

Approved March 28, 1988
Date

MINUTES OF THE Senate COMMITTEE ON Agriculture

The meeting was called to order by Senator Allen at
Chairperson

10:06 a.m. ~~p.m.~~ on March 25, 1988 in room 423-S of the Capitol.

All members were present except: Senator Doyen (excused)

Committee staff present: Raney Gilliland, Legislative Research Department
Jill Wolters, Revisor of Statutes Department

Conferees appearing before the committee: Dale Lambley, State Board of Agriculture
Chris Wilson, Kansas Fertilizer and Chemical Association, Inc.
Vernon McKinzie, Legislative Committee Chairman
Kansas Termite and Pest Control Association
David Murphy, President, Professional Lawn Care Association of Mid-America
Paul Fleener, Kansas Farm Bureau
Representative Robert Vancrum
Howard Tice, Kansas Association of Wheat Growers
Wilbur Leonard, Committee of Kansas Farm Organizations
Richard Mason, Kansas Trial Lawyers Association
Margaret Ahrens, Kansas Chapter of Sierra Club
Terry Shistar, Pesticide Coordinator for Sierra Club
Charlene Stinard, Kansas Natural Resource Council
Ron Schneider, Kansas Rural Center

The Chairman called the committee to order and attention to HB 2891; he then called on Dale Lambley and the following to testify.

Dale Lambley gave copies of his testimony with suggested amendments to the committee (attachment 1). In answer to the question, Mr. Lambley stated that his department would not be in trouble if this bill did not pass this session.

Chris Wilson, who could not be present to testify, provided copies of her testimony for HB 2891 (attachment 2).

Vernon McKinzie gave copies of his testimony to the committee (attachment 3). Mr. McKinzie answered a committee question stating that if this bill is not passed that it would have little impact on his profession this year.

David Murphy gave the committee copies of his testimony (attachment 4). In answer to a committee question, Mr. Murphy stated it was not expected to increase the cost of liability insurance if this bill is passed.

The Chairman announced the hearing for HB 2891 would continue when Representative Vancrum arrived to testify; he called on Paul Fleener to begin the hearing for HB 3068.

Mr. Fleener gave copies of his testimony with proposed amendments as prepared with Representative Robert Wunsch (attachment 5).

The Chairman recognized Representative Vancrum to testify for HB 2891.

Representative Vancrum expressed support for HB 2891 in that it would, if passed, help crack down on pesticide applicators that cross the Kansas line to do business in this state. This legislation would allow for penalty for applicators who do not apply pesticides properly. He explained this is

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

CONTINUATION SHEET

MINUTES OF THE Senate COMMITTEE ON Agriculture

room 423-S, Statehouse, at 10:06 a.m. ~~p.m.~~ on March 25, 1988

a problem in the bigger cities. Representative Vancrum expressed approval of amendments offered by Dale Lambley with a question about the number of days, "60" in the number 5 amendment on page 3 of Mr. Lambley's testimony.

The Chairman turned committee attention back to HB 3068 and called attention to copies of testimony by Howard Tice who could not be present (attachment 6). The Chairman called on the following to testify.

Wilbur Leonard, a proponent, gave copies of his testimony to the committee (attachment 7).

Richard Mason, an opponent, provided the committee with copies of his testimony (attachment 8).

Margaret Ahrens, an opponent, gave copies of her testimony to the committee (attachment 9). Ms. Ahrens gave the committee copies of testimony in opposition to HB 3068 by Terry Shistar who could not be present (attachment 10).

Charlene Stinard, an opponent, gave the committee copies of her testimony (attachment 11). Ms. Stinard stated that HB 3068 should be amended so that, if the plaintiff is successful, the defendant should be required to pay plaintiff's attorneys' fees and costs.

Ron Schneider testified that he was testifying as part proponent and part opponent. Mr. Schneider stated that the intent of the bill was good. He stated that maybe, in some cases, the maker of a pesticide product would be the faulty one instead of the applicator, and that maybe this legislation would be putting neighbor against neighbor; he requested the committee give careful consideration to HB 3068 before recommending passage.

The Chairman declared the hearing complete for HB 3068; he advised Representative Vancrum and Dale Lambley to get together and work out the differences concerning the proposed amendments and to report back to the committee by March 29. The Chairman called for action on committee minutes.

Senator Gordon made a motion the minutes of March 24 be approved; Senator Norvell seconded the motion; motion carried.

The Chairman adjourned the committee at 10:58 a.m.

TESTIMONY

HOUSE BILL NO.2891

PRESENTED TO

SENATE COMMITTEE ON AGRICULTURE

by

Dale Lambley, Director
Plant Health Division
Kansas State Board of Agriculture

March 1988

attachment 1
3-25-88

TESTIMONY

House Bill No. 2891

House Bill 2891 would require all uncertified employees of pesticide applicator businesses in Category 3 - Ornamental and Turf Pest Control to receive verifiable training as prescribed by the Secretary of Agriculture. This requirement would only apply to commercial pesticide applicators and would not affect a homeowners ability to apply pesticides on his or her own property. As I understand it, this bill is essentially designed to be a "me-too" version of the bill passed last session requiring training for uncertified termite and structural pest control applicators. As we indicated to you last session, it is our preference that all persons who commercially apply pesticides inside of homes, offices and restaurants or in the immediate vicinity of these structures should be certified. Nonetheless, the Kansas State Board of Agriculture supports this legislation, since it establishes a requirement for training which should raise the level of competency in the industry.

At the present time each pesticide business is required to have at least one employee who is commercially certified in the category or categories in which the business is licensed. In order to become certified, this individual must pass two or more closed-book examinations. He or she must then attend one approved training program or retake the examinations every three years. Many businesses have only one certified applicator who is usually the owner of the company or the branch manager. There are no statutorily mandated training requirements for other pesticide applicators employed by the business. The sole exception is the program requiring training for employees in structural and wood destroying pest control which is currently being implemented.

There are a number of suggestions of a technical nature which I would like to make relative to the language of the bill. Most are designed to insure compatability with the existing statute.

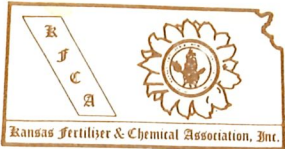
- 1.) The definition of "Certified Private Applicator" (lines 0048-0051) should not be changed. The new language implies legal authority which extends beyond the borders of this state. The problem is the wording "wherever located" in line 0049.

- 2.) To remain consistent with the names of categories used for licensing and certification, the amended definition of "Registered pest control technician" (lines 0075-0080) should read: "Registered pest control technician" means an uncertified commercial applicator who applies pesticides for wood destroying pest control, for structural pest control, for ornamental pest control, or for turf pest control, and who has received verifiable training.
- 3.) The definition of "Tree, ornamental shrubbery or turf" (lines 0124-0127) should be deleted. Commercial certification Category 3 - Ornamental and Turf Pest Control is presently defined by regulation in K.A.R. 4-13-11. Also of concern is the language on lines 0125-0126 dealing with property within the boundries of incorporated cities.
- 4.) Similarly, "tree or ornamental shrubbery pests or turf pests" should be changed to "ornamental pests or turf pests" (lines 0138, 0158-0159, 0189-0190, and 0201-0202).
- 5.) Finally, I have a concern about the 60-day limitations placed upon the agency in lines 0193-0198. We simply do not believe that we will be able to meet that deadline, particularly in the initial phase of the program when all existing companies will be submitting training materials for review. Furthermore, while we agree that business licensees should receive a written explanation if their training materials are disapproved, we would prefer that the materials themselves should be maintained in the Agency's files rather than returned to the licensee.

H.B. 2891 also contains one element entirely new to the agency's pesticide programs which causes it to depart from a bill strictly limited to the commercial ornamental and turf pest control industries. I am referring to New Section 5 which provides the agency with civil penalty authority. The agency has long felt that such authority would be highly beneficial to program enforcement and was considering making a similar proposal, possibly next session.

I would like to make three points about this section. First, as written, the agency would only have civil penalty authority for violations committed by commercial applicators. As a result, violations by other applicators could only be dealt with through the county attorneys and the criminal court system. Secondly, reference is made in lines 0237-0238 to an informal conference hearing. We would like to do that, but it is my understanding that the Administrative Procedures Act does not provide a mechanism for such a hearing. Thirdly, any civil penalties that are collected are to be credited to the state general fund (lines 0250-0252). This raises a couple of questions: What happens if a violator fails or refuses to pay the penalty? If the penalty is paid and then reversed on appeal two years later, how does the agency pay back the money? As you can tell, I have a budget concern.

Lastly, all business licenses, commercial applicator certificates and pest control technician registrations are issued on a calendar year basis. Furthermore, the summer months are extremely busy for our staff and for the commercial ornamental and turf industries. It would be extremely helpful to the agency and to industry if the act would take effect from and after January 1, 1989 rather than from and after its publication in the statute book as stated in lines 0257-0258.



KANSAS FERTILIZER AND CHEMICAL ASSOCIATION, INC.

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STATEMENT OF THE KANSAS FERTILIZER AND CHEMICAL ASSOCIATION

TO THE SENATE AGRICULTURE COMMITTEE

SENATOR JIM ALLEN, CHAIRMAN

REGARDING H.B. 2891

MARCH 25, 1988

Mr. Chairman and Members of the Committee, I am Chris Wilson, Director of Governmental Relations of the Kansas Fertilizer and Chemical Association. We appreciate the opportunity to provide comments to you concerning H.B. 2891. This bill was offered to include the turf and tree pest control industry in the registered pest control technician program which was passed last year for the structural pest control industry.

When the bill was amended in the House Energy and Natural Resources Committee, the turf and tree industry requested that authority be given to the State Board of Agriculture to assess civil penalties for violations of the pesticide business statutes. In so doing, they addressed not only their own industry, but anyone who has a pesticide business license. That is where our interest in this legislation surfaced.

KFCA has traditionally supported further regulation of the agricultural chemical industry. Our members know that the better job that individuals in our business do, the better the reflection on our industry as a whole. We also have a great regard for the State Board of Agriculture Division of Plant Health pesticide regulatory program and personnel.

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In that spirit, then, we fully support H.B. 2891, in particular the amendment in New Section 5, which applies to all pesticide business licensees. This would allow the Board of Agriculture to impose civil penalties in lieu of the U.S. Environmental Protection Agency. We generally support legislation which provides for state versus federal regulation. The penalties are the same as those which EPA may impose.

Thank you for considering our position.

Testimony on HB 2891

to

Senate Agriculture Committee

March 25, 1988

by

Vernon McKinzie, Kansas Termite and Pest Control Association

My name is Vernon McKinzie, I am legislative chairman for the Kansas Termite and Pest Control Association, an organization representing the structural pest control industry in Kansas. We are responsible for over 2,000,000 pesticide applications in and around structures per year in Kansas. Some of our members also provide lawn, tree, and ornamental services.

HB 2891 is a modification of SB 123 passed last session. We are grateful for your committee support at that time. It became law on January 1, 1988. Even though we have not had adequate time to fully evaluate its impact, preliminary indications are it will indeed improve the competency of structural pest control applicators.

SB 123 was written to effect only structural pest control applicators because of the need to be concerned about safety and effectiveness when pesticides were applied around people. It did not impact on other users groups. HB 2891 expands the existing law to require lawn and ornamental applicators meet verifiable training requirements. HB 2891 applies to all pesticide applicators as far as the clause on civil penalties is concerned.

We offered testimony on HB 2891 when it was in the House Committee on Energy and Natural Resources, and the amended version of the bill addressed some of our concerns.

We do not object to the lawn, tree and ornamental pesticide applicators being required to have verifiable training.

We do, however, raise a question about lines 124-127 concerning the definition of "tree, ornamental shrubbery or turf" and respectfully ask why these plants must be within the corporate limits of a city. What are we to call a tree, lawn, or ornamental if it is outside a corporate city? We perceive this as a fault in the language of the bill and suggest you consider a change to correct the fault.

Our second concern is with the Civil Penalty clause in Section 5, lines 220-221. The KTPCA has been on record for several years as favoring civil penalties for violation of the Kansas Pesticide Law, we object, however, to the concept of a minimum penalty of \$100.00 and respectfully suggest this is not harmonious with other state civil penalty statutes. We believe a precedent exists for the civil penalty to be assessed

(continued)

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up to a maximum level without regard to any mandatory minimum. We think regulatory officials need latitude to charge the penalty in relationship to the severity of violation and not be required to make every penalty start at a hundred dollar minimum. We do not object to the 5,000.00 maximum penalty but do urge you to reduce the \$100.00 minimum to zero which will bring the civil penalty section into harmony with other existing state statutes and the existing federal law.

Thank you for your consideration.

Testimony of
Professional Lawn Care Association of Mid-America
presented by David S. Murphy, FLCAMA president

House Bill 2891
March 25, 1988

Good day. My name is Dave Murphy. I am a local lawn care business man from Johnson County Kansas. I am the president of the Professional Lawn Care Association of Mid-America, a Kansas Association, and am on the Board of directors of the Professional Lawn Care Association of America, the National Association. Our combined membership provides in excess of \$30,000,000 of income, employs over 1500 Kansas residents and services over 150,000 Kansas Customers. I am here today to express our support of House Bill 2891.

The purpose of this bill is to increase safety among the professional urban pesticide user groups which include lawn care, tree care, and structural pest control. In brief House Bill 2891 calls for minimum verifiable training and registration of uncertified pesticide applicators. House bill 2891 also introduces civil penalties for violations of the Kansas Pesticide Law.

The correct use of pesticides in and around homes, on lawns, in schools and restaurants is critical. Neither our industry, our customers, nor the public wants to have incompetent people applying pesticides to their property. Most of us in the lawn and tree care industry have struggled on our own to upgrade the professionalism of our own businesses. We have always felt that incompetent, untrained pesticide technicians have no place in our industry. House Bill 2891 adds a margin of safety that we all desire without decreasing the benefits available from proper pesticide use.

Civil penalties are an important addition to the Kansas Pesticide Law. Currently the only way the state has of enforcing the law is to prosecute the law breakers in the county where the violation occurred. This is both time consuming, expensive and generally ineffective. The counties are reluctant to take on these cases because of their backlog of other, more pressing cases. A civil penalty of up to \$5000.00 per day per insident will make enforcement more effective.

The members of the lawn care industry believe House Bill 2891 is a good step towards protecting our employees, our businesses, our friends and neighbors, and our environment. As a member of the lawn care industry, as a Director of the Professional Lawn Care Association of America and President of the Professional Lawn Care Association of Mid-America I request that House Bill 2891 be approved.

Thank you.

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PUBLIC POLICY STATEMENT

SENATE COMMITTEE ON AGRICULTURE AND SMALL BUSINESS

RE: H.B. 3068 - Requiring reimbursement of costs when enjoined and prevented from using registered agricultural chemicals

March 25, 1988
Topeka, Kansas

Presented by:
Paul E. Fleener, Director
Public Affairs Division
Kansas Farm Bureau

Mr. Chairman, and Members of the Committee:

My name is Paul E. Fleener. I am the Director of the Public Affairs Division for Kansas Farm Bureau. We appreciate the opportunity to express our **strong support** for **H.B. 3068**. This legislation received a very strong - 94-30 - vote in the House of Representatives on March 8, 1988.

H.B. 3068 amends K.S.A. 2-3201 et seq., commonly referred to as the **"Agricultural Nuisance Lawsuit Act:"**

2-3201. Protection of farmland and agricultural activities; purpose. It is the declared policy of this state to conserve and protect and encourage the development and improvement of farmland for the production of food and other agricultural products. The legislature finds that agricultural activities conducted on farmland in areas in which nonagricultural uses have moved into agricultural areas are often subjected to nuisance lawsuits, and that such suits encourage and even force the premature removal of the lands from agricultural uses. It is therefore the purpose of this act to provide agricultural activities conducted on farmland protection from nuisance lawsuits.

Our policy position on agricultural chemicals is attached. Our people have asked that legislation be adopted to discourage the filing of nuisance lawsuits. That is the purpose of **H.B. 3068**. This legislation should discourage filing lawsuit or seeking to

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enjoin the proper use of registered agricultural chemicals, yet allow discretion to the court when the plaintiff actually sustains damages.

We believe individuals or groups who seek injunctions ... who seek to prevent the proper use of registered agricultural chemicals (fertilizers, pesticides, herbicides and fungicides) ... should be required to reimburse farmers, ranchers, county, state and federal governments for all costs when these legal actions are eventually shown to be unfounded or are overturned in a court of law. Using an agricultural chemical according to labelled instructions should be considered "proper use." We support complete and detailed labelling.

We envision that reimbursement, as proposed or stated in **H.B. 3068**, would include:

1. Court costs;
2. Legal fees; and
3. Crop losses ... resulting from this legal action.

We believe it is important that every member of this committee understand and that the public understand - **we do not condone misuse of agricultural chemicals.** We believe agriculture needs to act responsibly in protecting our environment and natural resources. We accept that responsibility. To assist farmers in reducing or preventing pollution from farming activities, Farm Bureau has developed, printed and is distributing the **"Self-Help ... Pollution Checklist."** We are making this information available throughout the state and are providing copies to other organizations and agencies who recognize the value of this document ... Kansas Cooperative Extension Service, Water

Management Districts, Kansas Department of Health and Environment.

The type of legal action we seek to prevent is becoming more prevalent nationwide as states become more urbanized. We believe H.B. 3068, amending the "Agricultural Nuisance Lawsuit Act," will prevent unjustified financial burdens on Kansas agriculture. Thank you for the opportunity to appear and express our support of **H.B. 3068**. We respectfully ask you to approve this bill. Thank you.

Agricultural Chemicals

We support reasonable regulation of the use of agricultural chemicals to assure adequate standards of public health. We will oppose regulations which are proposed as a result of mass hysteria and are not based on sound judgment and scientific knowledge.

No governmental agency should have the authority to ban, or continue the ban on, the manufacture or use of any agricultural chemical unless there is conclusive scientific proof that such use is detrimental to society.

We believe procedures should be developed so that some chemicals now banned from regular use can, in an emergency, be used by registered, certified applicators to control agricultural pest infestations.

We urge continued funding for research programs which could lead to eradication of those insects and pests that are particularly damaging to agricultural production.

We oppose the State of Kansas becoming involved in registration, certification, or determining the specific restrictions for agricultural chemicals. We believe such activity would be duplication and create confusion with existing federal regulations.

To discourage the filing of nuisance lawsuits, we urge legislation be enacted to:

1. Require individuals or groups that file injunctions against the proper use of registered agricultural chemicals to reimburse farmers, ranchers, federal, state and county governments for all court costs, legal fees, losses and costs arising from such injunctions that are eventually shown to be unfounded or are overturned in a court of law;
2. Require those filing any complaints to provide a bond guaranteeing payment of attorney fees and court costs. The amount shall be set by the court and subject to review upon motion by defense counsel. After conducting a hearing, the court may increase the amount of the bond; and
3. Prohibit non-affected parties from bringing a suit or injunction against pesticide users for possible misuse of chemicals.

HOUSE BILL No. 3068

By Committee on Agriculture and Small Business

2-24

Attachment 5
continued
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0018 AN ACT relating to agriculture; concerning actions to enjoin the
0019 use of agricultural chemicals; providing for the payment of
costs and attorney fees in certain cases; amending K.S.A.
0021 2-3203 and repealing the existing section.

0022 *Be it enacted by the Legislature of the State of Kansas:*

0023 New Section 1. In any case in which an action for injunction
0024 is brought for the misuse of agricultural chemicals and the court
0025 finds that the defendant properly used the agricultural chemicals
0026 according to state and federal law and the label instructions and
0027 that the plaintiff sustained no damages from the use of such
0028 agricultural chemicals, the court may assess against the plaintiff
0029 reasonable attorney fees and expenses incurred by the defendant
0030 as a result of such action. In addition, the court may assess
0031 against the plaintiff additional losses and costs incurred by the
0032 defendant upon proof that such losses and costs were the result
0033 of the bringing of such action. This section shall be part of and
(supplemental to the provisions of article 32 of chapter 2 of the
0035 Kansas Statutes Annotated and acts amendatory of the provisions
0036 thereof or supplemental thereto.

alleging the prior

0037 Sec. 2. K.S.A. 2-3203 is hereby amended to read as follows:
0038 2-3203. As used in this act:

an injunction granted as part of

0039 (a) "Agricultural activity" means the growing or raising of
0040 horticultural and agricultural crops, hay, poultry and livestock,
0041 and livestock, poultry and dairy products for commercial pur-
0042 poses.

Any assessment under this section shall be reduced (but not below zero) by an amount equal to the amount of any bond forfeited to the defendant under article 9 of chapter 40 of the Kansas Statutes Annotated. An assessment under this section shall be collected as costs in the action.

0043 (b) "Farmland" means land devoted primarily to an agricul-
0044 tural activity.

0045 (c) "Person" means any individual, partnership, profit or
0046 nonprofit corporation, trust, organization or any other business

0047 *entity, but does not include any governmental entity.*

0048 (d) *“Agricultural chemical” means those agricultural chem-*
0049 *icals as defined in the agricultural chemical act set forth in*
0050 *K.S.A. 2-2201 et seq., and amendments thereto.*

0051 Sec. 3. K.S.A. 2-3203 is hereby repealed.

0052 Sec. 4. This act shall take effect and be in force from and
0053 after its publication in the statute book.



KANSAS ASSOCIATION OF WHEAT GROWERS
"ONE STRONG VOICE FOR WHEAT"

TESTIMONY

Senate Committee on Agriculture
Senator Jim Allen, Chairman

HB 3068

The Kansas Association of Wheat Growers is firmly in support of HB 3068.

Presently, the farmer is quite vulnerable to those alarmists who feel that all chemicals are harmful, and must be kept out of the air, ground, water and food supply. We agree that chemicals that have been proven harmful should be strictly controlled, and farmers do a great job of handling dangerous chemicals.

However, our technology has improved to the degree that we can measure sub-microscopic particles in parts per billion and parts per trillion. One part per trillion would be described as the size of a postage stamp compared to the area covered by all five great lakes states. Simple common sense should show that such minute particles would have no possibility of causing harmful effects unless someone has no immune system at all. This is especially true in light of studies that show many of the so-called carcinogens are present in so-called organically grown plants, and many of them are produced by our own bodies.

In spite of what common sense should tell us, and in spite of the fact that the Board of Agriculture reports that there are no pollution sites in Kansas caused by application of farm chemicals, the farmer is still vulnerable to injunctions which can stop his field work, and in some cases, cause him to lose a crop, while he fights for his rights to use beneficial chemicals.

The farmer needs a tool to fight against such nuisance injunctions. Presently, someone who simply doesn't know what they are talking about could get an injunction to stop a farmer from applying a fertilizer or pesticide. And even if the court decides that the farmer has followed all label instructions, and all state and federal laws, the farmer has no way to recover the cost and inconvenience of defending himself, and perhaps crop loss, if timely application is important to save a crop.

We feel the farmer needs a tool to recover the cost of defending his proper use of beneficial chemicals. We also feel such a tool can deter some of these nuisance actions before they start, if people can be made to realize that they must bear the responsibility of their actions when the court finds that those actions are wrong, and when those actions have placed a financial burden on someone else.

We urge the committee to report HB 3068 favorable for passage.

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Committee of . . .

Kansas Farm Organizations

Wilbur G. Leonard
Legislative Agent
109 West 9th Street
Suite 304
Topeka, Kansas 66612
(913) 234-9016

TESTIMONY IN SUPPORT OF HOUSE BILL NO. 3068

BEFORE THE SENATE COMMITTEE ON AGRICULTURE

March 25, 1988

Mr. Chairman and Members of the Committee:

I am Wilbur Leonard, representing the Committee of Kansas Farm Organizations. We thank you for this opportunity to express our views concerning House Bill No. 3068.

This bill, as passed by the House, is very similar to SB 278 which was introduced in this Committee in the 1987. Amended to cover civil suits in addition to injunction actions, SB 278 was killed by the House Judiciary Committee. SB 3068 pertains to injunction actions only.

In cases whereby the user of agricultural chemicals is enjoined and thereby prevented from using such chemicals and the court finds that the chemicals had been used according to federal and state law, were used in accordance with the label instructions and the plaintiff has sustained no damages, the court may assess against the plaintiff:

- (a) reasonable attorney fees;
- (b) expenses; and
- (c) losses and costs sustained by the defendant because the action was brought.

Anyone who uses chemicals, whether to control weeds or pests, has both the moral and the legal responsibility to proceed in a prudent manner, to follow the manufacturers' instructions and to not cause injury to others. This bill is not intended as a legislative license to inflict harm on any person or group, but we do seek protection from unwarranted legal interferences.

As we all know, the timing of agricultural activities often means the difference between a profitable crop or a financial disaster. If an

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injunction is obtained by a court action and the farming operation is delayed for even a short time, it can lead to a substantial crop loss. Whole fields could be destroyed while legal maneuverings drag on. It's little consolation for a farmer to be vindicated in a court action if his crops have been lost in the process.

The principal purpose of this bill is to minimize the hasty filing of actions which have no foundation. If there is no legal basis for the case why shouldn't the person who brought suit and obtained the injunction pay for the consequences of his acts?

This bill won't deprive anyone of the rights to which they are legally entitled. If someone has been wronged because of the improper conduct of his neighbor in using agricultural chemicals, the aggrieved party has the right to bring an action to recover his loss and his costs. He also has the right to stop the continued misuse of chemical substances by seeking injunctive relief.

We believe House Bill No. 3068 will encourage some persons to reflect further before seeking injunctive action which could be harmful to farms and ranchers acting within the law. We respectfully urge the Committee to recommend this bill favorably for passage.

TESTIMONY BY RICHARD MASON, KTLA

GREEN & SACHSE, CHARTERED

ATTORNEYS AT LAW

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ROBERT W. GREEN
THOMAS H. SACHSE

March 23, 1988

TO: Senate Agricultural Committee

RE: H. B. 3068

Please vote NO on H. B. 3068. This law would be contrary to the public health and safety, it is unnecessary and it is in conflict with current law on this subject.

New Section 1 of the Bill states that in any case in which an action for injunction is brought for the misuse of agricultural chemicals and the court finds that the defendant properly used the agricultural chemicals according to State and Federal Law and the label instructions and the plaintiff sustained no damages from the use of such agricultural chemicals, the court may assess against the plaintiff reasonable attorney fees and expenses incurred by the defendant as a result of such action (emphasis supplied). The very nature of an injunction lawsuit is to stop a wrongful or negligent act or practice before it occurs and before it does damage to an individual or to the public health and safety. New Section 1 would impose a requirement that the public or an individual first suffer damages before a lawsuit could be brought from misuse of the agricultural chemicals. The new section would also require the plaintiff to make his own interpretation of State or Federal Law and deny him the right to seek a court interpretation of the State or Federal Law as to whether agricultural chemicals have been misused.

H. B. 3068 is in conflict with K.S.A. 2-3202, which provides that if an agricultural activity is undertaken in conformity with Federal, State and Local laws and regulations, it is presumed to be good agricultural practice and not adversely affecting the public health and safety. Under current law, that presumption can be rebutted by showing that under the particular circumstances the use of an agricultural chemical could pose a threat to the public health and safety and/or could be poor agricultural practice.

Under the new law, farmer Jones might learn that his

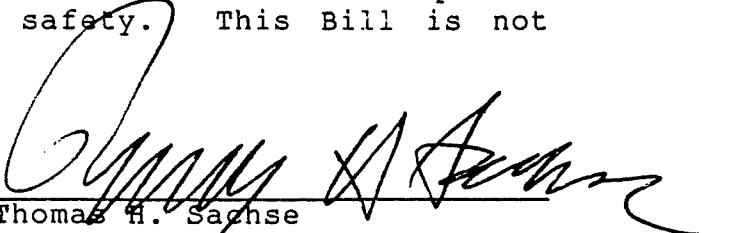
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neighbor is preparing to use agricultural chemicals. The proposed activity is in compliance with State and Federal Law, but farmer Jones has evidence to show that the proposed activity is poor agricultural practice by his neighbor and that the use of the chemicals will have a substantial adverse affect on the public health and safety. In other words, under the old law farmer Jones could rebutt the presumption under K.S.A. 2-3202. Farmer Jones files an injunction action to prevent his neighbor from applying the chemicals. The court finds that under the new law the proposed activity is in compliance with State and Federal Law and also finds that farmer Jones and the public have not yet suffered any damage. Attorney's fees and expenses would be assessed against farmer Jones, even though in good faith he has brought an action to prevent damage to the public and to himself.

The purpose of this legislation is presumably to prevent frivolous lawsuits. However, there is already adequate protection under Kansas Law to prevent the filing of frivolous lawsuits. K.S.A. 60-211, which is patterned after Federal Rule of Procedure 11 sets the standard that a lawsuit must be well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. Under House Bill 3068, the public or an individual would now be prohibited from bringing an action in good faith for the modification or the reversal of existing law.

K.S.A. 60-2007 provides for the assessment of costs against a person bringing a frivolous claim without a reasonable basis and fact and not in good faith. The law states that its purpose is not to prevent a party from litigating bona fide claims or defenses, but to protect litigants from harassment and expense in clear cases of abuse.

I am sure the intent in philosophy of H.B. 3068 was to protect agricultural activity from harassment and expense in clear cases of abuse. However, the law as proposed, would have the affect of preventing a party from litigating bona fide claims in situations where agricultural chemicals could pose a danger to the public health and safety. This Bill is not needed and should be defeated.



Thomas H. Sachse
Attorney at Law

P. S. An analogy can be drawn to a case I am presently handling for a farmer in Franklin County. My client's neighbor build levies and dikes on his property without a State permit. One of his levies burst causing flood damage on my client's property. We brought a lawsuit for the damage already done and for an injunction that he remove the unlawful structures. The Division of Water Resources has determined that the neighbor's dikes and levies were unlawful because they were built without the required state permit. However, there is no State law or regulation requiring the neighbor to tear down the unlawful structures. Therefore, my client sought an injunction from the State District Court to require removal of the unlawful structures and to prevent damage in the future. If a law were passed in this area similar to H.B. 3068, we would be subject to assessment of attorney's fees for bringing the injunction suit or have to wait until further damage to my client and to the ecology of the area occurred.

THS



SIERRA CLUB

Kansas Chapter

Testimony before Senate Agriculture Committee

HB 3068

March 25, 1988

I am Margaret Post Ahrens, representing the 2000 members of the Kansas Chapter of the Sierra Club. The Sierra Club works to protect our natural resources for the well being of present and future generations. We have an agricultural chemical expert who is a Kansan, but she is unable to testify today. I have submitted a copy of the testimony she gave before the House Agriculture and Small Business Committee on HB 3068.

HB 3068 as amended in the house to include state and federal law requirements for application with those of the label is a more technically correct bill than the earlier version. But we continue to oppose the bill for these reasons:

We know of no case of an injunction against the misuse of agricultural chemicals in Kansas, or a "nuisance suit" of the nature that this bill is supposed to prevent. The bill is designed to address a situation that does not exist in Kansas.

Furthermore, current Kansas law protects all her citizens against every type of nuisance suit, including any brought against those who use agricultural chemicals. The bill sets out to protect where protection is already in place.

More importantly, HB 3068 represents an attitude that pits the agricultural community against ANYONE who would dare to question the application of chemicals that have the potential for harming the water upon which we all depend for life and economy.

We propose that the agricultural community and the community at large have a common overriding concern and interest in clean, plentiful water. Rather than expressing any needful issue that would protect that water--and there are many of those issues--this bill implies that anyone in Kansas who would take actions to protect water is at war with agriculture. It makes a citizen, possibly a farmer who has a contaminated well and would seek to protect his family's health and his investment, appear to be a rabid nuisance environmentalist!

HB 3068 and others like it that failed in the 1986 session are bad bills because they do not have a problem to solve, and they are redundant in Kansas law. But their greatest harm is that they themselves are nuisances. They force us to concentrate our energies on preserving the constitutional rights of Kansans to protect themselves from harm. That is energy lost for exploring and sharing ways we can all act to protect the quality and quantity of water in Kansas.

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SIERRA CLUB

Kansas Chapter

SIERRA CLUB TESTIMONY ON HB 3068

3 March 1988

I am Terry Shistar, the Pesticide Coordinator for the Sierra Club. I come as a representative of the 2000 members of the Kansas Sierra Club. The Sierra Club opposes HB 3068.

CONTEXT OF BILL

First I would like to discuss the context in which this bill arises--specifically, the context of pesticide regulation. Pesticides are regulated nationally by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and in Kansas by the Kansas Pesticide Law and the Kansas Agricultural Chemical Act. FIFRA imposes upon EPA the duty of registering pesticides and approving labels. Both FIFRA and the Kansas Pesticide Law require that pesticides be used in accordance with label instructions, but they also require more than compliance with the label. The state is prohibited by FIFRA (Section 24(b)) from imposing labeling different from Federal labels, except for special state registrations.

To my knowledge, the right of the courts to impose an injunction to prevent pesticide misuse has never been used in Kansas. Last year, when a bill similar to this one was introduced, Bill Fuller told the House Judiciary Committee that he was not aware of any use of this power either.

Under the Kansas Pesticide Law, the district courts may restrain violations of the law by injunction. A pesticide

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application may be a violation of the Kansas Pesticide Law without violating the label.

Last year, I represented the Sierra Club in a coalition of organizations that was seeking changes in FIFRA. After the coalition arrived at a compromise bill in negotiations with the National Agricultural Chemicals Association, other amendments were made that eventually resulted in the death of the bill. One of these would have limited an agricultural user's liability for pesticide misuse to cases in which the label had been violated. This amendment was unacceptable to Congress because it made a drastic change in the level of responsibility of the pesticide user.

For example, FIFRA requires EPA to classify a pesticide as a restricted use pesticide "if the Administrator determines that the pesticide, when applied in accordance with its directions for use, warnings and cautions and for the uses for which it is registered, or for one or more of such uses, or in accordance with a widespread and commonly recognized practice, may generally cause, without additional regulatory restrictions, unreasonable adverse effects on the environment, including injury to the applicator." (Section 3(d)(1)(C))

WHAT HB 3068 DOES

In this context, what does HB 3068 do? Injunctions are granted by the court on a finding that the use would violate the Kansas Pesticide Law. If the court finds that the use is not a violation of the law, it does not issue an

injunction, and the usual provisions for frivolous actions apply if the plaintiff's claim is without basis. If the court finds that the use would violate the Kansas Pesticide Law, it may issue an injunction.

But the violation may not be a label violation. For example, the aerial application of a highly volatile, extremely toxic insecticide to a field adjacent to a school while children are attending would violate the Kansas Pesticide Law, which makes it illegal for a person required to be licensed, registered, or certified to "use any method or material without regard to public health, safety, or welfare." (KSA 2-2454(m)) There may not be a provision on the label that directly applies, but because the aerial applicator is required to be certified, he is required to meet certain other standards.

In addition, since the term "agricultural chemicals" includes pesticides used for other than agricultural uses, the extensive regulations for termite control would fall into the same category.

Therefore, there would be a number of violations for which an injunction could be rightfully granted under the Kansas Pesticide Law, but might nevertheless make the plaintiff liable for court costs and "other costs". Furthermore, the state does not have the ability to make the label carry all the legal weight because the state cannot require different labeling from federal labeling.

I am unclear about what this bill is meant to accomplish. The bill introduced last year, as well as a similar Senate bill (SB 508) this year, also addressed civil suits. Those bills have the additional problem of making recovery in a civil action dependent on proof of a violation of criminal statute.

The Sierra Club opposes both HB 3068 and SB 508 because to the extent that they do anything, they weaken public protection from pesticide misuse and create confusion about the intent of the law.

Kansas Natural Resource Council

Testimony before the Senate Agriculture Committee

HB 3068: Attorneys' fees and costs awarded to defendants in certain cases involving action for injunction to enjoin misuse of agricultural chemicals.

March 25, 1988

My name is Charlene A. Stinard, and I represent the Kansas Natural Resource Council, a private, non-profit organization promoting sustainable natural resource policies.

HB 3068 was introduced to discourage the frequency of "nuisance lawsuits" in the area of agricultural chemical application. Under this bill, if the defendant has caused the plaintiff no damage through the proper handling of an agricultural chemical, the plaintiff must pay attorneys' fees and other costs.

However, in fairness, we believe this bill ought to be amended. If the plaintiff is successful, the defendant should be required to pay plaintiff's attorneys' fees and costs.

We suggest this amendment be added to HB 3068 in order to insure that both the plaintiff and the defendant are held responsible for their actions.



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