Essentially, the FHLCA easements could present a transmission barrier between the rich wind resource in western Kansas and the load centers in the eastern US.

#### **Regarding the culture ...**

8. The greatest impediment to broad scale cultural acceptance of these easements will be the perpetual nature of them: people are generally uncomfortable about compromising an asset's value in the face of the uncertain needs of the future. USFWS may wish to allow an "opt-out" window every 25 years. It is less likely that a landowner will opt-out of the easement if, our recommendation #4 is implemented. Having received a steady cash flow for 25 years, landowner's would be unlikely to relinquish that income.

If, also, penalties for opting out were severe - for example, 4 times the amount received over the past 25 years - that would also deter opting out.

KNRC applauds USFWS for its initiative in promoting this program. We sincerely hope that our concerns will be fully addressed in the easement program, should it be realized.

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### **KNRC and the State Environmental Leadership Program (SELP)**

**by Jim Steichen  
KNRC Board Member**

SELP was created specifically to support organizations like KNRC and we have been active with SELP for years. SELP is a network of independent environmental activist organizations that focus on state level policy to preserve, protect and enhance the natural and human environment, and the health and quality of life for all people.

#### **SELP's Mission:**

SELP improves the quality of state level advocacy, and thereby achieves state and national environmental gains, and enhances democracy and justice. SELP achieves this through direct assistance and coordination efforts that strengthen the strategic and organizational capacity of SELP members.

#### **SELP's Vision:**

Every state will have at least one state policy organization that is smart, powerful and well run:

**Smart:** strategically guided; clearly defined and followed mission; active and engaged board; cultural competency

**Powerful:** no significant environmental decision is made in a state without our group's knowledge and consent.

**Well run:** effective financial tools and management, effective personnel management tools, competitive staff compensation, diverse and stable funding.

For the first time SELP has chosen to hold their annual conference in the Midwest. Participants from most of the 46 member organizations will meet at the **Lied Lodge in Nebraska City, NE from Nov. 17-21, 2010**. The program is about training and supporting organizations like ours to be more effective and successful in meeting our objectives. Program topics include practical subjects such as fundraising, creative use of the Internet, staff management, employment policies, etc. and sharing success stories.

I still remember the story from Idaho, which had a proposed coal plant that would provide power to California but no power to Idaho. It would be the first coal-fired power plant in Idaho. This project was sailing thorough state government until a retiree set up a booth at the Southern Idaho Home and Garden Show in Twin Falls. The message was a plea for a "Smog Free Idaho." By the end of the show about 2,000 people had signed a petition against the coal plant. Within a few weeks more than 8,000 people had signed it. The story was picked up by TV and newspapers and ultimately the project was stopped.

KNRC is among the smallest of SELP members. But of all our surrounding states only Colorado also has a SELP-member organization. SELP recognizes the important role Kansas played in slowing the expansion of coal-fired power plants.

If you are interested in attending the conference in November, or for more information on SELP, see their website: [www.selp.org](http://www.selp.org)

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## **Gardner Intermodal on Hold**

by Dave Murphy  
KNRC Board Member

Attorney Mark Dugan, on behalf of Hillsdale Environmental Loss Prevention (HELP), KNRC, et al., filed a lawsuit on January 7 against the United States Army Corps of Engineers (COE) challenging the issuance of a permit to Burlington-Northern-Santa Fe railroad (BNSF) to build an intermodal freight transfer facility (IMF) upstream of Hillsdale Lake, near Gardner, Kansas.

The complaint charged that the Corps issued the permit without sufficient environmental analysis (an EIS was not done) and that the permit and the environmental analysis that was performed was arbitrary and capricious.

The complaint charged that:

- The building and operation of the Intermodal would damage a major tributary of Bull Creek, a primary inflow to Hillsdale Lake, which is the primary source of drinking water for thousands of people;
- The limited environmental study that was performed by COE underestimated the likely emissions of air pollution;
- The COE failed to adequately quantify the health risk from diesel particulate matter and other pollutants; and
- The COE relied on grossly inadequate mitigation measures

The complaint requested the court to issue: (a) a declaratory judgment that the Defendants: are in violation of the Clean Water Act, NEPA, and the APA; (b) an order vacating the permit; (c) an injunction prohibiting Defendants from proceeding with any phase of the IMF; and (d) an order to compensate our attorney's fees and associated costs.

In the spring of 2009 BNSF announced that it intended to delay the project because of the sluggish economy but, when the Kansas Department of Transportation requested \$50 million in stimulus funds for the project, BNSF put the project on a fast track. We had heard that contractors were being lined up for the project in anticipation of receiving the funds. When the request for those funds was denied this year, BNSF announced that the project was once again delayed, but not abandoned.

The lawsuit will still go forward, although it will not need to be on the fast track it might have been had the \$50 million come through. With work on the IMF not starting immediately the lawsuit can proceed less frantically, and we can work towards requesting a permanent injunction.

On March 26, BNSF and the federal defendants both filed answers to the court. The Corps has until May

10 to file the administrative record. Because it's a review of an administrative action, it is different than most cases, without the same type of discovery. The court is limited to the review of the materials before the agency when it made its decision.

The rules set out a schedule for briefing, with the first brief (ours) due 45 days after they file the record. The COE response is due 30 days after that, and then we get 14 days to reply. The actual briefing schedule will probably be longer, though, because of the size of the record. The Corps tells us it's about 15,000 pages long! Also, depending on what's in the record, we may have some arguments about whether other things should be included, such as comments that were submitted after the deadline but before the Corps made its final decision.

The Natural Resources Defense Council also filed suit challenging the COE action, and both suits have been consolidated by the court, with our suit as the lead case. We will work together with NRDC, concentrating primarily on water issues while their lawyer, Melissa Lin Perrella, focuses on air issues.

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## **Expansion of the Bowersock Dam Hydroelectric Plant**

The Bowersock Mills and Power Company (BMPC) is moving ahead with plans to build the proposed North Powerhouse Expansion of the existing hydroelectric project on the Bowersock Dam in Lawrence. The Federal Energy Regulatory Commission (FERC) is expected to release its "Ready for Environmental Assessment" notice soon. At that time, NGOs (non-governmental organizations) and state and federal agencies have the opportunity to make any further comments on the project. The Environmental Assessment process is a standard requirement of all FERC hydropower licenses.

BMPC has worked with state and federal agencies, relevant NGOs and interested stakeholders - including KNRC - over the last two years to discuss the proposed project thoroughly and identify any potential issues with the expansion. To date it has received primarily positive comments. The Bowersock project has been certified as a "low-impact" hydropower project by the Low-Impact Hydropower Institute and the project has received the endorsement of KNRC as a good way to make additional clean energy with a limited amount of additional environmental impact.

Any questions or comments regarding the project should be directed to Sarah Hill-Nelson via email, shn@bowersockpower.com

## Conservation Legislation Caucus

by Margaret Thomas  
KNRC Board Member

KNRC organized the annual meeting of the Conservation Legislation Caucus (CLC) held February 13, 2010 from 9 to 12:30 in the Topeka Public Library. In addition to several KNRC Board members, attendees included Scott Allegrucci (GPACE); Craig Volland and Chris Cardinal (Sierra Club); Alan Pollan (TNC); Laura Calwell (FOK), Janet Scaro and Linda Meisinger (HELP – Hillsdale Environmental Loss Prevention), Jennifer Byer (TBW), and Jill DeWitt (Audubon).

High points: GPACE is gearing up for hearings on Holcomb the summer as part of the permitting process. Brownback, if elected Gov, has said he wants to dismantle KDHE. Sierra Club is trying to educate citizens about the substantial impacts to Kansas coming from global climate change. The answer is to promote wind development and, more important, energy efficiency. Sierra Club backs the moratorium on wind farms in the Flint Hills but if protecting habitat and grassland birds is the point of this then the state must also address the greater threats to wildlife from burning and overstocking. The Nature Conservancy also feels there is an opportunity to educate ranchers on alternatives to annual April burning. They encourage burning in a 6 week window and not every year. They are working on education to ranchers using OSU and KSU agronomy programs. There is good research from Kanza Prairie but it is not dispersed. Friends of the KAW is monitoring the KCMO stormwater planning effort, which EPA is overseeing, because the largest combined sewage overflow is now into the KS river, and there is no plan to fix this for 25 years. They are following several out-of-compliance treatment plants dealing with Blue Valley wastewater. Hillsdale Environmental Loss Prevention has filed a preliminary injunction against the Army Corps of Engineers and BNSF railroad to block the proposed BNSF Intermodal Facility near Edgerton on the grounds that an EIS should be prepared. KNRC is watching for possible reactivation of reservoirs, and is involved with EPA's triennial review process and efforts to reduce excessive nutrients in waterways. True Blue Women is monitoring the Holcomb issue and will promote participation in hearings. Burroughs

Audubon works with both KS and MO chapters. They worked with the League of Conservation Voters in MO to organize a successful Lobby Day in Jeff City and can help with the grass burning issue in Kansas and the water nutrient issue. They have a good connection with the Kansas City urban community.

Possible Next Steps for CLC in 2010

1 - Prepare members informed about Triennial Review Focus Group hearings.  
2 - Consider convening our own conference on solutions for agricultural production with participation by Kansas Water Office, Farm Bureau, KLA, other ag groups, the Rural Center, Land Institute, WRAPS, KSU and NRCS.

3 - Keep the public aware that Kansas' energy future is being set by decisions now and we need to promote wind and efficiency whenever possible.

4 - Keep the public aware of Holcomb permit hearings

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## Community Forum on Kansas Environmental Issues

By Kathy Riordan  
KNRC Board Member

The ninth annual Community Forum on Kansas Environmental Issues will be held Thursday, October 7, 2010 in Friendship Hall at Village Presbyterian Church, 6641 Mission Rd. in Prairie Village. The event starts at 5:30 pm with appetizers and exhibits by environmental organizations. The Forum is sponsored by Kansas Natural Resource Council, the Prairie Village Environmental Committee, and Friends of the Kaw.

Supper of locally grown foods is served at 6:00 catered by blue bird Bistro. The program follows at 7:00 pm.

This year's program will focus on Water. Karl Brooks, Director, EPA Region 7, and Secretary R. Bremby, KDHE have been invited to give brief remarks regarding current important water issues. Following their remarks Laura Calwell, Friends of the Kaw and Dave Murphy, KNRC will join them for a panel discussion. Q&A will be included as time allows.

Advance reservations are needed by Oct. 1 for this popular event. A donation of \$20 per person is requested to cover expenses. Reservations will be accepted beginning August 15. To make reservations send check made to KNRC/Community Forum to: KNRC/Community Forum, 7301 Mission Rd. Suite 248, Prairie Village, KS 66208. Your check confirms your reservation.

#### **Questions?**

Call Mary Helen Korbek at 913-362-6463 or email Kathy Riordan at [kfriordan@kc.rr.com](mailto:kfriordan@kc.rr.com). Environmental organizations wanting to reserve table space for exhibits should contact Margaret Thomas at [margaretgthomas@gmail.com](mailto:margaretgthomas@gmail.com).

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## **KDHE Triennial Water Quality Review Process Inches Forward**

**By Dave Murphy  
KNRC Board Member**

Better late than never, the first two meetings of the Water Quality Standards Triennial Review Focus Group, the first since 2002, were held in Topeka in November and December of 2009. The Clean Water Act requires that states review their water quality standards (WQS) through a public process at least once each three-year period.

The top four issues of concern to the group have become the subjects of white papers that will be prepared by KDHE for the purpose of properly documenting the related issues of concern. Those four topics include:

#### **1-Nutrient Criteria for Nitrogen and Phosphorous:**

None of Kansas' lakes that are designated for drinking water meet acceptable water quality standards for that use and many of them are impaired for other uses as well. According to a 2009 study conducted by EPA, nutrient pollution is the nation's number one most serious water pollution problem and it is getting worse at an accelerating rate. EPA has not promulgated new federal standards yet, but KDHE hopes to begin the process in anticipation of those new mandates.

#### **2-Clarification of anti-degradation standards and implementation standards:**

KDHE and KNRC concur that the implementation standards need clarification. As the standards read now, violations of the standard are impossible to define and enforcement is, well, unenforceable. For instance, if an activity is not allowed to add turbidity to a stream then how is the baseline determined and how much more turbidity is allowed above that baseline?

**3-Frequency & Duration:** Concentration, duration and frequency of contaminants play a role in determining whether a water body meets or exceeds numeric water quality standards. KDHE wants to explain why it makes sense to allow concentrations above the numeric criteria "with acceptable consideration of duration and frequency". From KNRC's point of view, existing Kansas regulations allow water quality to exceed standards far too often.

**4-Dissolved Oxygen (D.O.):** Oxygen is essential for the survival of aquatic animals. Low D.O. can occur naturally in low-flow or no-flow streams and in lakes and ponds, especially in the summer as water temperatures rise and flows are further decreased. KDHE wants to be able to remove D.O. impaired streams and lakes from the 303(d) list if it is determined that the impairment is from "natural causes". Although KNRC concurs that low-flows naturally reduce D.O., we are concerned about the definition of the term "natural causes" and how it will be interpreted. We regard it as unnatural and unacceptable that Kansas water policies have turned roughly 40% of our perennial rivers and streams into ephemeral creeks, have dramatically reduced the flows in the remaining rivers and streams and that improper agricultural and livestock policies and practices have loaded those same waters with nutrients that cause the excess algae growth.

Though determining "natural cause" would be plagued by political, rather than scientific, criteria, we will withhold judgment until we review the white paper. We will remind the group that our purpose is to "to protect and restore the chemical, physical and biological integrity" of our state's waters.

In addition to the development of these white papers, KDHE wants to create new seasonal numeric criteria for bacteria. EPA has rejected the current KDHE standard which allows streams to exceed numeric standards up to 10% of the year

EPA has told KDHE that Kansas must tighten up our temperature numeric standards. The existing regulations do not allow man-made activities to alter the temperature of water in a lake or stream by more than a few degrees. EPA is expected to modify national standards in the near future and KDHE is monitoring that review process.

The focus group has been formulated to provide a balanced membership representing the regulated community, environmental advocacy groups, technical groups and government agencies. The group includes one member of each of the following organizations: Kansas Dept. of Wildlife & Parks, Kansas Dept. of Agriculture, Kansas Water Authority, League of Kansas Municipalities, Kansas Chamber of Commerce, Kansas Farm Bureau, Kansas Livestock Association, Kansas Corn Growers

Association, Kansas Sierra Club, Kansas Natural Resource Council, League of Women Voters, Audubon of Kansas, Kansas Riverkeeper, Kansas Society of Professional Engineers and Kansas Biological Survey.

The next focus group meeting was supposed to happen in April, but a date has still not been set. At that meeting, whenever it does occur, KDHE will present its white papers. The group will be allowed time to digest the information and prepare written responses that will be submitted and discussed at the group's final meeting.

Later this year, KDHE will hold public meetings around the state to take comments on their proposed rule changes and to take comments on other ideas. Following that, KDHE will compile the comments and submit proposed changes for more public comment. Sometime this fall, the finalized changes are supposed to be submitted to EPA for approval. EPA will accept public comments and make a decision based upon review of the proposed standards and comments. KNRC will closely monitor this process.

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## Water Quality Milestones

Water quality issues have been a longtime concern of KNRC. In the 1980s, we fought for – and got - minimum streamflow standards to protect aquatic life in our surface waters. More recently we have sought to keep corporate hog operations out of our state so Kansas would not have to deal with threats from leaking or overflowing hog waste lagoons.

We successfully sued EPA in 2000 to compel enforcement of the Clean Water Act (CWA) in Kansas. Despite that, we have yet to see implementation and enforcement of the CWA in Kansas sufficient to bring our water quality up to where it should be. This spring, the KNRC Board decided to - once again - force the issue of water quality with state regulators, in court if necessary.

The CWA determines what states must do. The interpretation of what waters are entitled to protection by the CWA has been the subject of several recent court battles. Here is a summary of the turning points in that struggle, by way of explaining what led KNRC to its recent decision.

**January 2001** – The U.S. Supreme Court decided, in the case of *SWANCC v U.S.*, that EPA did not have CWA authority over all water within the borders of the country.

**March 2001** - The agriculture-dominated Kansas legislature stripped CWA protections for most of the small streams, ponds, lakes and wetlands in the

state. The new Kansas law also downgraded human bacterial protections for recreation based upon land ownership.

**June 2003** – One hundred percent of the lakes in Kansas that are used as a source of drinking water are listed on the Kansas 303(d) list as impaired (out of compliance with CWA drinking water standards) by the Kansas Department of Health and Environment.

**November 2008** - The U.S. Supreme Court ruled on two cases, *Rapanos v. United States* and *Carabell v. United States*. These were landmark decisions that clarified the SWANCC ruling. The high court said that, regardless of size or ownership, EPA and the Corps have CWA jurisdiction over wetlands, ponds, lakes and streams so long as they can establish a nexus (a connection whether by perennial or seasonal flow) between those water bodies and downstream, traditionally navigable stream.

**December 2008** – EPA issues a memorandum, “Revised *Rapanos & Carabell* Guidance”, that administratively clarifies CWA authority and EPA jurisdiction.

**January 2010** – During recent conversations with state bureaucrats, KNRC has been told that the state is not open to redress statutes, regulations or water quality standards based upon stream-flow or land ownership.

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## Holcomb Coal Plant Update

Sunflower Electric filed an air quality permit application on January 13, 2010 for the 895mW coal plant near Holcomb that last year's deal with Governor Parkinson made possible. After KDHE reviews the application and issues its decision on it, a series of public hearings will be held in the state. As of this writing (May 12) neither the decision nor the public hearing schedule have been announced.

KNRC remains opposed to the construction of this facility. If a diligent effort had been made to tap western Kansas' abundant wind resource beginning in 2006, that part of the state could already be reaping the benefits of increased employment and local property taxes from new wind farms. Once operational, these facilities would create grid power without any greenhouse gas emissions or consumption of precious groundwater. Kansas has the 2<sup>nd</sup> greatest land-based wind resource of any state in the nation, most of it in western Kansas, and it's long past time we began to utilize that resource to lead the way towards the inevitable Clean Energy economy of the post-carbon future. The current

estimated construction cost for the Holcomb coal plant is \$2.5 billion. Just think how much clean energy and increased end-use efficiency could be realized with that capital if it were not being wasted on the dirty energy paradigms of the past.

Watch the KNRC website for updates on the air quality permit decision, details on the public hearings and how you can participate.

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## **Legislative Update**

In great contrast to the past two years, the 2010 session of the Kansas legislature lacked much activity with regard to environmental matters. Several promising energy-related bills were introduced – but nearly all died in Carl Holmes' committee in the House.

One notable exception was the **PARE bill (HB 2729)**, which would allow cities and counties to set up “energy management districts” and sell special obligation bonds to create a loan fund for alternative energy and efficiency improvements to residences and businesses within those districts. The bill passed the House but got mired in the Senate Utilities Committee. However, it can carry over to the 2011 session so there is some hope it can be passed then. Between now and then, efforts will be made to mobilize local governments to advocate for passage of it.

Two measures passed that would enable development of the “Heartland Flyer” Amtrak connection between Newton and Oklahoma City, then on to Dallas/Ft. Worth. As petroleum becomes more expensive in the future, mass transit will become more important, so this is a wise investment on Kansas' part.

To stay on top of developments in the legislature, join the **KLUE** email list. Send your email address to: Jim Mason at [jmason15@cox.net](mailto:jmason15@cox.net) and you will receive regular updates via email during the session.

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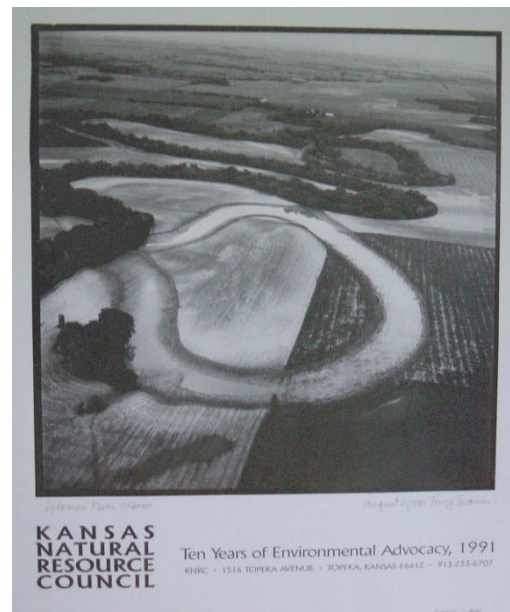
## **KNRC GARAGE SALE!**

As a fundraiser (and as a way to find good homes for these things) KNRC is offering the following:

### 10<sup>th</sup> Anniversary Posters!

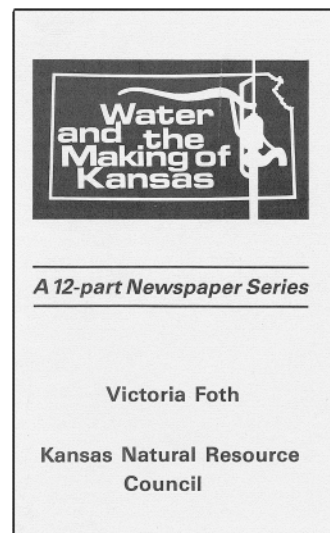
On the occasion of our tenth anniversary in 1991, we printed up these 22” x 26” posters with Terry Evans' iconic aerial black & white photograph of the “writing” the Smoky Hill River has left on the land. We have a limited number of these left and you can have one for

a \$20 (or more) donation to KNRC. Each poster is signed by the artist.



### Water and the Making of Kansas Booklets!

Back in 1988, we got grant support to produce a series of newspaper features on how water has affected the history of our state. We have a limited number of these booklets left and will send you one for a \$10 (or more) donation.



If you don't recall what was in the booklet, you can read it online at our website: [www.knrc.ws](http://www.knrc.ws)

Price for the poster and/or booklet includes postage. The poster will be sent in a mailing tube. Get one for yourself and your eco-conscious friends too!

Please make your check out to “KNRC”, include a note specifying what you want and send it to:

KNRC  
P.O. Box 2635  
Topeka, KS 66601

Thanks for your support of KNRC!

**The KNRC Journal** is a publication of the Kansas Natural Resource Council, a non-profit 501(c)3 organization whose purpose is to advocate for the protection, preservation and restoration of the Kansas environment in order to ensure the health and quality of life for all Kansas. KNRC is funded by memberships, donations and grants. All donations are tax-deductible.

**Jim Mason - Editor**

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