

Approved April 2, 1991  
Date

MINUTES OF THE Senate COMMITTEE ON Energy and Natural Resources

The meeting was called to order by Senator Ross Doyen at  
Chairperson

8:04 a.m./~~p.m.~~ on March 27, 1991 in room 423-S of the Capitol.

All members were present except: All members were present.

Committee staff present:

Pat Mah, Legislative Research Department  
Raney Gilliland, Legislative Research Department  
Don Hayward, Revisor of Statutes  
Lila McClaflin, Committee Secretary

Conferees appearing before the committee:

Dr. Ramon Powers, Kansas Historical Society  
Kelly Kindscher, Kansas Land Trust  
Representative John Solbach  
Michael Davis, University of Kansas Law School  
Steve Hamburg, Kansas Land Trust  
Alan Pollom, Nature Conservancy  
Senator Wint Winter  
Bill Fuller, Kansas Farm Bureau  
Janet Stubbs, Home Builders Association  
Nancy Kantola, Committee of Kansas Farm Organizations  
Howard Tice, Kansas Association of Wheat Growers

The Chairman opened the hearing on HB 2375 - creating the uniform conservation easement act.

Dr Ramon Powers suggested some amendments and stated with those changes included they would be pleased to support the bill (Attachment 1).

Kelly Kindscher gave some examples of how they think the Uniform Conservation Easement Act would benefit landowners, the State, and wildlife, how it has been used in other states (Attachment 2).

Representative John Solbach spoke in support of the proposal. He sees it as a way for farmers to protect their farming operations.

The Chairman asked Representative Solbach to please submit his remarks in writing.

Michael Davis, University of Kansas Law School, testified twelve states and Washington, D. C. have adopted the Uniform Conservation Easement Act. He stressed it is strictly volunteer, and he looked on it as pretty harmless stuff.

Steve Hamburg urged the adoption of the act unamended. He believes it does not hinder development, and it has been proven an effective tool for providing land owners with the options they want, and would provide many benefits to the society at large (Attachment 3).

Alan Pollom testified in support of HB 2375.

Senator Wint Winter strongly supported the proposal and stressed it was strictly a voluntary option.

Bill Fuller suggested a prominent statement be attached to the deed indicating that the easement limits the use of the property forever and acknowledged by the property owner's signature (Attachment 4).

Janet Stubbs expressed concern with the act and asked that the state agencies be given time to test the provisions of the 1987 act which were implemented in the recommendation of the Kansas Water Plan (Attachment 5).

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 Energy and Natural Resources,  
room 423-S Statehouse, at 8:04 a.m./~~p.m.~~ on March 27, 1991.

Nancy Kantola said landowners can donate land to any institution they wish for whatever the receiver wishes to use or preserve it for, this bill appears to be an unneeded and potentially dangerous bill (Attachment 6).

Howard Tice distributed copies of the "Private Property Rights Act of 1991". He urged the committee to vote against HB 2375 (Attachment 7).

The hearing on HB 2375 was closed. The meeting adjourned at 9:01 a.m. The next meeting will be March 28, 1991, at 8:30 a.m.

1991 SENATE ENERGY AND NATURAL RESOURCES COMMITTEE

Date March 27, 1991

PLEASE PRINT

GUEST LIST

<u>NAME</u>	<u>REPRESENTING</u>
Steven Hamburg	Kansas Land Trust
Diane W. Simpson	Kansas Land Trust
Kelly Kindred	Kansas Land Trust
Mike Davis	KU Law School
Shawn Harrelson	Ks. Tire Dealers
<del>Howard W. Tico</del>	Ks. Ass. of Wheat Growers
JANET J. STUBBS	HBA of Ks.
PAUCA FREERKSEN	League of Ks municipalities
Quika Detwiler	<del>Intern.</del>
Bill R. Fuller	Kansas Farm Bureau
David Barfield	KS Div. of Water Resources
Charles Nicolay	Ks Tire Dealers Assn.
Jim Ludwig	KPL Gas Service
Jerry Conrad	KGE
Darrell Monzel	KDWP
Marjorie J. VanBuren	self

STATEMENT OF DR. RAMON POWERS, EXECUTIVE DIRECTOR, KANSAS STATE HISTORICAL SOCIETY, BEFORE THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES RE HB 2375, MARCH 27, 1991

The State Historical Society has consistently supported and testified in favor of legislation that permitted conservation easements for properties of historical, architectural, archeological, or cultural importance.

House Bill 2375 replaces the existing state conservation easements legislation with the uniform conservation easement act. This agency supports House Bill 2375 in concept but we have one concern about the bill. We had attempted to identify our concern to the House committee that heard testimony but it was apparently lost in the confusion when that initial hearing ran overtime.

The State Historical Society suggests your consideration of one amendment to House Bill 2375. Lines 21 and 22 state that conservation easements can be used to preserve ". . . the historical, architectural, archaeological or cultural aspects of real property." This bill does not provide a definition for what constitutes a historical property. If you desire to provide a definition, we would propose the language in the current statute which states that conservation easements can be granted only on properties listed on either the national register of historic places or the state register of historic places. We would also be willing to extend the eligibility to those properties designated as local historic landmarks through a process established by local historic preservation ordinances.

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A conservation easement is presently one of the tools available to people, communities, and groups seeking to preserve historic properties. Currently state statutes recognize the validity of such conservation easements but only permit governmental entities to hold easements. House Bill 2375 would permit charitable corporations to hold easements. This agency supports that principle, believing, for example, that local preservation groups, such as the Lawrence Preservation Alliance or Historic Topeka, Inc., are fully capable of managing and enforcing easements for historic buildings in their own community.

With the proviso mentioned above we are pleased to support this bill.

March 27, 1991  
Kansas Land Trust  
Rt. 2, Box 394A  
Lawrence, KS 66046  
913-842-1203

Dear Senator,

The following letter provides you background information on House Bill No. 2375. We would like your support of this bill, which would allow the State of Kansas to adopt the Uniform Conservation Easement Act.

The Kansas Land Trust is a non-profit organization that was incorporated in July 1990. Our stated purpose is "to promote, for the benefit of the general public, the preservation of the natural, recreational, scenic, and agricultural values of land." One of the goals of the Kansas Land Trust is to allow the State of Kansas to have the same options that other states use to protect land resources. Therefore, we recommend that the current conservation easement Kansas Statute (KSA 58-3803) be repealed and that the Uniform Conservation Easement Act (Senate Bill No. 2375) be adopted.

A conservation easement is a legal agreement a landowner makes to restrict the type and amount of development that may take place on his or her property. People grant conservation easements to protect their land from inappropriate development while retaining private ownership. This assures the owner that the natural character of the property will be protected indefinitely, no matter who the future owners are. Donors of a conservation easement retain title to the property and continue to possess and manage it. Granting an easement can also yield federal tax savings. Each easement's restrictions are tailored to the particular property and to the interests of both the easement holder and the property owner.

Current Kansas law allows easements to be held only by governmental agencies and only for wetlands and riparian areas. In order to give landowners the right to protect their land, legislation is needed to allow for the use of conservation easements by non-profit organizations (such as the Kansas Land Trust and the Nature Conservancy) and to allow easements to be held for other types of land--prairies, woodlands, other natural areas, and farmland. These limitations to our existing statute can be remedied through adoption of House Bill No. 2375.

Since 1981, the Uniform Conservation Easement Act has been adopted by 11 other states. Many other states had enacted laws similar to it before the Uniform Act was established. Conservation easement laws in other states have been non-controversial, and have provided landowners additional land protection rights and benefiting the public through protection of natural areas, open space, and farms.

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*3/27/91*  
*attachment 2*  
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The adoption of the Uniform Conservation Easement Act will not cost the State of Kansas money because there are no funds needed for a program accompanying this statute change. Costs associated with management and oversight of conservation easements can be borne by non-profit organizations, such as the Kansas Land Trust and the Nature Conservancy. In fact, from a conservation perspective, this program will save the state of Kansas money, as protection of natural areas and creation of recreational opportunities will be able to occur without the need for money from the state government. Also, non-profits are needed for protecting land through conservation easements as they do not have the appearance of conflicts of interest that government entities do related to partisan politics and the helping of developers and farmers to receive federal tax breaks.

#### BENEFITS OF CONSERVATION EASEMENTS

The benefits of conservation easements that the Uniform Conservation Easement Act will allow, will include:

- 1) land can be protected while still remaining as private property; only the development rights have been given or sold to a governmental body or non-profit conservation organization;
- 2) the landowner can get federal tax advantages and can reduce their inheritance tax;
- 3) easements will benefit wildlife, wildlife habitat, and will protect endangered species;
- 4) easements can only be granted on a voluntary basis; that is, only willing landowners can grant an easement;
- 5) easements can protect farming operations in areas where they are threatened by urban sprawl;
- 6) easements do not cost the state money and the land is maintained on the local tax rolls.

#### AN EXAMPLE OF A POTENTIAL CONSERVATION EASEMENT

An example of an easement that the Kansas Land Trust would like to obtain would be for a 30-acre natural area, a native prairie hay meadow. This land is similar to the Elkins Prairie, located near Lawrence in an area that due to its proximity to the Kansas Turnpike is experiencing rising land values and housing development. This is one of the few native prairie tracts remaining in the area and has rare plant species on it. With the passage of this statute, we would approach the absentee land owner and explain to them what conservation easements are, and how they could potentially receive a tax advantage on their federal taxes by donating us their development rights. At the same time, the land would remain as their private property. If they were interested in granting us an conservation easement, we would also discuss how they would manage the land to suit our mutual purposes, and explain that we would inspect the land once a year to make sure that the management agreement would be upheld.

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## USE OF CONSERVATION EASEMENTS IN OTHER STATES

There are over 850 land trusts nationwide working to protect land through a variety of means--purchase and conservation easements being the two main ones. Some of these organizations are decades old (two started in 1891) and they have a track record of good management. These organizations have worked quietly and effectively. Examples from other states include:

1) Pennsylvania: The Lancaster County Agricultural Preservation Board is directed by a former Kansas State University professor--Tom Daniels. He administers their county program as part of the Lancaster Farmland Trust, which protects 9,000 acres of farmland (half of this acreage is protected by conservation easements). The nine year-old program covers approximately 95 farms. They do not have any major opposition to this program which is working with farm organizations to protect farmland in their county.

2) New Hampshire: The Trust for New Hampshire land has over 71,000 acres of land (primarily forested) protected through easements across the state. They receive donations for their program from many individuals, banks, and utilities, such as New England Power Company and New England Telephone Company.

3) Montana: The Montana Land Alliance has 36 large conservation easements that are protecting 78,000 acres of agricultural land. This organization has also received broad support. Its board of directors is primarily composed of ranchers and the organization receives donations from many individuals, the Burlington Northern Railroad, Chemical Bank, Rockwell (Aerospace) Foundation, and the Bank of Montana. They have reported no opposition to the easements that they have received.

4) Iowa: Mark Ackelson, Assistant Director of the Iowa Natural Heritage Foundation, spoke to the House Judiciary Committee concerning their land trust's use of conservation easements. He was unable to attend this hearings. Highlights of his talk include that Iowa has had the use of conservation easements for almost 20 years, and has allowed non-profit organizations to use them for the last 8 years. They have protected 12 parcels of land during this time with conservation easements. These parcels have been significant as scenic areas, urban open space, buffer areas around historic buildings and lake watersheds. Their organization is well respected and non-controversial.

## POTENTIAL QUESTIONS

Q. Will an easement protect the land for future generations?

A. Yes, it is a legal interest in the land that is binding in perpetuity. An organization, such as the Kansas Land Trust, can make sure that the easement is honored.

Q. Do conservation easements condemn land in private ownership?

A. Emphatically not. Easements are a completely voluntary

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arrangement. They do not require any change in ownership, and the land remains privately owned.

Q. Can conservation easements block development?

A. No. Even if some organization would try, conservation easements would not be able block development projects because easements can only be given on a voluntary basis and the rights of eminent domain supersede conservation easements and can be used by utilities, and by governments to build public projects such as roads, schools, and hospitals.

Q. Can conservation easements encourage economic development?

A. Yes, conservation easements can stimulate a higher quality of development, with low development costs and a higher return on neighboring lands (much like golf courses increase the value of land immediately surrounding them, while reducing the developers up-front costs by not constructing as many streets and utilities). By making a community more attractive to live in, they can attract new residents and businesses.

Q. Will conservation easements interfere with public utilities?

A. No, utility companies will retain all rights of access.

Sincerely,



Kelly Kindscher  
Executive Director

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TESTIMONY BY STEVEN HAMBURG  
IN SUPPORT OF HB 2375  
MARCH 1991

My name is Steven Hamburg and I am the President of the Kansas Land Trust. I am testifying in support of House Bill 2375, The Uniform Conservation Easement Act.

Conservation easements is about bringing communities together. Conservation easements are not pro or anti-development, nor are they conservative or liberal, they are about preserving an individual's rights to define his or her own environment. I have sat at a table working with individuals who represent the two extremes of American politics, yet they were united in efforts to put conservation easements on their lands. The over half million Americans who are members of land trusts are not easily characterized, but rather represent the cross section of Americans, they have one thing in common, that they care about the land. In each region and community the issues are going to be different, but the options that conservation easements provide are proving integral to the maintenance of the diversity of landscapes which comprise our urban and rural environments.

I would like to address in particular the relationship between conservation easements and development. Though at first glance developers and builders may feel threatened by conservation easements, they in fact have proven an opportunity for, rather than an impediment to, development. At no place in the country has conservation easements hindered development within a community. Easements can be used creatively by developers to increase profits for themselves, while preserving the natural attributes of an area. These limited developments reduce capital costs, and their associated risks, while increasing the value of each developed acre, the net result is increased profits. This concept has been applied successfully across the country. Here are a couple specific examples of successful joint ventures between developers and land trusts employing conservation easements;

King Land Project, New Hampshire - 184 acres, 55 which were sold to the State of New Hampshire for a Wildlife Management Area, 79 acres sold with a conservation easement to a private individual who is managing the property for timber, and the remaining 55 acres is slated for a limited development. (see attached map). In New

Hampshire arrangements such as these, has consistently raised the per acre value of adjacent developed land by hundreds of dollars.

Big Sur Land Trust, CA - has carried out two limited developments recently, one in which a 15 acre parcel was divided into two 2.5 acre lots and a 10 acre undeveloped parcel with a conservation easement. Another project involved a 460 acre parcel from which four house sites were created of 5 acres each, the remaining land was placed under easement. These projects have proved financially viable through the use of federal tax credits and the increased value of the house lots that were created, and the reduced development costs associated with the lower numbers of dwellings actually built.

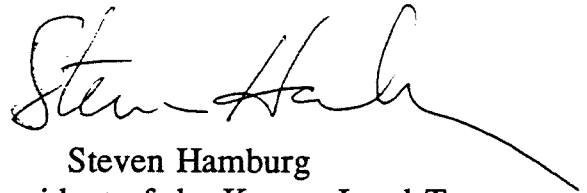
Many land trusts which employ conservation easements have developers on their boards of directors i.e. Lancaster County (PA) Agricultural Preservation Board. Lou Biacchi, Director of Governmental Affairs for the Pennsylvania Builders Association, finds "the current (conservation easement) law is appropriate and effective... it has caused no ill effects... we haven't had any major problems (with it)." He feels that in no way has the conservation easement law in Pennsylvania, which is well established, stifled development. We have been able to find no instances in which one of the 800 land trusts in this country has utilized conservation easements resulting in confrontations with developers.

In Kansas numerous developments have been built around golf courses. Surprisingly many of the people buying houses directly on the golf courses do not play golf. They have purchased these homes so that they may be next to open space. A cheaper and more attractive approach to filling the needs of such individuals is to build houses next to lands protected with conservation easements, the same result at a much lower cost to the developer, and greater protection for the home owner. If Kansas had a conservation easement law such an approach to developing would be feasible and desirable.

It is critical that non-profit organizations have the right to hold conservation easements, as they are the most effective holders of such easements, in terms of dollars and sense. They can develop the trust required to make easements and limited developments work. Why spend tax dollars to do what is effectively handled in most instances by non-profits. There are over 800 land trusts across the

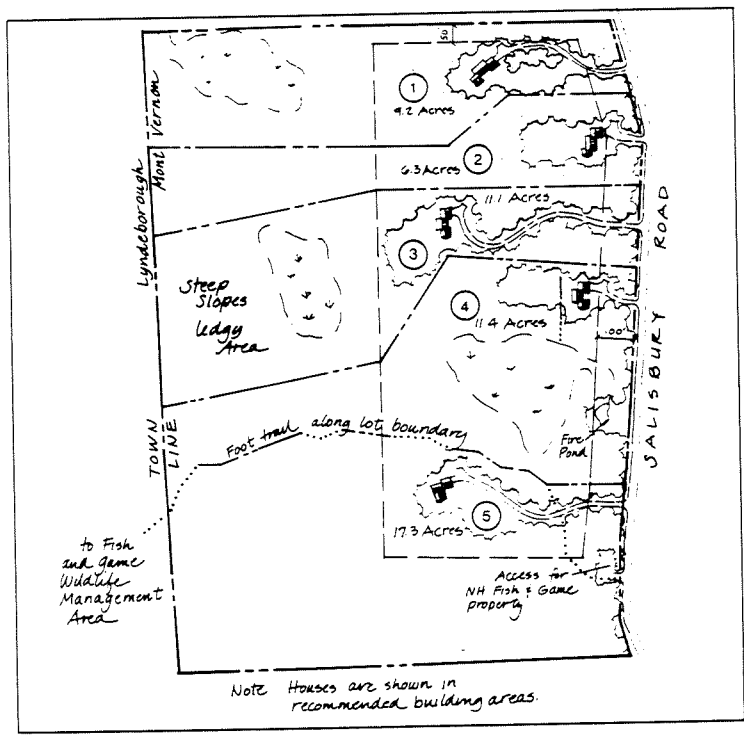
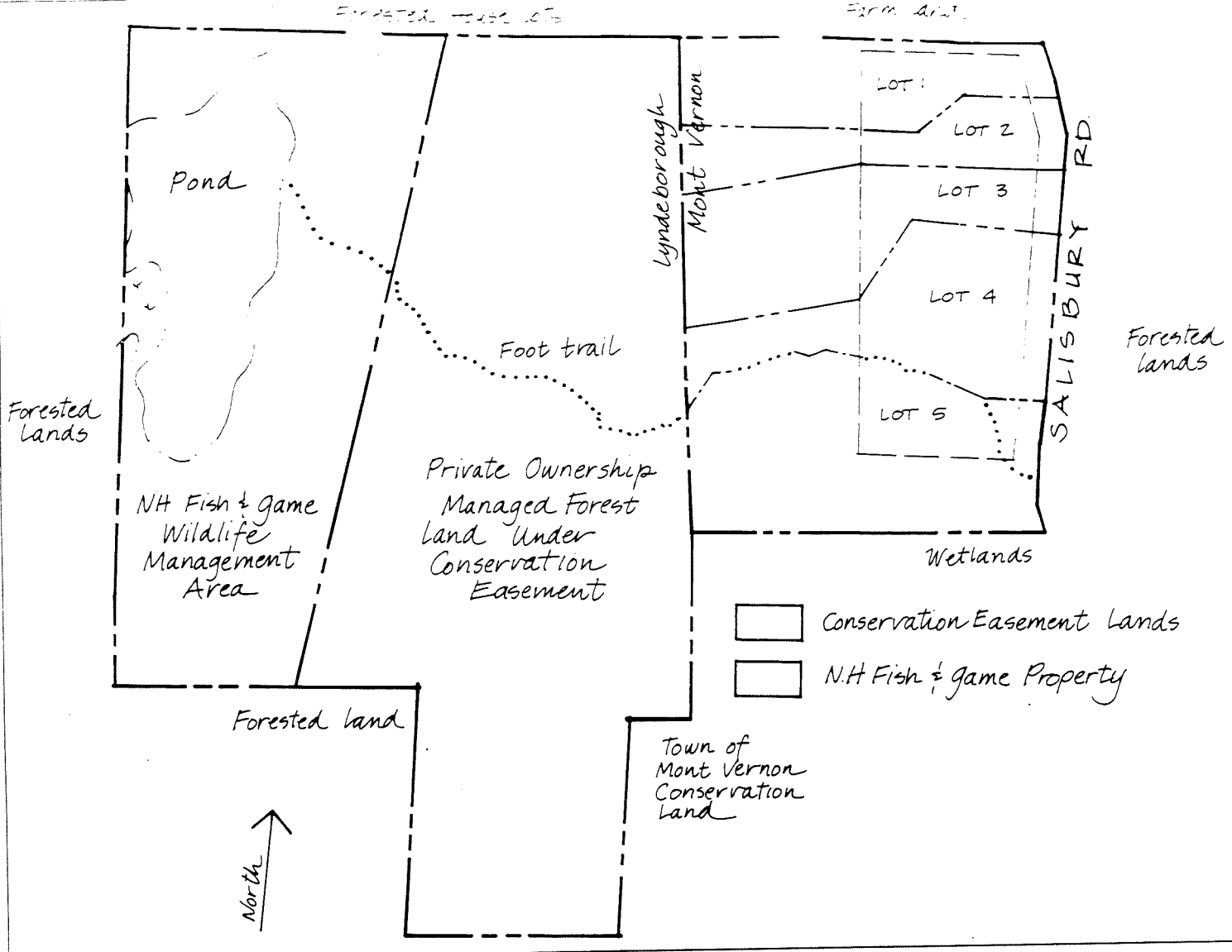
country and we have not been able to find one instance where they have been used to some less than noble end. I strongly urge you to adopt the conservation easement act unamended, it is a proven and effective tool for providing land owners with the options they want, which in turn provides many positive benefits to the the society at large.

I thank you for your time.

A handwritten signature in cursive script that reads "Steven Hamburg". The signature is written in black ink and is positioned above the printed name and title.

Steven Hamburg  
President of the Kansas Land Trust

401 Indiana St  
Lawrence, KS 66044



**Above:** Out of a 184-acre tract purchased from John & Anna King, the Forest Society sold 55 acres to NH Fish & Game, and 79 acres to a private buyer, after placing the land under a comprehensive conservation easement. The remaining 55 acres is slated for a limited development.

**Left:** The five lots are shown in greater detail here.

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# PUBLIC POLICY STATEMENT

## SENATE ENERGY AND NATURAL RESOURCES COMMITTEE

RE: H.B. 2375 - Creating the Uniform Conservation Easement Act.

March 27, 1991  
Topeka, Kansas

Presented By:  
Bill Fuller, Assistant Director  
Public Affairs Division  
Kansas Farm Bureau

Chairman Doyen and members of the Committee:

My name is Bill Fuller. I am the Assistant Director of the Public Affairs Division for Kansas Farm Bureau. Thank you for allowing us to express concerns about H.B. 2375 on behalf of the farmers and ranchers who are members of the 105 County Farm Bureaus.

A conservation easement is a legal agreement a landowner makes to restrict the type and amount of development that may take place on his or her property. We believe private landowners should decide how their property is used.

One of our concerns is the ongoing limitations on the use of the property regardless of who the future owners might be. We are also concerned that conservation easements are transferable. We believe it is only fair the provisions of any easement should be renegotiated each time the ownership of the property changes. What assurances do property owners have at the time they sign an agreement that future holders of the easement have the ability to supervise the provisions in the agreement?

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While we prefer the opportunity for property owners to renegotiate easements each time the owner of the property or the holder of the easement changes, we ask that the Committee at least make it abundantly clear to the property owner that the easement is binding to future owners. This could be accomplished in the Uniform Conservation Easement Act by including a prominent statement indicating that the easement limits the use of the property forever and acknowledged by the property owner's signature. This procedure has precedence with passage of S.B. 300 by the 1985 Legislature. S.B. 300 amended grain warehouse regulations (K.S.A. 34-2, 111) by requiring a grain buyer to inform sellers that deferred payment contracts and delayed pricing contracts are not protected by the warehouse bond. The contract was required to include a prominently displayed statement in not less than 10 point, all capital type, framed in a box with space provided for the seller's signature:

"THIS CONTRACT CONSTITUTES A VOLUNTARY EXTENSION OF CREDIT BY THE SELLER TO THE PUBLIC WAREHOUSEMAN AND IS NOT PROTECTED BY THE SURETY BOND OF THE PUBLIC WAREHOUSEMAN."

\_\_\_\_\_  
(must be signed by seller)

This statement and signature must be placed on the first page of the contract. We believe a similar disclosure should be required in any easement agreement.

We appreciate this opportunity to express our concerns and encourage the Committee to make the appropriate amendments to H.B. 2375. We will respond to questions. Thank you!

SENATE ENERGY & NATURAL RESOURCES COMMITTEE

HB 2375

March 27, 1991

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

The Home Builders Association of Kansas is appearing in opposition to House Bill 2375 which expands the purposes for which Conservation Easements may be granted from the "Wetlands and Riparian Areas" contemplated by the Conservation Section of the Kansas Water Plan. Some of the stated values are assuring land availability for agriculture, forest, recreational uses or maintaining or enhancing air or water quality and preserving the historical, architectural, archeological or cultural aspects of real property.

Current law protects the public's interest in natural, scenic or open spaces, wildlife habitat, agricultural, horticultural, recreational and forest values. Historical, architectural, archeological or culturally significant properties on the national or state registers of historic places are also currently protected. There has been no demonstration of the need for the additions found in section 1(a) of HB 2375.

HB 2375 would permit any charitable corporation, association or trust to create and hold conservation easements whereas current law permits only governments to be grantees of conservation easements. This issue was enjoined in 1987 when we testified that the Kansas Water Plan recommendation for creating conservation easements envisioned an exchange of the easement right for the expert advice and assistance

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of the state in preparing and implementing management plans for the wetlands and riparian areas covered by the grants. We testified that the ability to qualify as a charitable organization was no indicator of an organization's ability to administer such grants of real property interests.

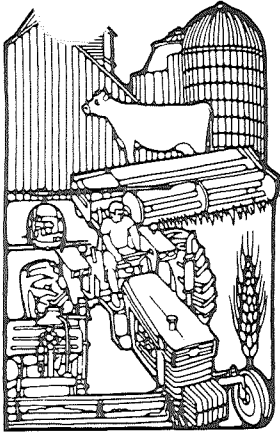
We also expressed concern that since conservation easements are transferable, it would be possible for such an organization to acquire and assemble conservation easements in a pattern which could be used to effectively block extension of public facilities such as streets, sewers and other utilities to areas which are not subject to conservation easements and thereby hold hostage the rights of private property owners unwilling to convey such easements to the organizations. Nothing in HB 2375 or in the testimony of proponents allays those concerns. Suggestions that powers of eminent domain override conservation easements are no assurance that a governing body would consider using its power of eminent domain to extend services to a proposed development landlocked by conservation easements.

Another new element which HB 2375 introduces into the conservation easement matter, is the creation of the authority for any person or organization eligible to hold conservation easements to enforce any of the terms of an easement regardless of the wishes of the grantor or grantee. We see this provision as an open invitation for groups to use the class action approach to descend on any proposed project or development with the hope of finding some flaw in the compliance with the terms of any conservation easement in the vicinity.

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*Attachment 5*  
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In closing, we urge your consideration of the concerns which we have expressed in this testimony and ask that you afford the state agencies time to test the provisions of the 1987 act which implemented the recommendation of the Kansas Water Plan.

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*3-3*



# Committee of Kansas Farm Organizations

## STATEMENT OF POSITION OF THE COMMITTEE OF KANSAS FARM ORGANIZATIONS

RE: H.B. 2375

Senate Committee on Energy and Natural Resources

Nancy E. Kantola  
Legislative Agent  
3604 Skyline Parkway  
Topeka, KS 66614  
(913) 273-5340

March 27, 1991

Mister Chairman, Members of the Committee: I am Nancy Kantola, Legislative Agent for the Committee of Kansas Farm Organizations. Our group is comprised of twenty-one member organizations. We require a unanimous vote to take a position on an issue.

House Bill 2375 was discussed at length in our meeting at noon yesterday. Our members voted to oppose this bill for several reasons.

First, it appears to be in direct conflict with legislation pending in Congress at this time, commonly referred to as Private Property Act. Government and other entities which have the authority to trespass at will on private property cause problems for farmers and ranchers now. To open up this violation of privacy in the name of "conservation easements" would increase the problem and the liability of having people unaware of the dangers of animals and equipment endangered.

Second, the property can be "protected" INDEFINITELY regardless of who the future owners might be. This certainly seems to be a bad idea. It sounds like the Farmland Preservation Act which certain states passed several years ago. It caused a number of farmers to lose their farms because they had signed their land up as production agriculture for a very long term. This limitation caused lenders to reduce it's mortgage value and kept farmers from selling off parts of their land for development which could have kept them in business.

Third, it appears that this bill could have repercussions beyond the land actually designated as a Conservation Easement. Would it be like the Historical Building designation and call for permission to be granted to a neighboring land owner before changing their adjoining land use, erecting a building or pen, or enlarging a pond?

Since landowners can donate land to any institution they wish for whatever the receiver wishes to use or "preserve" it for, this bill appears to be an unneeded and potentially dangerous bill.

We strongly urge it's defeat.

*E.N.R.*  
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*attachment 6*

Committee of Kansas  
Farm Organization Members

Associated Milk Producers, Inc.

Kansas Agri-Women Association

Kansas Association of Soil  
Conservation Districts

Kansas Association of  
Wheat Growers

Kansas Cooperative Council

Kansas Corn Growers Association

Kansas Electric Cooperatives

Kansas Ethanol Association

Kansas Farm Bureau

Kansas Fertilizer and  
Chemical Association

Kansas Grain and Feed  
Dealers Association

Kansas Livestock Association

Kansas Meat Processors  
Association

Kansas Pork Producers Council

Kansas Rural Water  
Districts Association

Kansas Seed Industry Association

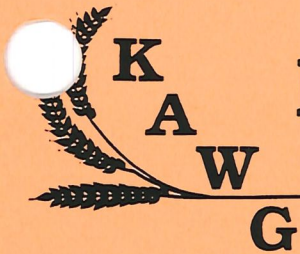
Kansas Soybean Association

Kansas State Grange

Kansas Veterinary Medical  
Association

Kansas Water Well Association

Mid America Dairymen, Inc.



# Kansas Association of Wheat Growers

P.O. Box 2349

Hutchinson, KS 67504-2349

(316) 662-2367

**ONE STRONG VOICE FOR WHEAT**

## TESTIMONY

Senate Committee on Energy & Natural Resources  
Senator Ross Doyen, Chairman

HB-2375

Mr. Chairman and members of the committee, I am Howard Tice, Executive Director of the Kansas Association of Wheat Growers. On their behalf, I thank you for the opportunity to appear today in opposition to HB-2375.

We deeply regret that we did not study this bill well enough to testify against it in the House Judiciary Committee. However, the issue of conservation easements was discussed at our last Executive Board meeting, and the decision to oppose HB-2375 was unanimous. Even though an easement under this bill is voluntary, we feel there are dangers that must be addressed.

At the federal level, conservation easements are utilized only where an area is recognized as "environmentally sensitive," and they are used only in conjunction with federal farm programs. As an example, under the latest rules change, only land which is recognized as "environmentally sensitive" with respect to wildlife habitat can now be entered into the Conservation Reserve Program. To be approved under the new rules, farmers have to accept a 30 year conservation easement. This is a shift away from conservation of highly erodible soil, to conservation of wildlife. In order to receive compensation for conserving land in the CRP, for 10 years, a producer must provide acceptable wildlife habitat on the land for 30 years. It should be noted that the easement is tied to the CRP, there is government compensation, and it is for a limited time. It is not permanent.

It is our understanding that only the federal government is recognized under these easements, as having right of enforcement. No other entity is permitted to control what land owners may do on their own property, and the government is limited in that control according to the conditions of the easements.

Under HB-2375, right of enforcement is given to unnamed charitable trusts, organizations or associations. The bill sets no limits on the regulations which could be imposed for the purpose of assuring the availability of the land for a broad range of uses. It states that a conservation easement is valid even though "it is not of a character that has been recognized traditionally at common law," or even though "it imposes a negative burden," or even though "the benefit does not touch or concern real property."

What this bill appears to do is to give a blank check to certain groups to dictate what someone else may do on their own private property. At the same time, if one person is successful in being recognized as an "organization," that one person could gain the same right of enforcement as a group. In either case, it is not good public policy to award any private group unlimited authority to dictate to others what they are allowed to do on their own private property.

Even though an easement under this bill would be voluntary, as we mentioned before, there is a very real danger to neighboring land owners as well as future owners of the land in question. An example which was brought up at our **Executive Board** meeting, concerned a possible conservation easement to protect the existence of a prairie dog town. Such an easement would cause problems for neighboring land owners who would not be able to adequately prevent damage to their pasture land, and possibly to crops, because of the protection afforded the prairie dogs under the neighbor's conservation easement.

On the surface, this bill seems innocuous. However, it is just another example of the growing tendency of some groups to impose their will on others, through legalized restrictions on private property rights. This tendency, which is also evident in government regulatory agencies, is being addressed by legislation pending in Congress.

**Senate Bill 50**, which is titled the **Private Property Rights Act of 1991**, would give statutory endorsement to procedures stipulated in **Executive Order 12630**, which requires federal agencies to determine the impact of their actions on private property, and to minimize the transgression of private property rights before they implement restrictive regulations.

I have attached copies of information sent to me from **Representative Pat Roberts'** office, concerning the **Private Property Rights Act of 1991**. While the bill specifically refers to the "taking" of private property, the courts have determined that regulations that "go too far" amount to a "taking of property." *{Where the quality of the faxed copies was too poor to be readable, I have retyped them for you.}*

It is clear that the courts are taking a dim view of government regulations which circumvent private property rights. It would appear that legislation which allows private individuals or organizations to restrict the private property rights of others would fall into the same category. It would also appear that similar "takings" claims could be filed against the **State of Kansas**, as a result of restrictions allowed by **HB-2375**.

Change is an inevitable fact of human life. Times change; society changes; land uses change. However, some groups can't accept change unless it fits into their accepted definition. Unfortunately, some of these same groups apparently feel that their desire to protect something they value transcends the private property rights of others

There comes a time when we must say **NO** to restrictions by one group, on the rights of others. This is such a time. We urge you to vote against **HB-2375**.

To ensure that agencies establish the appropriate procedures for assessing whether or not regulation may result in the taking of private property, so as to avoid such where possible.

IN THE SENATE OF THE UNITED STATES

JANUARY 14 (legislative day, JANUARY 8), 1991

Mr. STROMS (for himself, Mr. BOREN, Mr. GRASSLEY, Mr. HEFLIN, Mr. THURMOND, Mr. PEYOE, Mr. NICKLES, Mr. CRAIG, Mr. HATCH, Mr. BURNS, Mr. HELMS, and Mr. WALLOP) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

**A BILL**

To ensure that agencies establish the appropriate procedures for assessing whether or not regulation may result in the taking of private property, so as to avoid such where possible.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Private Property Rights  
5 Act of 1991".

6 **SEC. 2. DEFINITIONS.**

7 As used in this Act:

2

1 (1) The term "agency" means all executive  
2 branch agencies which engage in activity with the po-  
3 tential for taking private property, including any mili-  
4 tary department of the United States Government, any  
5 United States Government corporation, United States  
6 Government controlled corporation, or other establish-  
7 ment in the Executive Branch of the United States  
8 Government.

9           (2) The term "taking of private property" means  
10           an activity wherein private property is taken such that  
11           compensation to the owner of that property is required  
12           by the Fifth Amendment to the Constitution of the  
13           United States.

14 **SEC. 3. PROTECTION OF PRIVATE PROPERTY.**

15           No regulation promulgated after the date of enactment  
16 of this Act by any agency shall become effective until the  
17 issuing agency is certified by the Attorney General to be in  
18 compliance with Executive Order 12830 or similar proce-  
19 dures to assess the potential for the taking of private proper-  
20 ty in the course of Federal regulatory activity, with the goal  
21 of minimizing such where possible.

22 **SEC. 4. JUDICIAL REVIEW.**

23           (a) Judicial review of actions taken pursuant to this Act  
24 shall be limited to whether the Attorney General has certified  
25 the issuing agency as in compliance with Executive Order

3

1 12830 or similar procedures, such review to be permitted in  
2 the same forum and at the same time as the issued regula-  
3 tions are otherwise subject to judicial review. Only persons  
4 adversely affected or grieved by agency action shall have  
5 standing to challenge that action as contrary to this Act. In  
6 no event shall such review include any issue for which the  
7 United States Claims Court has jurisdiction.

8           (b) Nothing in this section shall affect any otherwise  
9 available judicial review of agency action.

## THE PRIVATE PROPERTY RIGHTS ACT OF 1990 (1991)

### INTRODUCTION

#### PRIVATE PROPERTY AT RISK

Many constitutional scholars believe it was inevitable: as American industry expands, natural resources are developed and population grows, government will attempt to control this growth with increasing levels of regulation. Almost every day, the federal government issues a new ream of regulations that place more demands on individuals and businesses, in hopes of addressing society's problems. Congress' budget crisis only speeds this trend, since it far less expensive to simply mandate public benefits (open spaces, low-income housing, medical care, etc.) rather than budget taxpayer dollars to achieve those same goals. The mounting burden of this regulation may conflict with basic property rights guaranteed by the Constitution.

The Constitution provides that "private property [shall not] be taken for public use without just compensation." The courts have determined that regulations which "go too far" [i.e. deny economic use of one's property without provocation or cause], amounts to a "taking of property" and requires compensation be paid to the owner. The U.S. Government is currently facing well over a BILLION dollars in "takings" claims of this type. Just in 1990, several of the largest "takings" judgements in the history of the United States were handed down by the U.S. Claims Court. And in California, property owners who can afford legal costs are winning about 50% of their "takings" claims before the intermediate appeals courts.

#### NEEDED: REGULATION WHICH RESPECTS PRIVATE PROPERTY

The need for the federal government to be more careful in how it regulates has been recognized since 1967, when a series of landmark Supreme Court cases clarified the rights of property owners against excessive regulation. A year later, President Reagan signed an Executive Order [E.O. 12630] which required agencies to "look before they leap" at what the private property impact of their regulations might be. At the current time; however, there is no statutory requirement that agencies even consider the impact on private property when issuing regulations.

That is why a bipartisan groups of Senators, supported by small business, farm and civil rights groups, as well as free-market environmentalists have proposed the Private Property Rights Act of 1990. (1991) This Act requires that federal agencies adopt administrative procedures to "assess the potential for taking private property in the course of regulatory activity, with the goal of minimizing such where possible." These procedures may be similar to those required by E.O. 12630, but must reflect the Court's current interpretation of what constitutes a "taking of private property." This assessment will allow agencies to draft regulations that impose on property rights as little as possible, while still achieving their regulatory goals. As a result, the public interest is served, individual property rights are protected without costly court battles and taxpayers need not pay compensation for "takings" that could have been avoided.