

Approved: Carl Dean Holmes
Date 4-29-95

MINUTES OF THE HOUSE COMMITTEE ON ENERGY AND NATURAL RESOURCES.

The meeting was called to order by Chairperson Carl Holmes on March 9, 1995 in Room 526-S of the Capitol.

All members were present except: Representative Empson - Excused
Representative Feuerborn - Excused
Representative Kline - Excused

Committee staff present: Raney Gilliland, Legislative Research Department
Dennis Hodgins, Legislative Research Department
Mary Torrence, Revisor of Statutes
Shirley Wilds, Committee Secretary

Conferees appearing before the committee: Frank Moussa - Office of the Adjutant General
Jean Barbee - Travel Industry Association of Kansas
Vic Miller - Shawnee County Commissioner
Ann Spiess -
Marci Penner - KS Sampler Foundation
Robert Littrell - KS Trial Lawyers Association
Ron Smith - KS Bar Association
Brad Lovelace - Wolf Creek Nuclear Power
Steve Adams - KS Wildlife and Parks
Harold Spiker - KS Department of Health and Environment

Others attending: See attached list

Chairperson Holmes opened hearings on **SCR 1604**.

Frank Moussa: Mr. Moussa reported that on behalf of his Agency and his membership in the Midwestern High Level Radioactive Waste Committee, he appears in support of **SCR 1604**.

Mr. Moussa said that basically this Resolution expands on the U. S. Department of Energy's (DOE) position in providing technical assistance to the states under the Nuclear Regulatory Policy Act; specifically, Section 180-C of the Act. The Agency wants to expand on that position to say that the Midwestern Radioactive Waste Committee is in support of the definition of technical assistance. Additionally, he said the Agency shares the position of the need for the training to be provided for the first responders on the corridor and to utilize the 180-C money, if it becomes available. The DOE has not firmed up its definition of whether I-70 will be a corridor, but Mr. Moussa said in their preliminary proposal I-70 is a potential corridor to the Yucca Mountain site for storage of the spent nuclear fuel.

The Agency's position is if that does become a possibility and Yucca Mountain does become the site and is opened in the year 2010, they would like to have at least five years of training prior to that time to train their responders. The training would be special training in knowing what to do in terms of notification to the state agencies; how to take readings; who to contact; and which lead agency would have the coordination of the process.

Mr. Moussa emphasized that **SCR 1607** is not a Resolution advocating a particular position on Yucca Mountain; rather, it is a Resolution to indicate if it does come to pass, the Agency wants to be part of the training for all responders in our state.

In conclusion he said that this Resolution expands on the Nuclear Regulatory Policy Act, and the Agency is interested in the DOE's commitment to the 180-C funding.

Chairperson Holmes appointed a Subcommittee on **SCR 1607** whose charge is to report their findings to the full Committee on Tuesday, March 14. Subcommittee members are Representative McClure, Chair; Representatives Lawrence and Sloan.

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 HOUSE COMMITTEE ON ENERGY AND NATURAL RESOURCES, Room 526-S Statehouse, at 3:30 p.m.. on March 9, 1995.

Hearing on SB 211:

Questions were submitted by Committee yesterday regarding the impact on the four specific counties mentioned in the stricken language. Staff reported research findings on the counties in questions, Ford; McPherson; Sumner; and Ellis.

Awaiting scheduled conferees on **SB 211**, Chairperson Holmes opened the hearing on **HB 2546**.

Jean Barbee. (See Attachment #1.) Ms. Barbee provided the Committee with an economic impact statement for travel and tourism in the state of Kansas. She said that the Travel Industry Association of Kansas supports **HB 2546** and recommended an amendment on Line 31 to delete the wording "without charge." She added that passage of this bill will be beneficial to the promotion of tourism in Kansas.

Ms. Barbee then showed a video entitled *There's No Place Like Home - The Discovery of Rural Tourism and How it Helps Preserve Small Towns in Kansas*. The video illustrated the growth of tourism in Kansas, and delivered a message on ways to determine the attributes of a community and how to promote tourism across Kansas.

After the Committee viewed the video, the Chair resumed the hearing on **SB 211**, receiving brief comments from two conferees.

The Honorable Vic Miller. Commissioner Miller reported that the County Commissioners recently executed formal action indicating their support for **SB 211**. He said that the bill allows the county to pass funds along to certain drainage districts for their needs, adding that amendments offered in the Senate were not intended to encumber the money from other counties.

Ann Spiess. Ms. Spiess said that the Kansas Association of Counties (KAC) did not address this issue in the Senate, and that there appears to be no problem with this bill. She added that it simply allows more flexibility for the counties. She reported the KAC will continue to monitor this situation.

The Chair closed the hearing on **SB 211** and resumed the hearing on **HB 2546**.

Marci Penner. (See Attachment #2.) Ms. Penner is director of the Kansas Sampler Foundation, a non-profit organization dedicated to helping preserve and sustain rural culture. She said that liability insurance a major barrier and prohibits grassroots rural economic development, the ability to preserve that culture, and educate others.

Ms. Penner shared case studies that she has done in Kansas, illustrating concerns of Kansans as they strive to bring rural culture to others. She introduced several Committee guests that are mentioned in her case studies: Carl Brenner and Cindy Peterson from Cassoday Country Inn and Ranch; Duane Vonada, Vonada's Stone Quarry; Michael Pickering, Bed and Breakfast. An example of concerns voiced:

- A deep fear of losing land or property to liability lawsuits
- Businesses have shut down because of high premiums
- Events have been canceled or not even held because of high premiums
- Events have had to eliminate certain activities because of liability
- Many events or businesses don't purchase liability insurance because of the high cost and then hope for the best
- Some events or businesses can't find coverage for special situations, even if they were willing to pay high premiums

In her concluding remarks, Ms. Penner said that she believes **HB 2546** is beneficial to rural Kansas. She added that she would like to see the elimination of language on Line 31 stipulating "without charge."

Robert Littrell. (See Attachment #3.) Mr. Littrell appeared on behalf of the Kansas Trial Lawyers Association, speaking in opposition to the proposed amendment that would delete the "without charge" language from the statute. He explained in some detail the following reasons for his opposition to the change:

1. Substantially change the whole concept of the act
2. Aid and protect a significant segment of the business community when other segments are not similarly benefitted
3. Give rise to many unintended results

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON ENERGY AND NATURAL RESOURCES, Room 526-S Statehouse, at 3:30 p.m.. on March 9, 1995.

4. Move away from the quid pro quo that was part of the original legislation
5. Probably be unnecessary in the first place insofar as there is undue concern to potential liability and insurance would be needed in any event

Mr. Littrell said the courts have emphasized many times that businesses are not insurers of those coming upon their property, and that just because a loss occurs does not mean that the landowner pays for the loss. Without proving that the landowner breached a duty of reasonable care, there is no recovery to the injured person. He added that the public expects a certain standard of care and deserves to be protected from losses caused by businesses that fail to exercise reasonable care.

Ron Smith. (See Attachment #4.) The Kansas Bar Association believes that the "without charge" distinction should be maintained in the Recreational Use law, as this distinction has always been between those who charge and those who do not for access to private property. To remove the language alters the purpose of the statute, because the purpose is to open up private lands which are not now open. The rural entity that charges a fee is turning private property into a commercial venture, and it should not be exempt. Mr. Smith said the Association thinks it would be an arbitrary distinction with a shaky constitutional basis and goes beyond the intent of the Recreational Use statute.

Chairperson Holmes recognized Representative Lawrence, who reminded the Committee of several questions posed recently on the Wolf Creek Lake Project. He introduced Brad Lovelace of Wolf Creek to brief the Committee on the Wolf Creek Project. Also, he said Steve Adams of Wildlife and Parks and Harold Spiker, Department of Health and Environment would be available if the Committee had further questions.

Brad Lovelace. (See Attachment #5.) Mr. Lovelace reported on several aspects of Wolf Creek Lake, giving some history and its present status.

The lake will be open for public fishing by the spring of 1996. Those areas of the lake that will not be open for public access are:

- The discharge area;
- Space around the lake's pair of nesting bald eagles;
- The intake region for water used in the plant;
- A 70-acre bird and wildlife refuge in the northern area of the lake which is included in the Wolf Creek Environmental Education Area.

A creel and size restriction will be enforced and access to the lake will be limited to ensure that the predator/prey balance is maintained.

Mr. Lovelace said this particular fishing area is very unique and there is not another of its kind in the United States, and that the strength of the Wolf Creek fishery is its diverse variety of predator species. In the course of a day on the lake, it will be common for an angler to catch four or five different species. He told the Committee that notification will be made informing the media and the public as soon as plans are in place. He said that once the lake is opened for public access, it will be managed by Wolf Creek personnel, and a fishing reservation system will be available later this year.

Steve Adams. Mr. Adams explained to the Committee that activities of the Wildlife and Parks Department would be the avenue through which the federal funds are handled for the project. The kind of access facilities planned are a low-ground parking lot, access road into the site, restrooms, etc., allowing easy ingress and egress. The way this will be accomplished will be by a government/private partnership that will involve Wildlife and Parks, Coffey County and Wolf Creek Corporation. Coffey County will provide funds for upgrading of the existing county road into the lake that will provide for the 25% match that is needed to utilize the federal funds, and there would be no state monies involved in the project. Also, there will be no long-term state commitment of state funds or state personnel. Once the site is constructed and operating, it will be maintained by Wolf Creek with the access program operated by Coffey County.

The Committee utilized the expertise of Messrs Lovelace; Adams and Spiker, and discussed at length the Wolf Creek Lake Project. All three individuals told the Committee members they are available for any information they might need as this the project progresses.

There being no further business to come before the Committee, the Chair adjourned the meeting at 5:40 p.m.

The next meeting is scheduled for March 13, 1995.

**ENERGY AND NATURAL RESOURCE COMMITTEE
GUEST LIST**

DATE: March 9, 1995

NAME	REPRESENTING
FRANK H. MOUSSA	The Adjutant General - ^{Div. of} Emergency Management
Jean Barber	Travel Industry
Glenn Cogswell	North Topeka Drainage Dist



Travel
Industry
Association of
Kansas

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TESTIMONY

DATE: March 9, 1995
TO: House Energy & Natural Resource Committee
FROM: Jean Barbee, Executive Director *Jean*
RE: HB-2546 (Recreational area liability)

TIAK supports HB-2546.

Attached is the economic impact of travel and tourism on the state of Kansas. Anything we can do to make doing "tourism" business easier for entrepreneurs is important to growth of the industry.

Today I'm going to show you the video recently produced by the Travel Industry Association entitled, "There's No Place Like Home - The Discovery of Rural Tourism and How it Helps Preserve Small Towns in Kansas."

We did this to entice and assist all small and rural communities in economic development through tourism. It will also point out to you what progress we're making and how the passage of legislation like HB-2546 can help in these efforts.

We also support an amendment to line 31 of the bill to delete "without charge". Our second conferee, Marcie Penner, will describe a variety of examples to you where this amendment could be important.

Thanks for your time.

*3/9/95
Energy: Natural Res.
Attachment #1*

Economic Impact of Travel & Tourism in Kansas

EMPLOYMENT

Travel and tourism was the 5th largest employer in the state in 1991.

In 1991, travel and tourism generated:

- ◆ **37,800 JOBS** - 1,000 of these jobs generated by foreign visitor spending.
Kansas ranked 37th in the nation in terms of number of workers employed in travel and tourism in 1991 and 42nd on per capita basis.
- ◆ **3.4% OF ALL JOBS IN KANSAS** - Tourism's share of non-farm jobs in Kansas ranked the state 44th in the nation in 1991.
- ◆ **\$391 MILLION IN PAYROLL** - about \$160 per capita
Kansas ranked 38th in the U.S. in terms of tourism generated payroll in 1991 and 47th on a per capita basis.

EXPENDITURES

- ◆ **OVER \$2.3 BILLION EXPENDITURES** in the state (about \$930 per capita).
Tourists spent nearly \$6.4 million per day in Kansas in 1991.

\$2,322 million total traveler expenditures (\$64 million of this by foreign visitors).

Kansas ranked 37th in the U.S. in terms of tourism generated expenditures in 1991 and 40th on a per capita basis.

Kansas ranked 45th in the U.S. in terms of foreign visitor spending (export receipts) in 1991.

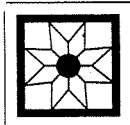
TAX REVENUES

- ◆ **\$257 MILLION TOTAL TAX REVENUES**
Kansas ranked 36th in the U.S. in terms of total tax revenue generated by travel and tourism in 1991 and 46th on a per capita basis.
- ◆ **\$130 MILLION FEDERAL TAX REVENUES**, enough money to fund the entire federal tourism budget for over 9 years at 1991 funding levels.

Kansas ranked 35th in the U.S. in terms of tourism generated federal taxes in 1991 and 45th on a per capita basis.
- ◆ **\$100 MILLION STATE TAX REVENUES**
Tourism contributed nearly \$273,300 per day to Kansas in state taxes in 1991.

Kansas ranked 36th in the U.S. in terms of tourism generated state taxes in 1991 and 37th on a per capita basis.

Kansas received nearly \$44 in tourism generated state taxes for each dollar the state budgeted for tourism in 1991.
- ◆ **\$27 MILLION LOCAL TAX REVENUES**
Kansas ranked 39th in the United States in terms of tourism generated local taxes in 1991 and 45th on a per capita basis.



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K A N S A S S A M P L E R F O U N D A T I O N

March 9, 1995

Chairman Holmes, Representative Lawrence, Committee, thank you for this opportunity to speak on behalf of rural communities across the state.

My name is Marci Penner from Inman, Kansas. I am the director of the Kansas Sampler Foundation, a non-profit organization dedicated to helping preserve and sustain rural culture. In other words, we do what we can to help keep small towns alive and thriving. We educate Kansans about Kansas and network community leaders statewide. My Dad, Mil Penner, and I write Kansas guidebooks and have travelled the state extensively and know the people in this statewide network personally.

Liability is prohibiting two things in rural Kansas: 1) grassroots rural economic development and 2) the ability to preserve and educate others about our rural culture.

Rural communities are dying. Some of the towns you represent are dying, more are struggling. To keep our communities alive we **MUST** make it possible for people to earn money **AND** allow them to keep what is dear to them - their rural culture. Liability is making both of these things difficult. Many things we do in Kansas are from the heart. We preserve our heritage because we love it, we want to share lost arts like blacksmithing because we want to. We want to share our rural culture with kids and adults.

Rural life is a vanishing lifestyle. We literally are attempting to survive as a lifestyle. I am not here to ask for a program to aid us; I'm here to say remove barriers so that we can help ourselves!

The major barrier right now that is keeping us from this grassroots form of economic development and preserving our rural culture is liability insurance.

I will share a few examples from the case studies that I gathered in the last few days. These are the points that will be illustrated:

1. A deep fear of losing land or property to liability lawsuits
2. Businesses have shut down because of high premiums
3. Events have been cancelled or not even held because of high premiums
4. Events have had to eliminate certain activities because of liability
5. Many events or businesses don't purchase liability insurance because of the high cost and then hope for the best
6. Some events or businesses can't find even find coverage for special situations even if they were willing to pay high premiums

3/9/95
Energy & Natural Res.
Attachment #2

Here are some examples:

*CLOVER CLIFF RANCH, Elmdale. The Donahues have a half million dollars worth of investment in four buildings on a small percentage of their acreage in Chase County. These buildings are used as bed-and-breakfasts. They have liability insurance but NO fire protection. Mr. Donahue's fear of losing his land through a liability lawsuit is so great that he pays dearly for liability premiums and then is not able to afford other insurances, like fire protection. He may lose his entire investment to fire but feels he has no choice because of the high premiums. He says he just closes his eyes and hopes it will all be OK.

*CASSODAY COUNTRY INN & RANCH, Cassoday. Carl invites guests to live the life of a Flint Hills cowboy with him. Last year his liability insurance was \$1,800. He couldn't make a profit when he had to pay that much for liability so he dropped the policy and just hopes nothing happens. He's committed to sharing his lifestyle.

SANTA FE TRAIL CLUB: Landowners that have Santa Fe Trail ruts on their property statewide are extremely concerned about letting people on their land because of liability concerns. Ralph Hathaway near Chase is an example.

*ELK FALLS. This is a town of 121 struggling mightily to stay alive. Tourism has been their best means of survival. In 1994, the Friends of Elk Falls (a non-profit group) paid \$157 for liability coverage for group tours. Circumstances forced one member of the group, Barry McGuire, to turn the tourism business into a for-profit venture. There is no way he can afford the liability premium that now costs him \$1,062 because he went for profit. Also, the liability policy only covered group tours and did not cover if a family wanted to stop by to see one of the attractions. This town has to just hope that no one would sue.

*OXFORD MILL RESTAURANT, Oxford. Oxford Mill hosts a 3-day arts-and-crafts festival on their property on the river. The liability premium for the show is \$2,000. He just closes his eyes the rest of the year and hopes that no one will sue. He has a nature walk along the river and people can tour his generator room. He says he's scared.

CASTLE ROCK, Gove County. Many of you have probably seen this dramatic product of Smoky Hill chalk formation erosion. Until the landowner died the public had access to Castle Rock and the nearby badlands. However, the heirs are fearful of losing the land through liability lawsuits and decided to put up a gate to Castle Rock. They have relented for now, however, and there is access but they are still afraid of that one person who could sue and possibly take their land.

*KANSAS COWBOY CAMP-OUTS, Red Hills. A Belvidere couple was going to offer an authentic Kansas cowboy experience in the Red Hills. They had landowners willing to allow usage of land -- except for one fear, liability. They were afraid of losing their land in a lawsuit. Because of these fears this business went under. This was a business someone wanted to do because they loved their cowboy heritage. They wanted others to enjoy an authentic outdoor cowboy experience.

*PRETTY PRAIRIE RODEO. The rodeo had trouble just finding someone to provide them coverage this last year. They didn't find a carrier until two weeks before the event. They had to eliminate their calf scramble and mutton bustin'. They have even more trouble finding coverage for their local festivals. They've had to eliminate mud volleyball. People won't volunteer to be on the Heritage Day committee because they are afraid of being personally liable as members of the planning committee. The liability policy for the rodeo is higher because the policy covers board members, too. Connie has talked to farmers about doing farm tours but she can't even get them to consider it because of liability.

VONADA'S STONE QUARRY, Sylvan Grove. This is a family owned operation in North Central Kansas. The Vonada's can't find any one insurance carrier to cover all they do. Some won't provide coverage because Donna teaches swimming lessons in an indoor pool. Some won't provide coverage because of the stone quarry tours and stone cutting business. Insurance carriers no longer consider their rural operation a farm. They have had to stop doing guided tours of the limestone quarry because of liability. Duane Vonada has a desire to share post rock country with anyone. He could provide such a beautiful opportunity for people to learn about the limestone layers, about the stone cutting craft, about the Smoky Hill region, about the history of his area, about the people of his region but liability has put a wrench into his ability to offer these things.

* KANSAS SAMPLER CENTER on the Penner Farm, Inman. For five years we have held a festival on our farm that provides Kansas communities a chance to educate the Kansas public about why they should travel Kansas. Last year over 100 communities came to promote and 6,500 people came to see what they had to offer. My Dad goes into a panic a month before the festival so worried about that person out there who could sue him to the point of losing his farm that his great grandfather homesteaded. We have a policy but we are just one of many people statewide who live with the fear through the festival. Our festival parking lot is the alfalfa field. We would love to transport people to the farm with a safe customized tram but the rider to the liability policy was so completely prohibitive that we could not offer this service. If we were able to offer that service it would bring more elderly people to this educational experience.

We want to use our farm to educate Kansans about Kansas. The thing that is keeping us from developing certain programs is liability. I want to build a treehouse in a grand cottonwood on the river bank and let people breath the air and watch the crops grow. We're too afraid to offer that. Has an insurance company ever given treehouse insurance? We want to offer hayrack rides along our tree-lined drainage ditch, through a corn field and to the adjoining McPherson Valley Wetlands. At this point we can't do this because of prohibitive premiums. We want to construct a 400' x 800' topographical map of Kansas complete with soils and indigenous trees from each geologic region and create a deluxe educational experience. That would be in part of my Grandpa's wheat field. I can't risk our family farm to liability yet there is so much we could offer to Kansans using our farm as a resource.

BLACKSMITH SHOP, Durham. Tom Donahue has restored a blacksmith shop as a hobby. People always want to come in and see what he's done or watch him at work. He's glad to share his place except he can't afford to buy liability because this is just a hobby for him. He is scared that someone will sue him and take away his dream. It's a dilemma. Should he let people come in and see what he has or not?

THE BIG BARN, Woodston. This massive barn and 15 acres were donated to this non-profit corporation. They have liability year-round and a special event policy. They would do more events if not for liability. They don't charge for people to see the barn on a daily basis but charge admission to the events. They say they need relief badly from these high premiums.

*TAD PIERSON, McPherson. Tad wants to provide the public the opportunity to see Kansas's back roads in the back of a wheat truck. Insurance companies don't know what to do with a request like this and the ones who will even look at it warn him that it will require an exceptionally high premium. This is a unique venture and provides a unique way to have an authentic experience in Kansas. It seems he is being penalized for being creative and wanting to share Kansas the way he feels it in his heart.

DAVE BROWN'S WELDING SHOP, Morland. Dave has a regular farmer and oil patch welding shop. But he also creates wonderful sculptures. He invites people to come in and see what he has done. He has no liability policy.

STAFFORD COUNTY FLOUR MILL, Hudson. Al offers tours of the mill and shows where and how they package flour. To my knowledge, this is the only mill in the state that offers this tour. He doesn't have a liability policy for this. He says he's not going to let fear of being sued keep him from sharing something he loves and wants others to know about. Other mills would like to offer tours but are completely fearful of the liability consequences.

VINTAGE MOTORCYCLE TRIALS, Fredonia. The event planners just close their eyes about liability. They could not do the event if they had to purchase liability.

*FALL RIVER CANOE, Eureka. The radiator shop in downtown Eureka provides canoes for those who want to 'run' the river. They don't carry a liability policy and are always worried about what could happen.

THE BREAKS, Cheyenne County. Landowners around the Breaks are hot. Local tourism efforts would love to have a rim drive but landowners are hostile about it, primarily because of potential lawsuits. What a shame. This is one of the most beautiful sights in Kansas.

*ROCKY RIDGE RESORT, Fredonia. The insurance company insisted that Jack Linn take his diving board off of his swimming pool before they wrote a policy. He has had no injuries in his swimming pool for 50 years and kids have just loved the diving board. He can't afford the liability for his small petting zoo. He has people sign waivers that he knows wouldn't hold up in court for floating down the Fall River. He needs to offer all these things to make his place unique and marketable.

LCL BUFFALO RANCH, Clifton. Lester Lawrence says as long as he doesn't charge people to see his buffalo his general policy for one million dollars is sufficient.

*CHASE COUNTY. The Jantzen's would consider letting people walk their ranch if they weren't afraid of liability. They would like to charge something to help supplement their income.

*HISTORICAL COMPLEX, Colby. Sue Ellen Taylor feels their year-round museum liability is reasonable but they are seriously considering eliminating special events because of the high premiums. Anything that involves movement; machinery, animals, transportation either requires an unreasonably high premium, or else they can't do it, or else they close their eyes to it. They'd especially like to use hay racks to transport people but can't.

In summary, I'd like to say that as I've been talking with people across the state in the last couple of days certain words and phrases kept cropping up -- words like fear, scared, 'I don't want to lose my land'. People can hope that no one will sue but it's very, very scary. There are so many things we could offer in rural Kansas, and in metropolitan areas, if we could eliminate the very real fear of being sued and losing all that we have.

One thing Kansas fights is an image problem, especially among its own citizens. So many people and situations I've talked about today would help instill pride in who we are and what we are. I believe that pride is the number one best economic development tool and we must remove barriers that keep us from educating Kansans about Kansas and that keep us from helping ourselves.

I'm greatly concerned about the language in line 31 of the bill that states that only situations where there is no charge involved would be covered by this bill. I personally know too many people in our rural areas who are charging for these kind of situations to either make a living or to supplement an income. The situation is grave in our rural areas and we are trying our best to find ways to survive. Help us help ourselves by removing that stipulation.

I believe that House Bill #2546 is good for rural Kansas and I respectfully request that you pass it. I'd like to see an amendment that removes the stipulation that states that only situations where there is no charge involved would be covered by this bill.

Thank you,

A handwritten signature in cursive script that reads "Marci Penner". The signature is written in black ink and is positioned to the right of the typed name.

Marci Penner

*Fee for service or entrance



KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

TO: Representative Carl Holmes and Members of the
Energy and Natural Resources Committee

FROM: Robert Littrell on behalf of
Kansas Trial Lawyers Association

RE: Summary of Testimony Opposing a Proposed
Amendment to HB 2546

DATE: March 9, 1995

* * * * *

Allow me to introduce myself. I am Robert Littrell, an attorney in the practice of law for the past 21 years in Manhattan. I was called upon by Kansas Trial Lawyers Association to present testimony on the subject of premises liability because I was counsel for the plaintiff on what is now the leading Kansas Supreme Court case establishing the standard of care of landowners to guests on their property. In that case an issue was presented as to the applicability of the Kansas Land and Water Recreational Areas law so I am one of the few lawyers to have experience with that little-litigated act.

I appear to oppose a certain proposed change to the Kansas Land and Water Recreational Areas law. The proposed amendment would delete the "without charge" language from K.S.A. 58-3204. Such a change would:

1. substantially change the whole concept of the act;
2. aid and protect a significant segment of the business community when other segments are not similarly benefited;
3. give rise to many unintended results;
4. move away from the *guid pro quo* that was part of the original legislation; and
5. probably be unnecessary in the first place insofar as there is undue concern to potential liability and insurance would be needed in any event.

DISCUSSION:

1. Substantial conceptual change: The concept of the original act may be discerned from the express statement of 58-3201 [to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability

Terry Humphrey, Executive Director

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3/9/95
Energy & Natural Resources

Attachment #3

toward persons entering thereon for such purposes]. This is amplified in the section defining "recreational purposes" [hunting, fishing, swimming, boating, camping, etc...]. In other words the idea was to promote public uses on private land by telling the landowner that if the landowner gratuitously made land available, then the landowner need not be afraid that the user will be so ungrateful as to sue him or her when injured by reason of the condition of the premises. By statute the owner of the land had no more legal liability to these users than to a trespasser.

An amendment seeking to eliminate liability for owners of non-agricultural land who charge for the use of their lands would be a singular deviation from this concept of trading liability exposure for gratuitous lending of lands for recreational purposes. All other business owners have a duty to keep their property in a reasonably safe condition. Members of the public who use such property are denominated as "invitees." An "invitee" is someone who is invited onto the premises of the landowner usually for purposes of engaging in commerce. This concept predates Kansas statehood and has remained essentially unaltered by 134 years of Kansas common law. This amendment would exempt a significant segment of the business community from the requirement of keeping their property in a reasonable safe condition.

2. Certain businesses protected, other not: Why is it that an amusement park or movie theater (both being on non-agricultural land used for recreational purposes for a fee) should not be responsible for negligence of an employee resulting in an unreasonably dangerous condition when a discount store or insurance office is not similarly treated? Businesses insure themselves for the eventuality of a loss to persons injured on the premises. Such insurance generally comes as part of a business owner's package comprehensively insuring against fire, theft, property damage, etc. As with every business, the business owner is in the best position to make and keep the business safe and evaluate hazards and known risks. What public purpose is served by stating that certain businesses need not maintain those standards? That they can reap the profits from a business, yet not have a minimal duty of responsibility for the condition of the premises? Why should for-profit enterprises be permitted to invite people onto their premises in order to engage in commerce but not be responsible for injuries suffered by those patrons that are caused by the legal fault of the landowner?

3. Unintended results: The proposed exemption should be very tightly drawn to meet the needs of an entity which the legislature believes is deserving of special benefit or privilege by reason of the great public benefit seen from its enactment. Otherwise, entities not intended to be benefitted will claim entitlement to the benefit.

4. Quid pro quo abandoned: The original legislative intent of trading protection from lawsuits for public use of private land is not being kept in the proposed change. What is offered in exchange for the exemption for certain businesses? Nothing. All that is

Page Three
Testimony - HB 2546
March 9, 1995

sought is a legislative privilege or benefit, yet the public gets no additional benefits. Only the interests of the landowner/business-person are advanced.

5. Change probably unnecessary: As I understand the situation, one entity seeking this change is a private concern that wants to charge admission to people who come upon essentially unimproved land. The liability exposure of a landowner under these conditions is slight under current law. It really would not even represent much of a savings to the business which would prudently insure itself in any event.

Unless some human activity creates an unreasonably dangerous condition, there will be few losses to land users that will not be borne by themselves. The courts have emphasized time and again that businesses are not insurers of those coming upon their property. Just because a loss occurs does not mean that the landowner pays for the loss. Without proving that the landowner breached a duty of reasonable care, there is no recovery to the injured person. The public expects a certain standard of care and deserves to be protected from losses caused by businesses that fail to exercise reasonable care. The Kansas Trial Lawyers Association urges you to reject this specific proposed amendment.

We have no objection to HB 2546, otherwise.

Legislative Testimony

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TO: Hon. Carl Dean Holmes, Chair
Members, House Energy & Natural Resources Committee

FROM: Ron Smith, General Counsel

SUBJ: HB 2546, Recreational Land Use Liability

DATE: March 9, 1995

The KBA has no position on this bill *in its original form*. However, we understand the tourism industry wants to broaden the concept so that recreational land use immunity would apply even if the landowner "charges" for the access to the property. If this change is made, several things happen. First, the Kansas Recreational Use Statute becomes nonuniform with the vast majority of other states that have similar statutes. The distinction in these statutes has always been between those who charge and those who do not charge for access to private property. It alters the purpose of the statute. KSA 58-3201 states:

"The purpose of this act is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes."

Clearly the purpose is to open up private lands which are not now open. If a person charges an access fee, the recreational use statute should not apply because *other premises liability law covers situations where an access charge is made*.

The change would create two classifications of tourism properties each with different negligence standards. Why should commercial use of farmland (which is what you have if you charge an access fee) for a hunting preserve carry different liability rules than the local main street? The businessman would have liability for ordinary negligence if he charges access to his store or holds himself out to the public as a commercial business. The rural entity that charges a fee is turning private property into a commercial venture. A commercial venture should not be exempt from liability. We think it would be an arbitrary distinction with a shaky constitutional basis and goes beyond the intent of the Recreational Use statute.

Current Kansas law does not make the business owner -- even persons who charge fees to enter private property for recreation purposes -- an absolute insurer of safety of persons who come to business establishments. *Agnew v. Dillons, Inc.*, 16 Kan. App. 2d 298 (1991). Our Court recently adopted a rule of law that all

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Energy & Natural Resources
3/9/95
Attachment #4

House Energy & Natural Resources Committee
HB 2546

persons, whether businesses or not, whether charging a fee or not, are required to use ordinary care under the circumstances to prevent others from being injured. The distinction between “invitees” and “licensees” is no longer valid in Kansas. (*Jones v. Hanson*, 254 Kan. 499, 511 (1994)). That distinction does not change the Recreational Use statute, however.

Under current case law, to avoid liability for negligence owners of property which charges an access fee need only show they took reasonable precautions under the circumstances to protect the public. Commercial businessmen do that on a daily basis.

We believe the “without charge” distinction should be maintained in the Recreational Use law.

Thank you.

apartment may be made on the person designated in the declaration to receive service of process.

History: L. 1963, ch. 329, § 27; July 1.

Research and Practice Aids:

Condominium ← 17.
C.J.S. Estates § 151.

58-3128. Personal application. (a) All apartment owners, tenants of such owners, employees of owners and tenants, or any other persons that may in any manner use property or any part thereof submitted to the provision of this act shall be subject to this act and to the declaration and bylaws of the association of apartment owners adopted pursuant to the provisions of this act.

(b) All agreements, decisions and determinations lawfully made by the association of apartment owners in accordance with the voting percentages established in the act, declaration or bylaws shall be deemed to be binding on all apartment owners.

History: L. 1963, ch. 329, § 28; July 1.

Research and Practice Aids:

Condominium ← 1.
C.J.S. Estates §§ 145, 146.

58-3129. Invalidity of part. If any provision of this act or any section, sentence, clause, phrase or word, or the application thereof in any circumstance is held invalid, the validity of the remainder of the act and of the application of any such provision, section, sentence, clause, phrase or word in any other circumstances shall not be affected thereby.

History: L. 1963, ch. 329, § 29; July 1.

Research and Practice Aids:

Statutes ← 64(2).
C.J.S. Statutes § 96 et seq.

Article 32.—LAND AND WATER RECREATIONAL AREAS

Law Review and Bar Journal References:

Survey of Kansas law on real and personal property (1965-1969), 18 K.L.R. 427, 438 (1970).
"Recreational Use of Nonnavigable Waterways," James B. Wadley, 56 J.K.B.A. No. 9, 27, 32 (1987).

58-3201. Limiting liability of property owners to persons entering premises for recreational purposes. The purpose of this act is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes.

History: L. 1965, ch. 559, § 1; July 1.

Research and Practice Aids:

Negligence ← 37.
C.J.S. Negligence §§ 63(117) et seq., 76.

CASE ANNOTATIONS

1. Immunity from liability to high school athlete injured following based on recreational use (75-6104) examined. *Nichols v. U.S.D.* No. 400, 246 K. 93, 94, 785 P.2d 986 (1990).

2. Act does not prevent 75-6104(o) from granting immunity for ordinary negligence when fees charged for use of public property. *Gonzales v. Board of Shawnee County Comm'rs*, 247 K. 423, 428, 429, 799 P.2d 491 (1990).

3. Whether utility permitted public to use lake area for KRUS (58-3201 et seq.) immunity purposes in wrongful death action examined. *Bingaman v. Kansas City Power and Light Co.*, 1 F.3d 976, 979 (1993).

58-3202. Limiting liability of property owners to persons entering premises for recreational purposes; definitions. As used in this act: (a) "Land" means land, roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty and includes agricultural and nonagricultural land.

(b) "Owner" means the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises.

(c) "Recreational purpose" includes, but is not limited to, any of the following, or any combination thereof: Hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites.

(d) "Charge" means the admission price or fee asked in return for invitation or permission to enter or go upon the land.

(e) "Agricultural land" means land suitable for use in farming and includes roads, water, watercourses and private ways located upon or within the boundaries of such agricultural land and buildings, structures and machinery or equipment when attached to such agricultural land.

(f) "Farming" means the cultivation of land for the production of agricultural crops, the raising of poultry, the production of eggs, the production of milk, the production of fruit or other horticultural crops, grazing or the production of livestock.

(g) "Nonagricultural land" means all land other than agricultural land.

History: L. 1965, ch. 559, § 2; L. 1988, ch. 198, § 1; July 1.

4-2

CASE ANNOTATIONS

1. Whether utility permitted public to use lake area for KRUS (58-3201 et seq.) immunity purposes in wrongful death action examined. *Bingaman v. Kansas City Power and Light Co.*, 1 F.3d 976, 979 (1993).

58-3203. Same; care of premises; duty of landowner. Except as specifically recognized by or provided in K.S.A. 58-3206, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.

History: L. 1965, ch. 559, § 3; July 1.

CASE ANNOTATIONS

1. Whether utility permitted public to use lake area for KRUS (58-3201 et seq.) immunity purposes in wrongful death action examined. *Bingaman v. Kansas City Power and Light Co.*, 1 F.3d 976, 979 (1993).

58-3204. Same; responsibility of landowner. Except as specifically recognized by or provided in K.S.A. 58-3206, and amendments thereto, an owner of land who either directly or indirectly invites or permits any person to use such property for recreational purposes or an owner of nonagricultural land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby: (a) Extend any assurance that the premises are safe for any purpose.

(b) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.

(c) Assume responsibility for or incur liability for any injury to person or property caused by an act of omission of such persons.

History: L. 1965, ch. 559, § 4; L. 1988, ch. 198, § 2; July 1.

CASE ANNOTATIONS

1. Act as not preventing 75-6104(o) from granting immunity for ordinary negligence when fees charged for use of public property determined. *Gonzales v. Board of Shawnee County Comm'rs*, 247 K. 423, 429, 799 P.2d 491 (1990).

2. Whether utility permitted public to use lake area for KRUS (58-3201 et seq.) immunity purposes in wrongful death action examined. *Bingaman v. Kansas City Power and Light Co.*, 1 F.3d 976, 979 (1993).

58-3205. Same; application to lands leased to state or subdivision. Unless otherwise agreed in writing, the provisions of K.S.A. 58-3203 and 58-3204 shall be deemed applicable to the duties and liability of an owner of land

leased to the state or any subdivision thereof for recreational purposes.

History: L. 1965, ch. 559, § 5; July 1.

CASE ANNOTATIONS

1. Cited; whether utility permitted public to use lake area for KRUS (58-3201 et seq.) immunity purposes in wrongful death action examined. *Bingaman v. Kansas City Power and Light Co.*, 1 F.3d 976, 979 (1993).

58-3206. Same; nonapplication of act to certain liabilities. Nothing in this act limits in any way any liability which otherwise exists: (a) For willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.

(b) For injury suffered in any case where the owner of nonagricultural land charges the person or persons who enter or go on the nonagricultural land for the recreational use thereof, except that in the case of nonagricultural land leased to the state or a subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge within the meaning of this section.

History: L. 1965, ch. 559, § 6; L. 1988, ch. 198, § 3; July 1.

CASE ANNOTATIONS

1. Term "willful" defined as intentionally causing injury; no waiver of immunity by undertaking to safeguard park users. *Klepper v. City of Milford, Kansas*, 825 F.2d 1440, 1447 (1987).

2. Whether utility permitted public to use lake area for KRUS (58-3201 et seq.) immunity purposes in wrongful death action examined. *Bingaman v. Kansas City Power and Light Co.*, 1 F.3d 976, 979 (1993).

58-3207. Same; construction of act as to certain liabilities and obligations. Nothing in this act shall be construed to: (a) Create a duty of care or ground of liability for injury to persons or property.

(b) Relieve any person using the land of another for recreational purposes from any obligation which such person may have in the absence of this act to exercise care in his or her use of such land and in his or her activities thereon, or from the legal consequences of failure to employ such care.

History: L. 1965, ch. 559, § 7; July 1.

CASE ANNOTATIONS

1. Act as not preventing 75-6104(o) from granting immunity for ordinary negligence when fees charged for use of public property determined. *Gonzales v. Board of Shawnee County Comm'rs*, 247 K. 423, 429, 799 P.2d 491 (1990).

LakeNews

Wolf Creek Nuclear Operating Corporation

Why a cooling lake?

All steam-driven electrical generating units require cooling water. Some plants use cooling towers to cool the water; others use bodies of water such as an ocean, lake, or river. Wolf Creek uses water from a 5090-acre man-made cooling lake.

Wolf Creek Lake's water is used to cool steam which turns turbines. (The turbines produce electricity.) As the lake water passes through the plant and cools the steam, it gains about 35 to 40 degrees of heat. The water is then returned to the lake, resulting in a small area of water that is warmer than the rest of the lake. But the overall effect is minimal--Wolf Creek Lake is typically only about one or two degrees warmer than other lakes within our geographical area.

History

There's a fish that can cause serious problems for power plants which rely on lake water for cooling. That fish is the gizzard shad. Shad are typically weak fish--they do not swim well against a strong current, and younger shad die in great numbers if mild winter weather is followed by a sudden cold snap. Gizzard shad are excellent in one aspect of species survival, however--reproduction. They are prolific. When a generation of young shad die because of cold weather, there are always more to take their place.

After a cold snap, there can be many disabled shad throughout the lake. These fish can get caught in the screens that filter lake water before it enters the plant. If enough shad collect on the screens, the screens can become clogged, requiring maintenance.

3/9/95
Energy & Natural Res
Attachment # 5

Biologists recognized the potential problems that could be caused by the shad. They took measures to control them. Before the lake was filled with water, there were numerous small farm ponds which dotted the future lake bed. In the years before water was pumped into the lake from the Neosho River west of Wolf Creek Lake, the ponds were stocked with young predator fish--the kind of fish that prefer gizzard shad for breakfast, lunch, dinner, and bedtime snack! The predators were well-fed; their sizes soon increased.

By the time water was pumped to the lake bed, the predators were large enough to eat many of the shad fish that were brought in from the Neosho River.

Predator/prey balance

Predator fish have done a superb job of controlling shad in Wolf Creek Lake.

In a typical midwestern reservoir, gizzard shad make up 30 to 45 percent, by weight, of the total fish population. In contrast, Wolf Creek Lake's shad constitute only about two to six percent of the total fishery weight. The Wolf Creek Lake has walleye; wipers, stripers, white, and large- and smallmouth bass; black and white crappie; and flathead, blue, and channel catfish.

Although this is a prime lake for fishing, maintenance of the predator/prey balance is important to Wolf Creek's efficient generation of electricity.

The lake today

The strength of the Wolf Creek fishery is its diverse variety of predator species. In the course of a day on the lake, it will be common for an angler to catch four or five different species.

Statistics

- * Lake size--5090 surface acres
- * Average depth--21.5 feet.
- * Deepest area--about 90 feet
- * Drains to lake--20 square miles
- * Elevation--1087 feet above main sea level
- * Lake construction--began in 1978
- * Water first pumped to the lake--1980
- * Initial filling of lake complete--June, 1982
- * The lake is maintained at a fairly constant level. To maintain this level during drier years, water is pumped from the Neosho River. If the lake becomes too full, water flows over the spillway into the Neosho River.

Public access

The lake will be open for public fishing by the spring of 1996. A few areas of the lake will not be open for public access:

- * The discharge area
- * Space around the lake's pair of nesting bald eagles
- * The intake region for water used in the plant
- * A 70-acre bird and wildlife refuge in the northern area of the lake which is included in the Wolf Creek Environmental Education Area.

Creel and size restrictions will be enforced and access to the lake will be limited to ensure the predator/prey balance is maintained.

Once the lake is opened for public access, it will be managed by Wolf Creek personnel. A fishing reservation system will be available later this year. Media will be notified as soon as it is in place.

WOLF CREEK LAKE PUBLIC USE

