

Approved: April 7, 1995  
Date

## MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Michael R. O'Neal at 3:30 p.m. on February 21, 1995 at Kansas University School of Law.

All members were present.

Committee staff present: Jerry Donaldson, Legislative Research Department  
Jill Wolters, Revisor of Statutes  
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the committee:

Janet Stubbs, Kansas Property Rights Coalition  
Mary Jane Stattelmann, Kansas Farm Bureau  
Terry Leatherman, Kansas Chamber of Commerce and Industry  
Karen France, Kansas Association of Realtors  
Ivan Wyatt, Kansas Farmers Union  
Edward Rowe, Kansas League of Women Voters  
Bill Craven, Kansas Natural Resources Council  
Diane Mullens, Kansas Chapter American Planning Association  
Craig Kenworthy, Overland Park Attorney  
Chris McKenzie, League of Kansas Municipalities  
Blaise Plummer, Assistant Sedgwick County Attorney, Wichita  
Steve Hawks, Kansas Wildlife Federation

Others attending: See attached list

Hearings on **HB 2015** - Private property protection act, were opened.

The Chairman announced that the Judiciary Committee had hearings during the 1993 & 1994 Legislative sessions. The intent of the bill is that there be some recognition in the law of public policy protecting private property rights from undue governmental actions.

Janet Stubbs, Kansas Property Rights Coalition, appeared before the committee in support of the proposed bill. She told the committee that this bill would not impose greater sanctions than already granted by the Constitution and courts. It does not interfere with eminent domain where compensation is awarded to the property owner. However, it does require compensation for the "taking" of the property of an individual and requires annual updated guidelines by the Attorney General to assist state agencies in assuring that their actions do not have taking implications. (Attachment 1)

Mary Jane Stattelmann, Kansas Farm Bureau, appeared before the committee as a proponent of the bill. She stated that the proposed bill would ensure that state agencies review all proposed rules and regulations, agency guidelines and procedures concerning the issuance of licenses or permits, administrative policies, directives and memoranda as to whether any of those documents propose an action which may constitute a taking as defined by case law. This bill would only insure that private property rights are protected, and it also can potentially reduce the state's liability if taking ramifications are fully evaluated ahead of time. (Attachment 2)

Terry Leatherman, Kansas Chamber of Commerce and Industry, appeared before the committee as a proponent of the bill. He stated that this bill would not relieve property owners from being responsible, but would inject government accountability for its actions. (Attachment 3)

Karen France, Kansas Association of Realtors, appeared before the committee in support of the proposed bill. She commented that this bill establishes a system for state agencies to review their actions in order to ensure that they do not constitute an unlawful taking of property without just compensation. (Attachment 4)

Mid-America Lumbermens Association, Kansas Grain & Feed Association, Kansas Rural Center, American Agri-Women and Kansas Land Improvement Contractors Association did not appear before the committee but requested that their written testimony be included in the committee minutes. (Attachments 5-9)

Ivan Wyatt, Kansas Farmers Union, appeared before the committee as an opponent to the bill. He stated that the bill would be a deadly tool that corporations could use to hammer down individual farm families to protect their property rights. It would also place a tax burden on any and all privately owned property. (Attachment 10)

## CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY, Room 313-S-Statehouse, at 3:30 p.m. on February 21, 1995.

Edward Rowe, Kansas League of Women Voters, appeared before the committee as an opponent to the bill. He gave two examples of the effect this bill would have on property values. (Attachment 11)

Bill Craven, Kansas Natural Resources Council, appeared before the committee in opposition to the bill. He stated that this bill was a "mask" to hide its true purpose, which is to make important public health, safety and environmental regulations too expensive to be enforced and force state governments to repeal or ignore regulations. (Attachment 12)

Diane Mullens, Kansas Chapter American Planning Association, appeared before the committee in opposition of the proposed bill. She told the committee that they oppose the bill because it threatens many state regulations that protect Kansas citizens and their property. (Attachment 13)

Craig Kenworthy, Overland Park Attorney, appeared before the committee as an opponent to the bill. The unintended consequence of this bill would be increasing Federal regulation of Kansas businesses and citizens. (Attachment 14)

Chris McKenzie, League of Kansas Municipalities, appeared before the committee in opposition to the bill. He commented that the proposed bill would discourage state government from carrying out its proper regulatory role; sets a precedent for extension of similar mandates on local governments; contains internal inconsistencies that will confuse parties attempting to adhere to it; and to expands the interpretation of what constitutes a "taking". (Attachment 15)

Blaise Plummer, Assistant Sedgwick County Attorney, Wichita, appeared before the committee as an opponent to the bill because if applied to local units of government, reasonable regulations like zoning would be under attack. (Attachment 16)



Steve Hawks, Kansas Wildlife Federation, appeared before the committee in opposition to the bill. He told the committee that this bill would force the state to hire new personnel to make assessments and file reports and would cost money for attorney fees. This is a very expensive solution for a non-existent problem. (Attachment 17)

Hearings on **HB 2015** were closed.

The committee meeting adjourned at 7:00 p.m. The next meeting is scheduled for February 22, 1995.

# HOUSE JUDICIARY COMMITTEE GUEST LIST

DATE: 21 Feb. '95

NAME	REPRESENTING
Jennifer Brandberry	KTLA
Raj Kavalasani	KU Student
Joe Posaboy	KU Student
David Adams	KU Law Student
Craig Kenworthy	My Clients
Jandra McKenzie	KU Law Faculty
Chris McKenzi	League of Kansas Municipalities
	student
Kay Hoff	KU Law Faculty
Mark Kistler	KU Law Student
Clay Barker	KU Law Student
Bud Rigney	KU Law Student
Phil DeLaTorre	KU Law faculty
Bill Scanlan	KU Law Student
TIM CURRAN	KU LAW Student
Will Coats	L. Students
Eric Wikstrom	KU Law Student
Roxann Tate	attorney
	KU faculty

# HOUSE JUDICIARY COMMITTEE GUEST LIST

DATE: 21 Feb., '95

NAME	REPRESENTING
Terry Leatherman	KCCI
Paul E. Fleener	Kansas Farm Bureau
BILL R. FULLER	Kansas Farm Bureau
Sabrina Wells	State Budget Division
KAREN FRANCE	KS ASSOC. OF REALTORS
Chris Wilson	KS Seed Industry Ass'n
Shane Willard	KS wheat GROWERS
Mary Fung	Ks. Rural Center
Seward Rowe	League of Women Voters/KS
Dan Hagenkast	Kansas Rural Center
Matt Holt	KCC/Student
Lori Fink	KCC
Joni Franklin	Sen. Brady's Sen Walker's Office
Steve Horner	Sen Langworthy
Coy Martin	Coy Martin
J Peck	KU Law School
David Leib	KS Water Office
Tom Stiles	KWO
Robin Lehman	KTLA

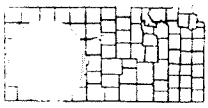
# HOUSE JUDICIARY COMMITTEE GUEST LIST

DATE: 2/21/95

NAME	REPRESENTING
Linda Monroe	KU Law student
David Norris	KU Law student
Jim R. R. Dawson	Kansas Assn of Counties
Tom Smith	Ks Bar Assn
Joan W. Wyatt	Ks Farmers Union
Karl Peter John	Ks Taxpayers Network
Joseph Krahn	KDOT
Bill Caven	KNRC / Sierra
Blaise Plummer	City of Wichita
STEVE HAWKS	Ks WILDLIFE FEDERATION
Sally Neuburg	Johnson Co. Farm Bureau & personal interests.
Bob Miller	Self Employed Farmer
Les Reagin	Kansas Farm Bureau
Jeff Houston	KU Law Student
Jamie Clover Adams	KOFA / KPCA
Mike Beam	Kansas Livestock Assn.
Steve Fenster	KU Law Student
Joe Lieber	Ks Co-op Council
Wiene Shriver	Ks Co-op Council







# Kansas Property Rights Coalition

M.S. Mitchell, Chairman  
Paul E. Fleener, Vice-Chairman  
Chris Wilson, Secretary

- Associated General Contractors of Kansas
- Associated Milk Producers, Inc
- Golf Course Superintendents Assn
- Home Builders Assn. of Greater Kansas City
- KAA-Kansas Agricultural Alliance
- Kansas Aggregate Producers Assn
- Kansas Agri-Women
- Kansas Agricultural Aviation Assn
- Kansas Assn. of Realtors
- Kansas Assn. of Wheat Growers
- Kansas Automobile Dealers Assn
- Kansas Bankers Assn.
- Kansas Building Industry Assn.
- Kansas Campground Assn
- Kansas Chamber of Commerce & Industry (KCCI)
- Kansas Commercial Property Owners Assn.
- Kansas Cooperative Council
- Kansas Corn Growers Assn.
- Kansas Farm Bureau
- Kansas Fertilizer & Chemical Assn.
- Kansas Grain & Feed Assn.
- Kansas Grain Sorghum Producers Assn.
- Kansas Independent Oil & Gas Assn. (KIOGA)
- Kansas Land Improvement Contractors Assn.
- Kansas Livestock Assn.
- Kansas Oil Marketers Assn.
- Kansas Pork Producers Assn.
- Kansas Railroad Assn.
- Kansas Ready Mixed Concrete Assn
- Kansas Seed Industry Assn.
- Kansas Soybean Assn.
- Kansas State Grange
- Kansas Taxpayers Network
- Kansas Veterinary Medical Assn
- Kansas Water PACK
- Kansas Water Resources Assn.
- Mid-America Dairymen
- Mid-America Lumbermen's Assn.
- National Assn. of RV Parks & Campgrounds
- National Fed. of Independent Business
- Western Retail Implement & Hardware Assn
- Wichita Area Builders Association
- WIFE-Women Involved in Farm Economics

TESTIMONY  
to the  
HOUSE JUDICIARY COMMITTEE  
February 21, 1995

HB 2015

CHAIRMAN O'NEAL AND MEMBERS OF THE COMMITTEE:

My name is Janet Stubbs, Executive Officer of the Kansas Building Industry Association, appearing before you today on behalf of the Kansas Property Rights Coalition in support of the intent of HB 2015. The list of the Coalition membership is listed at the left on the first page of this testimony.

In 1992, after attending numerous meetings at the National level at which the court cases and the involvement of our National Association on the subject of Private Property Rights were discussed, visiting numerous meetings of Local Associations and hearing the concerns of the membership regarding government regulations to which they were being subjected, I scheduled a meeting with a few of the associations which I knew to be concerned about this issue. From this first meeting of that small group, our Coalition has grown to some 43 organizations who believe they are being subjected to "confiscation without compensation" when government deprives them, to some degree, of the use of their property.

During the formation process, the Coalition elected leadership and prepared a preliminary list of issues which they believed were being promoted by the staff of Kansas state agencies. (A copy is attached to this testimony.) As I reviewed that list and the volumes of paper I have collected over the months of work, in preparation for this hearing, I followed the history of not only our Coalition but also the evolution of the Court decisions.

As early as 1922 Justice Holmes in the Pennsylvania Coal case said that "While property may be regulated to a certain extent, if a regulation goes too far, it will be recognized as a taking". However, for the next 65 years, the courts followed Justice Brandies dissenting view that "invalidation is the only remedy" and no monetary damages were awarded the injured property owner, no matter how egregious the police power action.

4210 Wam-Teau Drive, Wamego, Kansas 66547  
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Attachment 1

In 1987 the Supreme Court reasserted the Justice Holmes view of the Pennsylvania Coal case that the remedy of compensation is also available where a regulation effects a taking of private property. This was the effect in the First English Evangelical Lutheran Church v. County of Los Angeles.

Since 1987, there have been several highly significant Court cases very favorable to the rights of the private property owner with Nolan, Lucas, and Dolan being the most well known and widely publicized of the cases. More recently, the Circuit Court of Appeals for the Federal Circuit Court ruled in favor of the property owner in Loveladies Harbor v. United States.

Just as our forefathers rebelled against "taxation without representation", private property owners have been rebelling against government taking of the property for which they have worked and paid and upon which they continue to pay taxes. You will undoubtedly be told by the opponents of HB 2015 that our Coalition is comprised of groups which have no regard for the environment and the preservation of the land.

That could not be further from the truth. Our membership earns their livelihood from preservation of the land and the environment. They simply believe that if government requires that land should be used for public purpose, such as endangered species habitat, flood control, nature and bicycle trails, wetlands, etc, then compensation should be given the named owner for the land removed from his/her use.

The Fifth Amendment of our Constitution states, "nor shall private property be taken for public use without just compensation." The sentence ends there. It does not continue with, "except when government feels it is in the public interest."

The majority of Supreme Court justices in Dolan ruled that private property rights as protected by the Fifth Amendment are on par with individual rights protected by the First and Fourth Amendments. Private property rights are just as sacred as the rights of free speech, press and religion.

In 1993, SB 293 was introduced and passed by the Senate with heavy amendments. No action was taken by the House Judiciary Committee that year. In 1993, House Substitute for SB 293 was approved by both legislative bodies and vetoed by then Governor Finney.

Opponents of HB 2015 will undoubtedly argue that the recent Court decisions prove that no additional legal safeguards are needed in this area. We strongly disagree! How many people can afford expensive legal cases such as Nolan, Lucas, and Dolan? We believe that HB 2015 gives badly needed guidance to agency personnel.



Legal experts agree that HB 2015, with proposed amendments, would impose no greater sanctions than already granted by the Constitution and Courts. It does NOT interfere with eminent domain where compensation is awarded to the property owner. It does not interfere with a law enforcement activity which includes seizure or forfeiture of private property for violations of law or for evidence in criminal proceedings. It does not prevent the operation of local units of government. It does require compensation for the "taking" of the property of an individual.

It **does** require annually updated guidelines by the Attorney General to assist state agencies in assuring that their actions do not have taking implications.

Opponents say there is no example which can be cited of actions which constitute taking in Kansas. If you travel the State talking with private property owners, I can assure you there are instances which they believe to be takings. Have they filed lawsuits? No. Government intimidates in many ways.

In the instance of the membership which I represent, builders and developers, any conflict with the units of government on which they must depend upon for issuance of permits can result in retaliation through lengthy time delays, unusual or unreasonable requests and requirements, or denial. All of which is extremely expensive due to interest expense and professional fees. They find legal action not worth the time and expense. In some instances, organizations and associations are the entity which fight the battles to divert the wrath of the bureaucrat or public official away from the individual. In the end, resistance is always a greater expense to the consumer.

The public finds it intimidating and always frustrating to deal with the bureaucracy. I can speak to you from personal experience of a situation which my family has experienced and which we believe is a "taking".

Nine and a half years ago the small family farm on which I grew up began experiencing a shortage of water for the pastures due to watershed dams which had been constructed upstream. While my father was hospitalized terminally ill, my mother & I met the first time with water authorities in an attempt to resolve the problem. Today, my mother still owns the land, she has been unable to receive rent from the pastures the past two summers due to lack of water for the cattle. The owner of the property on which the watershed is located continues to be permitted to deny downstream property owners water. The fish with which he has stocked the body of water are of greater concern than the livestock downstream. The stream bed through our property has filled in with soil and vegetation. The ability to disturb it is questionable and expensive. DWR officials state it is the responsibility of the watershed officials. Watershed officials do not want to rule against

friends, neighbors, etc.

We have preserved our domestic water rights yet I cannot explain to my 85 year old mother what benefit there is to completing the annual paperwork to do so. In our view, this is a "taking". She is deprived of income from the pastures. The land value is reduced. Yet we have been unable to resolve the issue. It is extremely frustrating to me and I have worked around state government for over 20 years and don't feel the intimidation that many others might. It is very expensive for everyone to attempt to resolve.

Following my presentation, testimony will be given by Mary Jane Stattleman who has been instrumental in drafting this piece of legislation and working with the agencies to resolve their concerns.

Committee members, we have solicited input and consultation from numerous sources on this legislation and believe we have a product which can be accepted by everyone due to its correlation with both Constitution and Case law. Therefore, we respectfully request the favorable support of this Committee for HB 2015.

PRELIMINARY LIST OF DISCUSSION TOPICS  
FOR COALITION ACTION - 1993 KANSAS LEGISLATIVE SESSION  
MEETING OF AGRICULTURAL INTERESTS AND KANSAS HOMEBUILDERS

\* UNDER THE GENERAL HEADING OF PRIVATE PROPERTY RIGHTS ISSUES

1. STATE CONTROL OF AGRICULTURAL WATER RIGHTS, USE OF CONSERVATION PLAN LEGISLATION AND REGULATIONS TO REDUCE OR ABROGATE EXISTING WATER APPROPRIATIONS.
2. EXPANSION OF THREATENED OR ENDANGERED SPECIES LEGISLATION AND REGULATION TO INCLUDE PLANTS AND MICRO ORGANISMS WHICH CAN BE USED TO STOP AGRICULTURE THE WAY IT HAS BEEN USED IN OTHER PLACES TO STOP INDUSTRY AND BUSINESS.
3. WELLHEAD PROTECTION PROGRAM LEGISLATION AND REGULATION WHICH CAN BE USED BY LOCAL AND STATE GOVERNMENT TO CONTROL USE OF CHEMICALS, CULTIVATION, CROP SELECTION ON PROPERTY WITHIN TEN MILES OF ANY PUBLIC WATER SUPPLY WELL.
4. REPEAL OF USE VALUE METHOD OF ASSESSING AGRICULTURAL LAND.
5. CONSERVATION EASEMENT LEGISLATION AND REGULATION WHICH CAN BE USED BY ENVIRONMENTAL INTERVENORS TO HARASS AGRICULTURAL OPERATORS BY CLAIMING VIOLATIONS OF SPECIFIC CONDITIONS OF THE CONSERVATION EASEMENT.
6. WETLANDS AND RIPARIAN AREA LEGISLATION AND REGULATIONS WHICH ARE BASED ON THE CONCEPT THAT SUCH AREAS MUST BE PLACED IN THE PUBLIC TRUST BECAUSE PRIVATE USE WILL RESULT IN DESTRUCTION OF IRREPLACEABLE NATURAL RESOURCES.

7. PUBLIC RECREATIONAL LEGISLATION AND REGULATIONS WHICH WILL GIVE THE PUBLIC ACCESS TO AND PASSAGE OVER RIVER, CREEK AND STREAM CORRIDORS BEGINNING WITH THE TWO LEGALLY NAVIGABLE RIVERS.
  8. USE OF CLEAN WATER ACT LEGISLATION AND REGULATIONS TO HARASS AGRICULTURAL OPERATORS WITH ISSUES SUCH AS FENCING WATERWAYS TO ELIMINATE POLLUTION BY STOCK AND REQUIRING EROSION CONTROL BEST MANAGEMENT PRACTICES.
  9. HALTING THE RURAL WATERSHED PROGRAM AIMED AT REDUCING RURAL FLOODING BY APPLICATION OF THREATENED OR ENDANGERED SPECIES. WETLANDS AND RIPARIAN AREA AND OTHER ENVIRONMENTAL ACTIVIST PROGRAMS.
- \* UNDER THE GENERAL HEADING OF LAND USE ISSUES AFFECTING THE RESTRICTION OF DEVELOPMENT RIGHTS OF AGRICULTURAL LANDOWNERS.
1. STATE LAND USE LEGISLATION AND REGULATIONS WHICH TAKE THE CONTROL OF THE FUTURE USE OF AGRICULTURAL LAND AWAY FROM LOCAL GOVERNMENTS WHICH CANNOT BE TRUSTED TO PROTECT THE PUBLIC TRUST.
  2. USE OF AGRICULTURAL ZONING TO PROHIBIT THE EXPANSION OF URBAN AND SUBURBAN DEVELOPMENT.
  3. ENACTMENT AND ENFORCEMENT OF REGULATIONS WHICH PROHIBIT PRIVATE WATER AND SEWER SYSTEMS THEREBY PREVENTING EXPANSION OF DEVELOPMENT INTO AREAS OUTSIDE OF URBAN SERVICE LIMITS.



# PUBLIC POLICY STATEMENT

## HOUSE COMMITTEE ON JUDICIARY

### RE: H.B. 2015 - Creating the Private Property Protection Act

February 21, 1995  
Lawrence, Kansas

Presented by:  
Mary Jane Stattelma, Assistant Director  
Public Affairs Division  
Kansas Farm Bureau

Mr. Chairman and Members of the Committee:

Thank you very much for the opportunity to testify today on H.B. 2015. We are strongly in support of this legislation. It would establish for the State of Kansas a benchmark for public/private understanding of the fundamental importance of private property and the protection of that private property.

For the record, Mr. Chairman, my name is Mary Jane Stattelma. I am Assistant Director of Public Affairs for Kansas Farm Bureau. We bring to you the views (our policy position, adopted Nov. 19, 1994 is attached) of farmers and ranchers in each of the 105 counties of the State of Kansas ... those who belong to Farm Bureau in the county and have associated themselves together to seek a climate of opportunity for the great profession of farming and ranching and the production of food and fiber for all of us.

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Mr. Chairman, the purpose of H.B. 2015 ... the Private Property Rights bill before you today ... is to ensure that state agencies review all proposed rules and regulations, agency guidelines and procedures concerning the issuance of licences or permits, administrative policies, directives and memoranda as to whether any of those documents propose an action which may constitute a taking as defined by case law, by the Fifth Amendment to the United States Constitution and by the Kansas Constitution.

H.B. 2015 is prospective. By that we mean the bill would require an evaluation of all the above referenced agency documents prepared and drafted after the enactment of this bill. One of the differences between last year's bill (S.B. 293 or House Sub. for S.B. 293) and the legislation this year (H.B. 2015) is the review process, found in Section 8 of the bill. The review process would allow individuals who have a direct financial or economic interest to request an agency to review an existing rule or regulation or other agency document. This process allows individuals to raise taking questions with regard to existing documents, yet to be done on a case by case basis and without undue burden to the state agency.

H.B. 2015 contains a role for the Attorney General. This too, is different from H. Sub. for S.B. 293. The role is one which would call on the Attorney General to develop a checklist ... guidelines ... for agencies to follow. We believe it is important for state agencies to function under the same guidelines, thus insuring uniformity.

H.B. 2015 does not prohibit state agencies from carrying out their lawful duties. The bill only instructs the agencies to review



their proposed actions ... hold them up against the Constitution and corresponding case law. Under the Dolan case, the US Supreme Court stated that government, not private individuals, should bear the burden of making sure governmental actions are constitutional.

The legislation before you today requires agencies to ensure compliance with the Constitution. The bill does exempt various governmental actions such as eminent domain, seizure, forfeiture and stop-sale actions from the assessment requirement. That list of exemptions allows agencies to continue to function effectively.

H.B. 2015 is patterned after the Utah law on the protection of private property. Utah has had its private property protection legislation on the books for two years. The prime sponsor of the legislation, Rep. Evan L. Olsen, has told us (see attached letter) that during the time this legislation has been law in the State of Utah, his state has incurred no fiscal impact because of the private property legislation. That is important for this committee to know. It is important for the Administration to know. It is important for agencies to know. Private property protection can and should be done, and under H.B. 2015 can be done in such a way that there is minimal or no cost involved to governing properly while taking into account the protection of private property.

This bill not only helps insure that private property rights are protected, it also can potentially reduce the state's liability if taking ramifications are fully evaluated ahead of time.

Finally, Mr. Chairman, this bill asks only that state agencies do what they prudently should be doing under U.S. Supreme Court cases.

We have worked diligently with various state agencies and private organizations so as to create a mechanism that is reasonable and workable for all concerned.

Thank you for your time and attention. I would be glad to answer any questions you may have in regard to private property protection in general or H.B. 2015 in particular.

Improving net farm income, enhancing the economic opportunity for farmers and preserving private property rights are our most important goals.

The right to own and enjoy property, the right to privately manage and operate property for profit and individual satisfaction is at the heart of our American capitalistic, private, competitive enterprise system. The principle of private property rights is being eroded. Any erosion of that right weakens all other rights guaranteed to individuals by the Constitution.

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. The Fourteenth Amendment to the United States Constitution provides that no person shall be deprived of life, liberty or property without due process of law. Unfortunately, those who do not have the financial resources or the time to wage a court battle seeking redress for a "taking" of private property do not receive full protection of the Constitution. In recognition of those facts, enactment of private property rights protection legislation is a high priority for us in order to provide a state remedy whenever state or federal agencies infringe upon private property rights.

We believe any action by government that does not constitute a valid use of a state's police powers and which diminishes an owner's right to use her/his property, constitutes a taking of that owner's property. Government should provide due process and compensation to the same degree that an owner's right to use her/his property has been diminished by government action.

When regulations or legislation regarding rare, threatened or endangered species alter agricultural practices, agricultural producers should be compensated for the cost of these altered agricultural practices.

We believe eminent domain procedures should include development of an agricultural impact statement, complete with public hearing, appeal, and a determination of compensation for disruption of normal farming practices. Equitable payment must be made for any private property in any "taking" or "partial taking" by eminent domain.

HOUSE OF REPRESENTATIVES  
STATE OF UTAH



REP. EVAN L. OLSEN  
5TH DISTRICT  
(CACHE COUNTY)  
2009 SOUTH 3200 WEST, ROUTE #1  
YOUNG WARD, UTAH 84339  
RES. 752-4304 / BUS. 752-4304

COMMITTEES: REVENUE AND TAXATION; ENERGY, NATURAL  
RESOURCES, AND AGRICULTURE; NATURAL RESOURCES  
AND ENERGY APPROPRIATIONS SUBCOMMITTEE,  
CO-CHAIRMAN

January 5, 1995

Mary Jane Stattleman  
Kansas Farm Bureau  
2627 Kansas Farm Bureau Plaza  
Manhattan, Kansas 66502-8508

Dear Ms. Stattleman:

I am writing in response to your inquiry concerning the result of Utah's Private Property Protection Act passed in the 1993 General Session of the Utah Legislature. When I sponsored the bill passed to protect private property rights in Utah, we heard the same claims you describe in Kansas concerning the extreme fiscal impact of such a requirement on state agencies. We were told by many that the fiscal impact would be in the millions of dollars.

But, as we expected, the costs have not materialized. In fact, we have not been able to identify any additional costs to agencies of state Government as a result of this private property protection act. We never sought to add any additional protection to private property beyond that provided by the United States and Utah Constitutions. We simply wanted state government to recognize those rights and avoid regulations that infringe on them and could possibly represent a taking of private property rights.

I hope this is helpful to you in your quest to secure the same protection of private property rights in Kansas. If I can be of further assistance to you, please let me know.

Sincerely,

Evan L. Olsen  
District 5, Utah House of Representatives

# LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry



835 SW Topeka Blvd. Topeka, Kansas 66612-1671 (913) 357-6321 FAX (913) 357-4732

HB 2015

February 21, 1995

## KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the  
House Committee on Judiciary

by  
Terry Leatherman  
Executive Director  
Kansas Industrial Council

Mr. Chairman and members of the Committee:

My name is Terry Leatherman. I am the Executive Director of the Kansas Industrial Council, a division of the Kansas Chamber of Commerce and Industry. On behalf of the members of the Kansas Chamber of Commerce and Industry, thank you for this opportunity to explain why KCCI supports HB 2015.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

At this point in the 1995 Kansas legislative session, close to 900 bills have been introduced. While subject matter varies, one constant theme in most bills is legislative intention to channel the regulatory arm of government in a desired direction. Tax bills tell revenue agencies how to handle

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collection efforts. Human resources bills often set new guideposts for state officials to determine if this individual qualified for unemployment compensation benefits, or whether that person should be granted workers compensation. This Committee spends much time on bills to provide guidance to courts across our state in deciding individual instances of criminal or civil responsibility.

HB 2015 is another example of legislation to direct state regulatory action. In this bill, a message is being sent to state agencies that they must consider how their regulatory activity affects the rights of property owners. From KCCI's perspective, this is a very appropriate message for the Legislature to send. After all, what HB 2015 simply asks is state agencies to follow Attorney General developed guidelines to steer regulatory or administrative action to protecting the Constitutional rights of private property owners.

In past consideration of this issue, criticism has surfaced that adhering to property rights guidelines would burden state regulatory efforts. This argument strikes the Kansas business community, which has found compliance with government regulatory "burdens" a challenge of staying in business, as curious. In the past two years, government has told business they will comply with the new environmental requirements of the Clean Air Act of 1993, they will make their work place accessible to the physically challenged as directed by the Americans with Disabilities Act, and will allow employees to meet their family needs by conforming their policies with the Family and Medical Leave Act.

These are pointed out not to criticize the Acts, but to stress that when government determines an important social goal, a compliance process will be developed to meet the goal. Protecting private property rights is certainly an important policy objective. If it truly does hinder regulatory activity, should that impede legislative action in this area?

Kansas can meet its regulatory goals without sacrificing the constitutional rights of private property owners. HB 2015 will not relieve property owners from being responsible, but will inject



ernment accountability for its actions. Towards that end, the Kansas Chamber urges your support for HB 2015.

Once again, Mr. Chairman, thank you for this opportunity to appear today. I would be happy to attempt to answer any questions.



Executive Offices:  
3644 S. W. Burlingame Road  
Topeka, Kansas 66611-2098  
Telephone 913/267-3610  
Fax 913/267-1867

TO: THE HOUSE JUDICIARY COMMITTEE  
FROM: KAREN FRANCE, DIRECTOR, GOVERNMENTAL AFFAIRS  
DATE: FEBRUARY 21, 1995  
SUBJECT: HB 2015 PRIVATE PROPERTY RIGHTS BILL

Thank you for the opportunity to testify. On behalf of the Kansas Association of REALTORS®, I appear today to support HB 2015.

The Kansas Association of REALTORS® holds private property rights as a basic freedom of this country. As American citizens, we have the constitutional right to own and use our property however we see fit, as long as our use is not dangerous or harmful to others. We support government's use of police power when regulating property use to protect the rights of others. However, we cannot support the use of government authority that constitutes a "regulatory taking" of property without just compensation.

Since the inception of the REALTOR® organization, we have stood for the protection of private property rights. At the state and federal levels, we continually keep our eye out to ensure that the private property rights which the United States Constitution guarantees us are protected. We believe that this legislation will go a long way towards protecting those constitutional rights and, in the long run, save taxpayers, and the state government a lot of money in terms of court costs and legal fees.

What does this bill do? This bill establishes a system for state agencies to review their actions in order to ensure that they do not constitute an unlawful "taking of property without just compensation", an action which is prohibited by the Just Compensation Clause of the Fifth and 14th Amendments of the United States Constitution, and Section 18 of the Bill of Rights of the constitution of the state of Kansas.

Under the bill, the Attorney General will develop guidelines for the state agencies to utilize throughout their decision making process in order to ensure that they are not unknowingly, illegally "taking" property without just compensation. These guidelines would allow state agencies to evaluate their actions for "takings" implications, and adjust them accordingly.

(continued)

House Judiciary  
2-21-95  
Attachment 4

What we are trying to accomplish by this legislation is a system which will help to avoid legal entanglements for property owners, and the state. Keep in mind that the States which have had to defend these suits have had to expend untold amounts of money, time, and energy in order to defend their actions.

We have tried to address many of the concerns raised in the legislation presented last year as it related to the actions of the agencies. This bill provides a method for property owners to request a review of a regulation, rather than forcing the agencies to review all of the regulations in effect when this legislation takes effect. The process is a reasonable one, whereby the property owner must have some sort of standing in order to make a request for review.

It is important to note what we are not proposing what to do in this bill. We are not impacting the decisions of local units of government or of the state legislature. The Private Property Protection Act is specifically limited to "state agencies". "Governmental Action" is clearly defined at line 27, page one of the bill.

The bill does not impact all agency actions, only those state agency actions which have "takings" implications. Most agency actions do not have "taking" implications. Actions without "taking" implications would not require evaluation by an agency.

The procedure for the agencies outlined here mirrors the requirements for economic impact statements in the rule and regulation making process. The agencies did not like that requirement when it was being discussed by the legislature, but they have adjusted to the requirement just as they will adjust to this requirement. The more time spent taking into account private property rights issues at the rule and regulation making stage will hopefully save time and money in court if litigation were to arise.

We believe that this country was built on Private Property Rights. We believe this bill will help to ensure that those rights are protected by a system which will guarantee that just compensation is given when government agencies deem it is necessary to regulate those rights in such a way as to essentially "take" it from the owner. We ask for your assistance in this endeavor by recommending HB 2015 favorable for passage.



**TESTIMONY TO THE HOUSE JUDICIARY COMMITTEE**

**HOUSE BILL No. 2015**

**February 21, 1995**

**Mister Chairman, members of the House Judiciary Committee, I regret, that due to a scheduling conflict, I will not be able to appear before you today as a proponent of House Bill No 2015. Please accept this written support as an endorsement to the amended version of the bill, which I have attached to this testimony.**

**I am most appreciative to the conferees who are appearing before your committee today, and am confident they are presenting our position to you, expressing the importance of this Legislation. Three years of work have gone into crafting this bill that you have before you today. An issue important enough to be addressed by the Governor in his State of the State address, we stand "shoulder to shoulder" with the 40 plus members of the Property Rights Coaliton in urging your most favorable action on this measure, and are hopeful for expediant action, if at all possible.**

**Again, I am sorry I cannot appear personally to address you with these comments.**

Session of 2006

# HOUSE BILL No. 2015

By Committee on Judiciary

2-7

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To <i>Mitch</i>	From <i>Janet</i>	
Co.	Co.	
Dept.	Phone #	
Fax #	Fax #	

9 AN ACT creating the private property protection act

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

12 Section 1. This act shall be known and may be cited as the private

13 property protection act.

14 Sec. 2. It is the public policy of the state of Kansas that state agencies,  
15 in planning and carrying out governmental actions, anticipate, be sensitive  
16 to and account for the obligations imposed by the fifth and the 14th  
17 amendments of the constitution of the United States and section 18 of  
18 the bill of rights of the constitution of the state of Kansas. It is the express  
19 purpose of this act to reduce the risk of undue or inadvertent burdens on  
20 private property rights resulting from certain lawful governmental actions.

21 Sec. 3. As used in this act, unless the context requires otherwise:

22 (a) "Taking" means, due to a governmental action, private property  
23 is taken such that compensation to the owner of the property is required  
24 by the fifth or 14th amendment of the constitution of the United States  
25 or section 18 of the bill of rights of the constitution of the state of Kansas  
26 and this act.

27 (b) (1) "Governmental action" means any of the following actions  
28 which may give rise to a claim of taking:

29 (A) Proposed legislation by a state agency that if enacted and en-  
30 forced would limit the use of private property;

31 (B) proposed rules and regulations by a state agency that if adopted  
32 and enforced would limit the use of private property;

33 (C) proposed inter-agency guidelines and procedures concerning the  
34 issuance of licenses or permits by a state agency which limit the use of  
35 private property; or

36 (D) proposed administrative policies, directives, or memoranda au-  
37 thored or implemented by a state agency which would limit the use of  
38 private property; or

39 (E) required dedications or exactions from owners of private property  
40 by a state agency.

41 (2) "Governmental action" does not include:

42 (A) Activity in which the power of eminent domain is formally exer-  
43 cised;

"Take" or  
or its use is restricted or limited by a governmental action

constitute a taking

constitute a taking

constitute a taking

constitute a taking

constitute a taking

(B) the repeal of rules and regulations, elimination of governmental programs, or amendment of rules and regulations such that limitations on the use of private property are reduced or removed;

(C) activity representing a valid exercise of the state's police powers, including seizure or forfeiture of private property for violations of law or as evidence in criminal proceedings; and

(D) state agency action authorized by statute or by valid court order in response to a violation of state law.

(c) "Private property" means any real or personal property in this state that is protected by the fifth or 14th amendment of the constitution of the United States or section 18 of the bill of rights of the constitution of the state of Kansas.

(d) "State agency" means an officer, department, division or unit of the executive branch of the state of Kansas authorized to propose, adopt or enforce rules and regulations. "State agency" shall not include the legislative or judicial branches of the state of Kansas or any political or taxing subdivision of the state of Kansas.

Sec. 4. The attorney general for the state of Kansas shall establish on or before January 1, 1996, and update annually guidelines to assist state agencies in evaluating proposed and existing regulatory or administrative actions, or both, and to assure that such actions do not have taking implications. These guidelines shall be published in the Kansas register. The guidelines shall be based on current law as articulated by the United States supreme court, the supreme court of Kansas and this act.

Sec. 5. The guidelines developed by the attorney general shall be adhered to by state agencies in promulgating rules and regulations pursuant to K.S.A. 77-415 et seq., and amendments thereto.

Sec. 6. (a) Before any governmental action which has the effect of restricting private property, including, but not limited to, those taken on the basis of protection of public health or safety, the state agency shall prepare a written report available for public inspection that follows the guidelines established by the attorney general and complies with the following:

(1) Clearly and specifically identifies the public health or safety risk created by the use of the private property;

(2) describes the manner in which the proposed action will substantially advance the purpose of protecting public health and safety against the specifically identified risk;

(3) sets forth the facts relied upon to establish that the restrictions to be imposed on the use of the private property are roughly proportional to the extent in which the use of the property gives rise to the need for such restriction;

law enforcement activity involving

or its use

or limitation justify the need for such or limitation

in a taking;

(5) identifies the alternatives, if any, to the proposed government action that may:

(A) Fulfill the legal obligations of the state agency;

(B) reduce the extent of limitation of the use of the private property and

(C) reduce the risk to the state that the action will be deemed taking; and

(6) ensure that any conditions imposed on issuing a permit shall relate directly to the purpose for which the permit is to be issued, shall substantially and reasonably advance that purpose and shall be expressly authorized by law.

(b) If there is an immediate threat to public health and safety that constitutes an emergency requiring immediate action to eliminate the risk, the report required by this section shall be prepared when the emergency action is completed, in which case the report shall include a complete description of the facts relied upon by the agency in declaring the need for emergency action.

(c) If an action involves a permit process or any other procedure that will limit or otherwise prohibit the use of private property pending completion of the process or procedure, the duration of the limitation on prohibited use of the property shall not extend beyond a reasonable period of time.

(d) Before any state agency implements a governmental action for which a report is required under this section, the state agency shall submit a copy of the report to the governor and the attorney general.

(e) Each state agency shall submit with the economic impact statement as required by K.S.A. 77-416, and amendments thereto, a copy of the taking assessment as required pursuant to this act.

Sec. 7. The state agency shall include in such agency's budget a fund to be used as a source of payment if a taking is determined to have occurred.

Sec. 8. The process for reviewing existing rules and regulations, interagency guidelines and procedures, administrative policies, directives or memoranda, shall be as follows:

(a) Any individual who is seeking a license or permit or renewal thereof, may request the agency to review pertinent existing rules and regulations so as to determine whether the rules and regulations constitute a taking. The agency shall respond to the requestor within 30 days of receipt of the request.

(b) Any individual who has a direct economic or financial interest in property that is governed or affected by rules and regulations may seek

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1 shall submit to the appropriate agency a written request setting out the  
2 governmental action in question and the corresponding rules and regula-  
3 tions to be reviewed and shall provide sufficient information so that the  
4 state agency can determine whether the individual has an actual direct  
5 financial or economic interest, or both. The agency shall respond to the  
6 requestor within 120 days from the receipt of the verified request, or at  
7 least 30 days prior to exercising the governmental action.

8 (c) The state agencies which are impacted by this act may adopt any  
9 rules and regulations necessary to implement the provisions of this sec-  
10 tion.

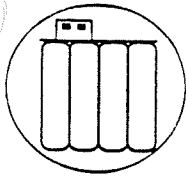
11 Sec. 9. If a state district or appellate court or state agency pursuant  
12 to this act determines that a governmental action has resulted in a taking,  
13 the effect on the valuation for property tax purposes of such property  
14 shall be taken into account in determining the value of the property as  
15 required pursuant to K.S.A. 79-503a, and amendments thereto.

16 Sec. 10. An owner of private property who successfully establishes  
17 that a governmental action constitutes a taking of such owner's private  
18 property shall be entitled to recover reasonable attorney fees and ex-  
19 penses.

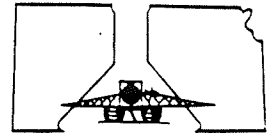
20 Sec. 11. Nothing in this act shall be construed to limit the scope of  
21 judicial review of an agency action, create a new private cause of action  
22 or limit any right of action pursuant to other statutes or at common law.

23 Sec. 12. If any provision of this act or the application thereof to any  
24 person or circumstance is held invalid, the invalidity does not affect other  
25 provisions or applications of the act which can be given effect without  
26 the invalid provision or application, and to this end the provisions of this  
27 act are severable.

28 Sec. 13. This act shall take effect and be in force from and after its  
29 publication in the statute book.



**Kansas Grain & Feed Association  
Kansas Fertilizer & Chemical Association**



**STATEMENT TO  
THE HOUSE JUDICIARY COMMITTEE  
REGARDING H.B. 2015  
REP. MICHAEL O'NEAL, CHAIR  
FEBRUARY 21, 1995**



**KGFA & KFCA advocate public policies that advance a sound economic climate for agribusiness to grow and prosper so they may continue their integral role in providing Kansans and the world with the safest, most abundant supply of food and fiber.**

The following statement supporting H.B. 2015 is submitted on behalf of both the Kansas Grain and Feed Association (KGFA) and the Kansas Fertilizer and Chemical Association (KFCA). While the two associations share staff, they have distinct memberships, separate boards of directors and association programs. KGFA's 1200 members include country elevators -- both independent and cooperative -- subterminal and terminal elevators, feed manufacturers, grain merchandisers and others who serve the industry. KFCA's nearly 500 members are primarily plant nutrient and crop protection retail dealers, but also include manufacturer's representatives, distribution firms, and equipment manufacturers.

KGFA & KFCA strongly support the purpose of H.B. 2015, "to reduce the risk of undue or inadvertent burdens on private property rights." Our policy states, "[KGFA & KFCA]... support a state private property rights bill that would require state agencies to explore the "takings" implications of their action ... such analysis places a preemptive check on state agencies to protect individual citizens."

The goal of exploring the takings implications of government action is accomplished in three ways in H.B. 2015. First, issuance of guidelines on takings law by the Attorney General. Second, consideration of takings during regulatory analysis and third, establishing a process to allow those with a direct economic or financial interest to petition for a takings assessment on existing regulations.

KGFA & KFCA limit their comments today to the takings assessment portion of H.B. 2015. Kansas citizens and the regulated community expect government agencies to assess all options during rulemaking and choose those which are the least burdensome and most cost-effective options while meeting the regulatory requirement. This does not happen automatically. Agencies are instructed through the Economic Impact Statement (EIS) requirements (K.S.A. 77-416) to consider costs when developing regulations. Adding the takings dimension to this process is a sound idea. While all laws are governed by the U.S. Constitution, it

seems that as with cost-effectiveness analysis, agencies must be told the obvious -- to consider takings which are protected by the U.S. Constitution.

The attached matrix categorizes current EIS requirements and illustrates how the takings assessment required by H.B. 2015 fits within this existing scheme. The matrix further shows the requirements of H.B. 2120 which overwhelmingly passed the House on February 14, 120-5. It clarifies and expands the type of information that must be contained in the EIS and adds a risk assessment component. Like the takings assessment, the additional EIS requirements of H.B. 2120 instruct agencies to do what sound policy analysis already dictates.

KGFA & KFCA believe the costs associated with H.B. 2120 are similar to those of H.B. 2015. In a letter to the House Energy and Natural Resources Committee, Director of the Budget Gloria Timmer states that agencies could absorb the requirements of H.B. 2120. The only caveat was that KDHE submitted a cost ranging from zero to \$86,400 annually with the top of the range based on full review of all rules and regulations. This complete review of existing rules and regulations would not apply to the takings assessment since only those the Attorney General determines warrant review would be reviewed.

Some will argue the takings assessment in H.B. 2015 is bureaucratic and expensive. KGFA & KFCA counter the takings assessment fits well within the existing EIS framework and the guidelines provided by the Attorney General will assist the agencies in this task. In his State of the State address, Governor Graves talked at length about making hard choices and managing for results. He directed a review of all current rules and regulations with a view toward eliminating those no longer needed and asked his Secretaries to refrain from issuing any rules and regulations in the future until the costs to individuals and

businesses could be measured against the benefits to the state. The takings assessment is a piece needed to make this determination.

The "takings" assessment will be a valuable tool so reasonable choices can be made in the effort to solve increasingly complex problems. Hard choices cannot be made without relevant information.

Thank you for this opportunity to express the views of the KCFA and KFCA on H.B. 2015. Any questions may be directed to Jamie Clover Adams, Director of Legislative and Regulatory Affairs, 234-0461.

# ECONOMIC IMPACT STATEMENT COMPARISON

	Current EIS Requirements (K.S.A. 77-416)	Takings Assessment Requirements H.B. 2015	Environmental Impact Statement Requirements H.B. 2120	Proposed Changes to EIS Requirements H.B. 2120
Explain what it is and why we need it.	<p>Description of rule and what it is intended to accomplish.</p> <p>Mandated by feds and required to implement their programs?</p>	<p>Specifically indentify the public health or safety risk created by property use and how the action will protect public health and safety</p>	<ul style="list-style-type: none"> <li>* Description of the need for the rule and the environmental benefits gained</li> <li>* level of risk to the public health being removed or controlled</li> <li>* level at which substance considered harmful</li> </ul>	No Change
What's it cost	<p>Description of cost, who bears cost, who will be impacted</p>	<p>Set out the facts that make the restriction or limitation necessary</p> <p>[do the costs equal the benefits?]</p> <div style="border: 1px solid black; padding: 5px; width: fit-content; margin: 0 auto;"> <p>Is there a takings?</p> </div>		<p>Description of capital cost and annual cost of compliance</p> <p>Initial and annual cost of implementing and enforcing</p> <p>Paperwork Burden</p> <p>Detailed statement of data and methodology</p>
Is there a better way?	<p>Description of less costly or less intrusive avenues considered.</p> <p>Why were they rejected.</p>	<p>Identify alternatives to reduce the takings impact.</p>		No Change

6-5



# The Kansas Rural Center

P.O. Box 133  
Whiting, KS 66552  
(913) 873-3431  
(913) 841-1959

## Testimony concerning House Bill No. 2015, The Private Property Protection Act Before the House Judiciary Committee, February 21, 1995

The Kansas Rural Center (KRC) is a private, non-profit organization that promotes the long term health of the land and its people through education, research and advocacy. The Rural Center cultivates grassroots support for public policies that encourage family farming and stewardship of soil and water. The Center is committed to economically viable, environmentally sound and socially sustainable rural culture.

KRC fully supports the protection of private property rights as provided for by the 5th Amendment of the U.S. Constitution and the Constitution of the State of Kansas which includes the Constitutional right to just compensation when private property is taken for public use. We believe that these Constitutional protections are adequate, and that takings issues should be addressed on a case by case basis.

While we recognize that there are legitimate individual concerns and problems regarding implementation of government regulation, the solution lies in clarifying, revising, or reforming the regulations themselves. We must not confuse frustration with complying with often complex regulations, with the reason for the regulations. Regulations are in place to protect the public health and safety. Making them inoperable will mean the public will be placed at risk.

The bill, as written, will have the effect of shifting the burden of public health and safety regulation to counties and municipalities, or to the court systems through private civil action which will become necessary should individuals or corporations be allowed to challenge any state regulation. It is our belief that this legislation is designed to prevent effective regulation by the state where the safety and health of all citizens comes in conflict with the rights of an individual or corporation to do as it wishes commercially.

We believe that democratic government is in part designed to afford protection of the powerless from the powerful. By removing the state from specific conflicts, counties and municipalities will be the first line of defense. Generalities about private property aside, many of the specific cases that have already arisen pitch very powerful corporate interests with deep pockets, against relatively weak local governmental entities. A case in point is the Premium Standard Farms "takings" lawsuit in Putnam County, Missouri. Premium Standard Farms is one of the largest vertically integrated hog producers and processors in the country. They have filed a \$7.9 million law suit

against Lincoln Township, (population 146), claiming township zoning constitutes a taking. One has to wonder whether the legal outcome in that case, or even the challenge to the regulation would exist, if Premium Standard Farms were up against the state government rather than the township. We fear that we will see many more cases like this should this act become law.

Regulations which protect the safety and health of individuals represent no more of a taking of private property, that speed laws represent a restriction of the right to travel. They are in place to prevent disasters befalling the community. Without them, disasters will happen, and the state will have failed its duty.

Because we believe that this bill would eliminate or inhibit the basic balance between individual rights and the common good, the KRC opposes House Bill No. 2015.

STATEMENT OF CHRIS WILSON  
TO THE HOUSE JUDICIARY COMMITTEE  
REPRESENTATIVE MIKE O'NEAL, CHAIRMAN  
CONCERNING H.B. 2015, REGARDING PRIVATE PROPERTY PROTECTION  
FEBRUARY 21, 1995

Mr. Chairman and Members of the Committee, I am Chris Wilson, Strategic Action and Response Chairman of American Agri-Women (AAW), the nation's largest coalition of farm, ranch and agribusiness women, representing over 50,000 members nationwide. There are 50 state and commodity affiliates of AAW, including Kansas Agri-Women, of which I am a past president.

In recent years, the protection of private property rights has emerged as the top issue for our organization. It is an issue which has touched the lives of members throughout the country. In numerous cases, livelihoods of those who have farmed or ranched their land for several generations have been taken through government action. An example is in the State of Washington, where an endangered species habitat was declared and as a result, farmers were prohibited from using the water source which was vital to the production of their crops. That species was not indigenous to the area, but had been introduced by man for a time and no longer existed in the area, but the agency involved desired to reintroduce it there. The water reservoir is one which was developed by the farmers at their personal cost.

In these types of cases, we strongly believe that the property owners should be entitled to greater consideration by the government as to the cost and benefit of the action. If the government deems it appropriate to take the action, based on careful consideration and evaluation, then the property owner should be compensated.

Representatives, H.B. 2015 will not prevent any government action and will not give property owners any additional rights or insure compensation if part or even all of their property is taken. Frankly, I would like for Kansas to take a stronger stand in the protection of private property. However, it is a small, but hopefully significant step in showing that our state does care about property rights and is willing to require state agencies to consider private property in making decisions. AAW supports any steps which can be taken to protect property rights and continues to work at the federal level for greater protection.

Thank you for introducing H.B. 2015 and for your consideration of this legislation.



*Kansas Land Improvement Contractors Association*  
P.O. Box 1304 \* Arkansas City, Ks 67005 \* (316)441-0115 \*(316)442-4234

February 17, 1995

Stubbs & Associates  
816 Tyler, Suite 300A  
Topeka, KS 66612

RE: HB2015 Private Property Rights

Dear Janet:

The following paragraphs constitute the position statement of the Kansas Land Improvement Contractors Association regarding private property rights. Please share this with our legislators with regards to HB2015.

The Constitution of the United States grants to every citizen the right to own property. Inherent in the right to own property is the right to use that property for economic gain as long as the exercise of that right does not infringe upon the right of others or threaten the health or safety of others. Moreover, the Constitution further guarantees that the government may not take privately owned property without due process and just compensation. Due process requires the demonstration by the government of a vital and pressing interest in the property before it can be taken.

All existing environmental legislation and rules for implementation of environmental law should be carefully analyzed and corrected to assure compliance with these constitutional guarantees, and all future legislation and rules be should be written with great care to avoid abridgement of these constitutional guarantees.

The concept of private ownership of real property is an historic cornerstone of the American economic system. The framers of our Constitution understood the importance of this concept and guaranteed that government would not take private property without due process and just compensation.

We believe that any action by government that diminishes the owner's right to use his property constitutes, to a degree, a taking of the owner's property. Therefore, government should provide due process and compensation to the exact degree that an owner's right to use his property has been diminished by government action. Furthermore, we believe that the only just basis for compensation in such cases is fair market value.

The passage of this bill will be a positive step in the right direction for the protection of the rights of private property owners.

Sincerely,

A handwritten signature in black ink that reads 'Paul Hettenbach'.

Paul Hettenbach  
KLICA Legislative Chairman

House Judiciary  
2-21-95  
Attachment 9

STATEMENT  
OF  
IVAN W. WYATT, PRESIDENT  
KANSAS FARMERS UNION  
ON  
HOUSE BILL No. 2015  
(PRIVATE PROPERTY RIGHTS)  
BEFORE  
THE HOUSE JUDICIARY COMMITTEE  
AT  
THE KANSAS UNIVERSITY LAW SCHOOL

FEBRUARY 21, 1995

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE:

WE IN THE KANSAS FARMERS UNION OPPOSE THE SO-CALLED "TAKING" LEGISLATION OF HB-2015 BEING WIDELY PROMOTED BY SOME AGRICULTURAL GROUPS AS A PRIVATE PROPERTY PROTECTION ACT.

DURING THE PAST YEAR, THERE HAS BEEN A DEFINITE TREND DEVELOPING WITH THIS TYPE OF LEGISLATION. IT IS BEING PROMOTED AS PROTECTING "PEOPLES RIGHTS", WHEN IN FACT, IT IS IN REALITY A DEADLY TOOL ABSENTEE CORPORATIONS ARE USING TO HAMMER DOWN INDIVIDUAL FARM FAMILIES RIGHTS TO PROTECT THE VALUES OF THEIR HOMES AND PROPERTY. THIS TYPE OF LEGISLATION CAN BE USED TO SCYTH DOWN EVEN LOCAL UNITS OF GOVERNMENTS ABILITY TO PROTECT THEIR CITIZENS PRIVATE PROPERTY RIGHTS, THE VALUE OF THEIR PROPERTY AND IN SOME CASES THEIR MORAL VALUES. IN OTHER WORDS, THIS TYPE OF PROPOSED LEGISLATION CAN BE USED TO DESTROY HOME RULE. SUCH ATTEMPTS ARE BEING MADE IN SOME STATES.

THE PROPONENTS OF THIS SO-CALLED "PROPERTY RIGHTS" LEGISLATION WOULD HAVE YOU BELIEVE THEY ARE CONCERNED ABOUT THE LITTLE PEOPLE WHO MAY NOT HAVE THE FUNDS OR TIME TO PROTECT THEIR PROPERTY RIGHTS.

THIS IS A FARCE. THIS SO-CALLED PRIVATE PROPERTY PROTECTION AS IT RELATES TO RURAL COMMUNITIES IS A TOOL FOR THOSE WHO SUPPORT THE REFORMATION OF THIS COUNTRY'S AGRICULTURE INTO A CORPORATE CONTROLLED VERTICAL INTEGRATED AGRICULTURE. A TOOL BEING USED IN AN ATTEMPT TO WIPE OUT THE MOST EFFICIENT FORM OF AGRICULTURE KNOWN, THE PRIVATE ENTREPRENEURSHIP INDUSTRY OF FAMILY OPERATED AGRICULTURAL.

ONE EXAMPLE OF THIS IS A RURAL LINCOLN TOWNSHIP IN PUTNAM COUNTY, MISSOURI. THESE FARM FAMILIE'S TOWNSHIP GOVERNMENT IS BEING SUED BY PREMIUMS STANDARD FARMS BECAUSE THEY HAD ZONED THEIR TOWNSHIP TO PRESERVE THEIR QUALITY OF LIFE, AND THE PRESERVATION OF THE VALUE OF THEIR PRIVATE PROPERTY. NOW BECAUSE THE TOWNSHIP DOESN'T HAVE THE FUNDS TO FIGHT SUCH LAWSUIT, THESE FAMILIES IN LINCOLN TOWNSHIP ARE HAVING TO DIG INTO THEIR SAVINGS TO FIGHT THIS \$7.9 MILLION LAWSUIT INITIATED BY THIS GIANT HOG FARM.

WE HAVE SEEN SIMILAR SITUATIONS IN IOWA AND OHIO WHERE THE FARM BUREAU IN THOSE STATES JOINED SIDES AGAINST FARM FAMILIES TRYING TO DEFEND THEIR PROPERTY VALUES AND HOMES FROM EQUALLY DESTRUCTIVE FORCES, <sup>wnc</sup> WERE FORCED TO GO THROUGH THE COURTS, TO SEEK RELIEF AND RETRIBUTION.

RECENTLY IN NEBRASKA, THEIR SUPREME COURT RULED IN A SIMILAR SITUATION IN FAVOR OF "INDIVIDUAL PRIVATE PROPERTY RIGHTS" VS. CORPORATE PROPERTY RIGHTS AND DECLARED THE CORPORATION CEASE AND DESIST IN THEIR ACTIONS THAT WAS DESTROYING PROPERTY VALUE AND QUALITY OF LIFE, OR GET OUT OF THE STATE OF NEBRASKA.

LAST NOVEMBER THE PEOPLE OF ARIZONA OVER TURNED "PROPOSITION 300" WHICH WAS SIMILAR TO THIS BILL BEING PROPOSED HERE. THE PROPONENTS OF THAT REFERENDUM CALLED IT THE MOST IMPORTANT VOTE ON THE PROPERTY RIGHTS ISSUE IN 1994. HOWEVER, IT WAS DEFEATED BECAUSE THE PEOPLE OF ARIZONA RECOGNIZED IT WAS THEIR PERSONAL AND PROPERTY RIGHTS THAT WERE AT STAKE.

THIS WAS AN ISSUE THAT PITTED "THE PEOPLE OF ARIZONA" AGAINST THE HIGHLY FINANCED CAMPAIGN OF ECONOMIC DEVELOPERS, BANKERS AND LARGE CORPORATIONS, MUCH LIKE THE CORPORATE HOG AND DAIRY ISSUE OF WESTERN KANSAS.

IN HIS INAUGURAL ADDRESS, GOVERNOR GRAVES INDICATED ONE OF HIS GOALS WAS TO EXTEND THE OPPORTUNITY FOR A BETTER QUALITY OF LIFE TO ALL, WHETHER IT BE EAST OR WEST, URBAN OR RURAL.

ACTIONS OF THE KANSAS LEGISLATURE IN 1994 LET LOOSE THE POWER OF CORPORATIONS TO RUN RAMPANT IN OUR RURAL COMMUNITIES, WITHOUT CONCERN FOR THE FAMILIES OF THOSE COMMUNITIES. THIS WAS BECAUSE THE LEGISLATURE VIRTUALLY ELMINATED ANY GUIDELINES OR REALISTIC PROTECTION FOR THE PROPERTY RIGHTS OF THOSE FAMILIES OR THEIR QUALITY OF LIFE. IS IT ANY WONDER THEN WHEN WE HEAR MORE AND MORE PEOPLE SAY, YOU CAN'T TRUST

GOVERNMENT AT ANY LEVEL ANYMORE.

SOME PEOPLE THOUGHT THE PASSAGE OF THE 1994 CORPORATE HOG AND DAIRY LEGISLATION WOULD DIVIDE KANSAS, EAST FROM WEST, URBAN FROM RURAL, HOWEVER JUST THE OPPOSITE WAS TRUE.

WHEN WE LOOK AT THE VOTING RESULTS OF THE CORPORATE HOG AND DAIRY ISSUE IN THE NUMEROUS COUNTIES IN WESTERN AND CENTRAL KANSAS IT WAS EVIDENT THERE WAS A GREAT LACK OF COMMUNICATION BETWEEN THE GENERAL PUBLIC AND THEIR ELECTED OFFICIALS. WE ARE NOW BEGINNING TO HEAR FROM PEOPLE WHO ARE BECOMING CONCERNED ABOUT THE PROTECTION THEIR PROPERTY RIGHTS AND THEIR QUALITY OF LIFE IN COUNTIES WHERE THERE WERE NO ELECTIONS, WHEN THEIR COUNTY COMMISSIONERS TOOK IT UPON THEMSELVES TO OPEN THE GATES TO ATTACK ON THEIR PEOPLES PROPERTY RIGHTS.

IT IS IMPERATIVE THAT WE DON'T PASS MORE LEGISLATION THAT WILL FURTHER JEOPARDIZE RURAL FAMILIES ABILITY TO PROTECT THEIR FAMILIES AND THEIR PROPERTY. IT IS JUST AS EQUALLY IMPERATIVE THAT WE DON'T PASS LEGISLATION THAT WILL EVENTUALLY STRIP OUR URBAN COMMUNITIES OF THEIR ABILITY TO PROTECT THEIR PROPERTY RIGHTS, QUALITY OF LIFE, AND MORAL VALUES THAT WOULD RESULT FROM ACTIONS IN THE NAME OF A "TAKINGS LAW" UNDER THE GUISE OF A "PRIVATE PROPERTY PROTECTION ACT". SOME OF THE SUPPORTERS OF THIS BILL ARE THE SAME AS THOSE WHO A FEW YEARS AGO *Supporter* LEGISLATION THAT WOULD HAVE GRANTED CORPORATIONS THE RIGHT OF EMINENT DOMAIN CONDEMNATION AGAINST PRIVATE LANDOWNERS.



URBAN AREAS HAVE IN THE PAST, USED LOCAL GOVERNMENT REGULATIONS TO LIMIT THE USE OF SOME PROPERTY IN MANNERS THAT COULD CAUSE A LOSS OF PROPERTY VALUE TO HOMEOWNERS, A LESSER QUALITY OF LIFE, OR JEOPARDIZE FAMILY VALUES WHEN DEALING WITH SUCH THINGS AS ADULT MOVIE THEATERS, SALOONS, ETC. THIS ISSUE OF PRIVATE PROPERTY RIGHTS CROSSES ALL LINES.

WE ARE CONSTANTLY HEARING POLITICIANS FROM SENATOR DOLE TO MEMBERS OF THE HOUSE SAYING WE NEED TO RETURN "POWER" TO THE PEOPLE. MOST CERTAINLY THEN WE SHOULD NOT NOW BE LOOKING AT LEGISLATION THAT WILL STRIP OUR URBAN PROPERTY OWNERS AND FARM FAMILIES IN RURAL COMMUNITIES "POWERLESS" TO DEFEND THEIR PROPERTY. INSTEAD WE SHOULD BE LOOKING AT LEGISLATION THAT WOULD STRENGTHEN LOCAL UNITS OF GOVERNMENT ABILITY TO PRACTICE HOME RULE BY ALLOWING TOWNSHIPS TO PASS PRIVATE PROPERTY AND QUALITY OF LIFE PROTECTION RULES.

FOLLOWING LAST NOVEMBER'S ELECTIONS SEVERAL WESTERN KANSAS LEGISLATORS APPEAR TO SUPPORT THIS ARGUMENT WITH QUOTES, SUCH AS ONE STATE REPRESENTATIVE THAT WAS QUOTED AS SAYING HE THOUGHT THE VOTERS WERE SAYING THEY WANT GOVERNMENT CLOSER TO THE PEOPLE, MEANING THEY WANT MORE GUIDANCE FROM COUNTY, CITY AND TOWNSHIPS ... AND LESS FROM TOPEKA AND WASHINGTON.

ANOTHER REPRESENTATIVE WAS QUOTED AS SAYING, "I THINK IT GOES DOWN TO TRYING TO GET THE POWER BACK INTO THE HANDS OF LOCAL GOVERNMENT."

IN THOSE LOCAL ELECTIONS ON THE CORPORATE HOG AND DAIRY ISSUE, LOCAL PEOPLE WERE INCENSED WITH MEMBERS OF STATE INSTITUTION USING TAX DOLLARS TELLING THEM HOW THEY DIDN'T KNOW WHAT WAS GOOD FOR THEM, AND THEY SHOULD

LET THEM RUN THINGS.

IT WAS OBVIOUS THESE TAX FUNDED PERSONS WERE ON A "SPECIAL INTEREST" SERVITUDE VENTURE, WITH NO CONSIDERATION FOR ALTERNATIVES, AND THEY HELD LITTLE CONCERN FOR THE PEOPLE OF THOSE COMMUNITIES OR WHAT IT COST THEM, IN "ENERGY", "FINANCIAL STRENGTH" AND "TIME" TO PROTECT THEIR RIGHTS OF PROPERTY. MANY OF THOSE LOCAL PEOPLE HAD TO DIG DEEP INTO THEIR OWN SAVINGS TO FIGHT THE BATTLE TO PROTECT THEIR PROPERTY VALUES, AND QUALITY OF LIFE.

IT IS IRONIC THAT NOW WE SHOULD BE CONSIDERING LEGISLATION THAT WOULD STRIP THIS LIMITED POWER OF THE BALLOT BOX FROM THESE PEOPLE TO PROTECT THEIR PROPERTY, THEIR HOME, HEALTH AND FUTURE.

IT IS NO ACCIDENT THAT THE SAME PEOPLE THAT SUPPORTED THIS SO-CALLED "CORPORATE FIX" FOR WESTERN KANSAS COMMUNITIES ARE SOME OF THE SAME ONE'S WHO SUPPORT THIS LEGISLATION.

PROponents OF THIS LEGISLATION MAY WELL USE ISOLATED CASES WHERE A BUREAUCRATIC OR THE ARMY CORP OF ENGINEERS PERSONNEL GOT CARRIED AWAY WITH THEIR POWER AND AUTHORITY, NOT UNLIKE WHEN OCCASSIONALLY A POLICEMAN, A SHERRIF OR HIGHWAY PATROLMAN MAY WELL GET CARRIED AWAY AND MAKE A BAD DECISION. IN EITHER CASE THE SOLUTION TO SUCH A SITUATION IS NOT TO STRIP POWERLESS THOSE THE LAW IS SUPPOSED TO PROTECT. INSTEAD, THE PROBLEM HAS TO BE DEALT WITH REALISTICALLY, THIS BILL DOES NOT DO THAT. THIS LEGISLATION IN EITHER CASE WOULD BE TO SAY, GOVERNMENT AT ANY LEVEL SHOULD NOT BE ALLOWED TO INTERVENE TO PREVENT THE LOSS OF PROPERTY VALUE, LIFE OF

HEALTH BY ANY ACTION OF OTHERS. ALLOWING, IF THERE IS A LOSS OF PROPERTY, LIFE, ETC., THE INDIVIDUAL MUST EXPEND THEIR SAVINGS OR FUTURE EARNINGS TO SEEK RETRIBUTION, SO MUCH FOR LAW AND ORDER.

THIS TYPE OF LEGISLATION WILL NOT STOP HERE IF ITS SUCCESSFUL. IT HAS ALREADY BEEN STATED. NEXT YEAR WE WILL SEE EXPANDED LEGISLATION TO ELIMINATE THIS TYPE OF LAW AND ORDER TO INCLUDE LOCAL UNITS OF GOVERNMENT.

WE OF THE KANSAS FARMERS UNION OPPOSE ANY LEGISLATION THAT WOULD HAVE, IF IT HAD BECOME LAW LAST YEAR, PIT THE CITIZENS OF THOSE WESTERN KANSAS COUNTIES HEAD TO HEAD AGAINST THOSE NUMEROUS CORPORATE GIANTS, AND CORRUPTED GOVERNMENT OFFICIALS AS WE ARE WITNESSING NOW IN THE STRUGGLE OF THE PEOPLE OF PUTNAM COUNTY MISSOURI. <sup>Peopl<sup>e</sup></sup> WHO ARE NOW STRIVING TO RAISE FUNDS TO DEFEND THEIR HOMES, THEIR FAMILIES, THEIR COMMUNITY AGAINST A CORPORATE GIANT ARMED WITH THE SO-CALLED "TAKINGS" CLUB.

A FEW NOTES ON SECTIONS OF THIS PROPOSAL LEGISLATION. PAGE 1, LINE 22, WHY SHOULD "TAKINGS" RELATE TO ONLY "GOVERNMENTAL ACTION," WHEN THERE ARE CORPORATIONS THAT ARE MUCH LARGER THAN COUNTIES AND MANY CASES STATE GOVERNMENTS.

PAGE 2, LINE 16, WHY SHOULD "LEGISLATION" BE EXEMPT FROM THE LAW, IN LIGHT OF SOME OF LAST YEARS LEGISLATION THAT MOST CERTAINLY FAILED TO PROTECT PEOPLE'S PROPERTY VALUE AND QUALITY OF LIFE.

THE KANSAS FARMERS UNION POLICY MORE CORRECTLY IDENTIFIES A "TAKING" AS ANY ACTIONS OF A UNIT OF GOVERNMENT THAT PLACE IN FORCE ACTION THAT PROVIDES A TAX INCENTIVE OR EXEMPTION FOR ANY PRIVATE OR CORPORATE

ENTITY, ~~THE~~ <sup>There by</sup> PLACED AN ADDED TAX BURDEN ON ANY OR ALL PRIVATELY-OWNED PROPERTY."

THANK YOU.

Chairman O'Neal and members of the committee, my name is Edward Rowe and I am a member of the lobby corps of the League of Women Voters of Kansas. I am here to ask you to vote against the extreme view of private property represented by HB 2015.

The U.S. Constitution forbids the government from "taking" private property without compensation. The example we all think of is a state highway department condemning private property for the public purpose of building a road. The owner experiences a 100% loss on the land. The courts have always considered this a "taking" and the owner must be fairly compensated. Neither we nor the advocates of HB 2015 would want to change this. The disagreement comes when local, state and federal governments act in other ways which improve the general quality of life, but also have some effect on property values. Let me give you two examples I'm familiar with.

Example 1: Since the late 1960s state agencies have had the authority to inspect larger feedlots and to require construction of lagoons where necessary. These allow biodegradation of organic wastes in the runoff before it is released into local streams, therefore reducing adverse effects on downstream property owners. I was an eye- and nose-witness to the massive fish-kills on the Cottonwood which occurred in 1967 before the regulations went into effect. Please don't tell me the problems were caused by rotting leaves and please don't turn the clock back on these regulations.

My second example has to do with municipal zoning, which I understand is not on the chopping block this year, hardly a reassuring way to put it. My city changed the zoning of my neighborhood. Previously our zoning permitted unrestricted building of large apartment complexes, but we were down-zoned to a category which ruled out creation of new units larger than 5-plexes. The purpose of the down-zoning was to stabilize a historical neighborhood which had become a mixture of apartments and single family residences, prevent further traffic congestion, and otherwise improve the property values and quality of life for the residents. That down-zoning probably did decrease the potential market value of deteriorating properties held by some owners planning to cut them up into student apartments or tear them down and replace them with barrack-like buildings. Should we have paid those owners for hypothetical lost income when their real contribution was to let their properties become blighting influences?

In both of my examples, property rights are being protected by the present system (those of downstream water users and of single-family homeowners).

The advocates of legislation like HB 2015 seem to argue that a land-owner has an absolute right to do whatever he wants with his property, and that any act of government which reduces its value should be compensated. This may be good bumper sticker rhetoric, but it is likely to lead to disastrous environmental results when I am allowed to use my land in a way that makes me rich but seriously degrades your land.

The advocates of legislation like HB 2015 have a blind-spot for all the many cases where governmental actions increase the value of a piece of land. Here's one rural and one urban example: Everybody in my county (city and rural dwellers) is taxed for such rural improvements as bridges. As I look at my county map, there are a lot of bridges out there at \$180,000 each. The changes I've seen in municipal zoning more often increase than decrease the value of a piece of urban property.

League's stated positions on natural resources are squarely in opposition to the one-sided rhetoric of the pro- HB 2015 advocates. League believes deeply in "stewardship" of the land, "resource management," and "setting [environmental] standards." We urge that you take a more balanced view, one that recognizes the rights of all property owners and also their responsibilities to the rest of society and to future generations.

Thank you for letting me testify today.



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H.B. 2015  
House Judiciary Committee  
Testimony of Bill Craven  
Kansas Natural Resource Council  
and Kansas Sierra Club  
Feb. 21, 1995

I appreciate the opportunity to testify on the bill with the most obviously inappropriate title of this legislative session. This bill is not about private property rights. This bill instead uses that all-American title as a cynical disguise to mask its true purpose which is twofold: (1) Make important public health, safety and environmental regulations too expensive to enforce or (2) force state government to repeal or ignore the regulations.

Around the nation, these bills are sponsored by a coalition of industries which depend on using natural resources to make their money. The impacts of mining, logging, development, and agribusiness are controversial because they depend on a careful balancing of the use of public and/or natural resources which at the same time respects these industries' right to engage in business.

Although "takings" legislation has been considered in about 40 states, it has passed in less than 10. No state has passed a bill as extreme as this proposal. The majority position in those 10 states is a free-standing version of what is before you today as Section 4 of H.B. 2015.

A great deal of misinformation has been promulgated which tries to make the case that various regulations--like the Endangered Species Act or the wetlands regulations--somehow interfere with private property rights. Less than .1 percent of the more than 200,000 projects reviewed under the ESA have resulted in modifications to proposed projects. Farmed wetlands are generally subject to a national permit allowing the continued use of that land.

I am mystified by the asserted need for this law. There are no cases of uncompensated takings in Kansas. There is one example where a state agency, regulating pursuant to a federal statute, created a situation in which the legislature paid a landowner compensation. We now know--thanks to the Wichita Eagle story two weeks ago--that he considered that payment too little, and that he planned to seek compensation every year. This bill can't reach federal regulations. Another of the problems of this bill is that it doesn't set any limits on how much, or how often, compensation will be paid. It also doesn't say whether the state will obtain title to the land once the compensation has been paid. Typically, when a taking occurs and compensation is paid, title is transferred to the government. Are the proponents really interested in more public ownership of Kansas land? That seems to be a likely, but unintended consequence of this bill.

The groups I represent strongly support what the state and federal constitutions declare about private property. We support compensation when the government physically takes property. And we support compensation for regulatory takings as that term is used in the cases.

Some of the proponents have worked with me and other opponents in recent months to construct compromise language, and I applaud them for that effort. The amendments which the coalition has told me it will support are indeed helpful.

Obviously, my strong preference is for this bill to be killed. Alternatively, I would respectfully suggest the following amendments:

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In Section 3, the “governmental action” definitions should all be changed to reflect that the definition of a constitutional taking is not altered. The phrase “give rise to a claim of taking” on p. 1, line 28, should be changed to “constitute a taking.”

Again in Section 3, in paragraphs A, B, C, and D, the phrase “limit the use of private property” should be changed to “constitute a taking.” I am told these first five amendments will be endorsed by the private property coalition.

These amendments would make certain that this bill tracks the constitution. As the definition of a taking is refined by the courts, this language would track that definition. A separate objection to the proposed language is that it radically alters the commonly understood definition. It has never been the case that governmental action which “limits” private property is a taking. Were that the case, then perhaps most every regulation would be a taking. To prove this point, ask yourself to identify any public health, safety, civil rights, or environmental regulation that doesn’t, to a certain extent, limit private property. And then ask yourself whether the state wants to be in the business of paying landowners or business to comply with those regulations. I am not here to defend every regulation. I am here to defend the constitutional process. And I want to underscore the fiscal implications of this bill, both in terms of agency paperwork and in terms of payment to landowners and businesses.

One part of the coalition’s balloon that is troubling is on page 2, line 4. If the sentence is amended to read “Law enforcement activity representing a valid exercise of the state’s police powers” then other valid exercises of the state’s police powers will be excluded from the definition. I would suggest that a means be created to retain the original intent, which is that police powers unrelated to law enforcement be excluded from the definition of governmental action.

On p. 2, line 36, and on p. 3, line 11, the word “substantially” should be deleted. Under existing law, government may regulate when reasonably necessary to effectuate its police powers. In these two examples, that threshold would be changed. In the second example, the two words, “substantially and reasonably” are used together. That is a marriage of two distinct tests that is simply unworkable.

Section 6 requires what are called “takings impact assessments.” Last year, four state agencies testified that this requirement would cost more than \$1 million, would slow down the permitting process, and would divert agency resources from these agencies’ real work. Of course, there are more than four state agencies which would be affected, so the fiscal implications are actually quite higher. I find it curious that the political mood of the legislature seems to be looking for ways to streamline government and cut bureaucracy and red-tape. This provision goes in exactly the opposite direction. I would respectfully ask the committee to consider deleting Section 6.

Also in Section 6 is the “roughly proportional” language on p. 2, line 40. My understanding is that the coalition will propose an amendment. This language is borrowed from the Dolan case which involved a dispute of a city exaction or dedication of property. That language is inappropriate for state agencies, and raises the question of whether cities and counties will be drawn into the bill regardless of the disclaimer that they won’t be. If that language won’t be stricken entirely, the way to solve that problem is to re-word the section to state that the restriction is “justified” by the use of the property. It’s my understanding that is also the coalition’s position.

Section 4 requires the Attorney General’s office to promulgate guidelines to make certain that future regulations don’t unduly interfere with private property rights. Last fall, during negotiations with the proponents, this section was suggested by me as a free-standing compromise because several states have adopted similar language. It seems to be working well. This is the only section I endorse. It could stand alone as the only private property rights legislation which is needed. The benefit of having the Attorney General’s office make these determinations—as opposed to several attorneys in several agencies making what may be inconsistent determinations—is apparent. The Attorney General’s office is already involved in the agency rule-making process, and this proposal seems a natural extension of that role.

The “roughly proportional” language of Section 6, as well as paragraph 6 of section 6 (page three, line 9) and page three, line 19, pertain to permits. This language is also objectionable because it upsets the normal constitutional balancing of everyone’s private property rights. Why should state agencies focus only on the

private property rights of someone applying for a permit? Often, those who own private property next to, or downstream from, a permit applicant have private property considerations which could be jeopardized if the permit is granted. Think of the people who live downstream from feedlots or corporate hog operations, or levees or stream channelization projects. There are hundreds of examples.

Paragraph 6 of section 6 also contains "substantially," the word to which I objected earlier. An additional problem is that it contains the phrase that the permit "shall relate directly to the purpose for which the permit is to be issued." This language isn't necessary at all. A permit is issued for its intended purpose. This paragraph also says that every permit shall be expressly authorized by law, which is truly an awesome extension of legislative intrusion into executive branch agencies.

This paragraph is a great example of why last year many critics called this bill the "full employment bill for lawyers." Throughout the bill, there is confusing, circular, and inconsistent language that will only result in extensive litigation against the state.

Section 7 requires state agencies to have a slush fund to pay for compensation. The proponents can't have it both ways. They say this bill is intended to require state agencies to "look before they leap" and/or to "pay attention" to private property rights before issuing regulations. I suspect that isn't the real purpose. As section 7 says, compensation is in fact intended. And if the definition of governmental action isn't changed to reflect the constitutional definition of a taking, the amount of compensation will be very large indeed.

I think the language of Section 9, regarding favorable property tax treatment of property is unworkable. I think the language of Section 10, allowing prevailing party attorneys fees is a dramatic departure from existing law, and will further increase the costs of this bill to the state and the taxpayers. I would ask the committee to consider deleting sections 7, 9, and 10.

There is an obvious philosophical disagreement between the proponents and the opponents. The proponents seem to believe in the legal fiction that private property rights are absolute—that they should be allowed to do anything they want on their land regardless of the consequences to their neighbors. If they pollute, they don't want enforcement. If there is enforcement, they want the state to pay them to comply because of the alleged interference with their private property rights. Opponents don't believe in an absolute version of private property rights. We believe in the old adage that "the right to swing your fist stops where my nose begins."

This bill is a contest between the public interest—as defined by constitutionally conservative and fiscally conservative parameters—and corporate greed. You don't see any real grassroots groups here asking for this bill. And you have been warned that the proponents plan to come back next year or the year after and ask for a bill to apply to the zoning laws of cities and counties. When corporate greed can be falsely couched in terms of "private property rights," there are no limits.

Finally, I want to remind the committee that the public in Arizona defeated a referendum on private property rights last November by a percentage of 60-40 despite being outspent substantially by the proponents.



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# Misbegotten

## Property rights bill is another lawyer's feast

**W**ill 1995 be the year that Kansas legislators abandon common sense to create full employment for lawyers? Yes — if a property rights bill introduced in the House becomes law.

The bill is sponsored by the House Judiciary Committee, whose members — surprise, surprise — are mostly lawyers. It would require state agencies to study whether any action they take could unfairly reduce property values. Agencies also would be required to set aside money to compensate landowners who might be harmed by the action in question.

Kansans rightly treasure their private property rights and may wonder what could possibly be wrong with the bill. The answer: It constitutes a dire threat to their wallets, in two fundamental ways.

First: Once the law takes effect, every state agency whose actions affect property owners — whether it be environmental enforcement, nursing home regulation or highway expansion — has to set aside part of its budget for possible compensation of "aggrieved" property owners. Every dollar set aside hinders that agency's ability to carry out its mission.

That is precisely the idea behind the bill: to intimidate state agencies from taking action affecting property owners. But what if a property owner is polluting Kansas drinking water supplies or letting helpless old people sleep in their own waste? Is it really in Kansans' best interest when an

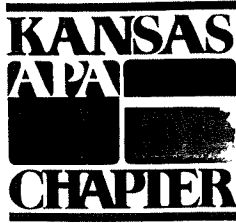
agency becomes too timid to enforce the law — just to keep a property owner's "rights" from being "trampled"?

Second: Such a law would be so foreign to the established ways of doing things in Kansas that every section of it is certain to be challenged in lawsuits. Is it really in Kansans' best interest to have lawyers feasting on their tax money, as court officials' time and energy are drained off figuring out what the law meant?

The answer to these questions would be yes if the state showed too little respect for property rights, as other states, most notably California, have.

But Kansas is no California. The state, if anything, has been too hesitant to flex its muscle when streams are polluted, when old folks suffer in nursing homes or when public facilities such as parks and highways need expanding. Despite a perception to the contrary, the state respects property rights. That's why the bill's proponents are at a loss to find multiple examples of the trampling of property rights.

The bill is a scheme to free those property owners who are so inclined to abuse their property in ways that hurt others — as folks living next to some Kansas feedlots have been hurt through air and water pollution. Unless legislators want to cripple the state's ability to do virtually everything and waste their constituents' tax money, they would be wise to let this misbegotten bill die aborning.



**TESTIMONY IN OPPOSITION OF PROPOSED  
H.B. 2015**

**Diane Mullens, President  
Kansas Chapter, American Planning Association**

On behalf of the members of the Kansas Chapter, American Planning Association (KAPA), I want to express our opposition to the Private Property Protection Act, H.B. 2015. This act, if passed, would have a detrimental impact on the citizens of the State of Kansas as well as cities and counties throughout the state.

KAPA is a non-profit, professional, public interest and research organization representing more than 400 city and county planners, elected and appointed city, county and planning officials, and citizens. Our members share a commitment to the use of sound planning to meet our state's economic and community development needs, to conserve resources, and to preserve the environment.

In principle, we oppose the bill because it threatens many state regulations that protect Kansas citizens and their property. Many of these regulations implement environmental and planning laws that the Kansas legislature has analyzed, debated and adopted.

**We opposed H.B. 2015 for the following reasons:**

- 1) On its face, the proposed bill appears to be an assessment taking law modeled after Executive Order 12,630. However, Section 7, of the bill could be construed as a compensation clause which could have the effect of ending regulation on the state level. This section could be construed to require compensation as determined by the attorney general rather than by the courts.
- 2) Professional planners and officials are in favor of thoughtful, sensible regulation and believe that it is wise to study the impact of regulatory actions prior to their adoption. However, Section 3(b)(1)(A-E) is overly broad and would require a study of any action whether significant or insignificant. This will result in agencies which spend all their time doing assessment studies and no time regulating or enforcing regulations.
- 3) The proposed bill requires an impact analysis in virtually every instance of diminution of value of property. This will result in study, at the taxpayers expense, of insignificant governmental actions. The bill, instead, should require

an impact analysis and study when the regulatory agency has determined that the regulation's impact statewide is substantial and is likely to significantly devalue private property.

Finally, KAPA members are concerned that this bill, if enacted, would ultimately result in cities and counties being brought under its provisions by subsequent legislation. KAPA supports the present land use and regulatory system which balances conflicting interests, but we also believe that there is need for improvement. We urge you to explore ways to **improve the application of the current system--not revamp it**. We need to lift the burden from those property owners who are truly in need of relief from excessive government regulation. KAPA is directly involved in finding innovative ways to meet this challenge without the passage of takings legislation which we believe would prove detrimental to Kansas citizens and local communities.

2/21/95

My name is Craig Kenworthy. I am an attorney from Merriam with my office in Overland Park. I am the Chairman of the Merriam Chamber of Commerce and a member of the Merriam Plan Commission. Today, however I am not here in those capacities but instead as an attorney with clients that deal with regulatory agencies including the Kansas Department of Health and the Environment. There are many points I could make about this bill but I am going to focus on one aspect.

That is the unintended consequence this bill will have of increasing Federal regulation of Kansas businesses and citizens. In the rush to lessen the state regulatory load, this law would encourage greater federal control. As you know, several of KDHE's programs are actually governed by Federal law. These programs include Clean Water and Underground storage tanks. KDHE is only allowed to operate these programs because it is authorized to do so by EPA.

Let's say this bill passes. First, KDHE continues to regulate but finds more of it's regulations being challenged as "takings". So faced with paying more of it's budget to plaintiff and their lawyers (under the Attorney's fee provision) it slacks off a little. No.No.No. says EPA and removes KDHE's regulatory authority.

Now when my clients have a problem I'm not dealing with someone in Topeka, I'm dealing with EPA Region 7.

Let me give you an example. Right now, if I have a client who has real estate with gas contamination that has to be cleaned up so the property can be sold, my environmental consultant can call KDHE and KDHE will come out to the site while we do testing look at the site and try to give us some guidance on how best to clean up the property. I am not going to get that kind of help from the federal government. At EPA, my problem competes with problems in Cedar Rapids and Omaha instead of being a concern for a district office of a state agency.

Putting a Muzzle on KDHE as some proponents would like to do will only leave us with less local control in several regulatory areas. Then you'll have regulations that can never be a taking. This bill cannot force EPA to pay anyone, anything for any "taking". Don't pass a bill whose unintended consequence is greater regulation not less.



**League  
of Kansas  
Municipalities**

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**LEGISLATIVE TESTIMONY**

**TO:** House Judiciary Committee  
**FROM:** Chris McKenzie, Executive Director *CM*  
**DATE:** February 21, 1995  
**RE:** Comments on HB 2015

Good afternoon and thank you for the opportunity to appear today and offer testimony on HB 2015, creating the private property protection act. The League generally opposes this legislation for the following reasons:

- It will discourage state government from carrying out its proper regulatory role.
- It sets a precedent for extension of similar mandates on local governments.
- It contains internal inconsistencies that will confuse parties attempting to adhere to it.
- It could be construed to expand the interpretation of what constitutes a "taking".

**1. Inhibiting State Government's Regulatory Role.** Proponents of HB 2015 will likely agree with this observation and support this objective. While each of us is sympathetic to the plight of a property owner who has received the short end of the stick in dealing with a government agency, it is extremely critical to remember that Kansas citizens rely on state government agencies to protect and promote the public health through regulatory and other actions. For cities this is especially critical in the environmental protection area in which the Kansas Department of Health and Environment not only regulates cities as producers of contaminants, but it also regulates other persons and entities. In some cases, the state has actually preempted any local regulation (e.g., pesticide control) and reserved all powers to itself. In such cases, if the state agency is not aggressive than the quality of the health of city residents can be affected negatively. In other instances, such as the regulation of feedlots, city residents depend on KDHE to prevent the pollution of surface and ground water supplies. If KDHE does not, cities will be forced increasingly to become plaintiffs enforcing state and federal water quality laws.

Admittedly this bill does not do anything to directly impair state agency regulatory action. It will, however, result in directing a larger share of agency resources to analyzing agency actions for the purposes of the bill--resources that could be devoted to protecting the public health. Ironically as well, it will probably lead to bigger, more expensive state government at a time when the legislature is concentrating on reducing the size of state government. For example, the number of state agency lawyers needed to analyze governmental

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actions will probably increase as a result.

The bottom line is do we really want to encumber state agencies with going through administrative procedures which consume precious public resources and will likely produce little of value?

**2. Local Government.** We are fully aware that cities are excluded from the scope of this bill by provisions of paragraph (d) of Section 2, which defines "State agency" to not include political or taxing subdivisions of the state. You may be aware that in some states, such as Utah, the adoption of state private property rights legislation has simply laid the groundwork for legislation in subsequent years imposing similar requirements on local units. In a recent article in the Wichita Eagle M.S. Mitchell was cited as the source of a statement that a bill of this type "to require cities and counties to pay landowners if local regulations lower property values" may be pushed next year or the year after. In an era in which I would estimate conservatively that 20 - 25% of the resources of cities are spent complying with mandates from the federal or state government, the idea of yet another mandate is chilling. It also is hard to stand by and watch your intergovernmental partner shackle itself and not wonder if your level of government may be next. We believe this is a viable concern.

**3. Internal Inconsistencies in the Bill.** Like its predecessor last year, this legislation contains some internal inconsistencies which make it very difficult to understand. For example, in lines 4 - 5 on page 2, an "activity representing a valid exercise of the state's police powers" is exempted from the definition of "governmental action." Yet in lines 34 - 35 on page 2 the report required to be prepared by state agencies under Section 6 is required to "clearly and specifically" identify "the public health or safety risk created by the use of the private property." Since actions taken by state and local governments to protect the public health and safety represent an exercise of the state's "police power," these provisions appear in conflict.

**4. Confusion Over What Constitutes A "Taking."** We understand that it is not the intent of this bill to expand the definition of what constitutes a "taking" of private property for public use. The expansive definition of "governmental action" in Section 3, however, gives rise to concern on many city attorneys' parts that this legislation, if enacted, would do just that. The practical effect of such a result for cities is that federal courts frequently rely on rights granted and defined in state law to determine the extent of the protection of rights afforded by the U.S. Constitution. In order to address this question, we would respectfully request the Committee to add language in Section 11 of the bill (after the word "law" in line 22) as follows: "or be used in making a judicial determination of a constitutional taking."

Thank you for the opportunity to address you on this issue. We look forward to working with the committee and the legislature on this matter in the future.

1 shall submit to the appropriate agency a written request setting out the  
2 governmental action in question and the corresponding rules and regu-  
3 lations to be reviewed and shall provide sufficient information so that the  
4 state agency can determine whether the individual has an actual direct  
5 financial or economic interest, or both. The agency shall respond to the  
6 requestor within 120 days from the receipt of the verified request, or at  
7 least 30 days prior to exercising the governmental action.

8 (c) The state agencies which are impacted by this act may adopt any  
9 rules and regulations necessary to implement the provisions of this sec-  
10 tion.

AMENDMENT PROPOSED BY LEAGUE  
OF KANSAS MUNICIPALITIES

11 Sec. 9. If a state district or appellate court or state agency pursuant  
12 to this act determines that a governmental action has resulted in a taking,  
13 the effect on the valuation for property tax purposes of such property  
14 shall be taken into account in determining the value of the property as  
15 required pursuant to K.S.A. 79-503a, and amendments thereto.

16 Sec. 10. An owner of private property who successfully establishes  
17 that a governmental action constitutes a taking of such owner's private  
18 property shall be entitled to recover reasonable attorney fees and ex-  
19 penses.

20 Sec. 11. Nothing in this act shall be construed to limit the scope of  
21 judicial review of an agency action, create a new private cause of action  
22 or limit any right of action pursuant to other statutes or at common law.

23 Sec. 12. If any provision of this act or the application thereof to any  
24 person or circumstance is held invalid, the invalidity does not affect other  
25 provisions or applications of the act which can be given effect without  
26 the invalid provision or application, and to this end the provisions of this  
27 act are severable.

or be used in making a judicial  
determination of a constitutional  
taking.

28 Sec. 13. This act shall take effect and be in force from and after its  
29 publication in the statute book.



CITY COUNCIL OFFICE  
CITY HALL — FIRST FLOOR  
455 NORTH MAIN STREET  
WICHITA, KANSAS 67202  
(316) 268-4331

TESTIMONY RE: HB 2015  
FEBRUARY 21, 1995  
HOUSE JUDICIARY COMMITTEE  
KANSAS UNIVERSITY LAW SCHOOL  
2ND FLOOR, FORMAL COMMONS ROOM

Representative O'Neal, and members of the House Judiciary Committee, I am Blaise Plummer, an Attorney with the City of Wichita Law Department, speaking on behalf of City Council Member Bill Cather. I would like to highlight for you today excerpts from a letter which Council Member Cather has sent to all legislators. The full text of the letter follows.

I urge your strong opposition to H.B. 2015, misnamed the "Private Property Protection Act." I am a strong proponent of private property rights as set forth in the United States and Kansas constitutions; but as a former legislator and current City Council Member, I am also a strong believer in the use of reasonable regulations to protect the public health, safety, and environment. What this bill really does is upset the constitutional balance which defines what is a "taking" of private property for which governmental compensation must be paid. The definition of "governmental action" (page 1, lines 27-38) and consequently, of a "taking" used in the proposal, is a radical and extreme departure from the current constitutional definition.

Proponents apparently believe in the right to do anything they want on their land, regardless of the consequences to neighbors. Private property rights, like other constitutional rights, are not absolute. The cases reflect a delicate balance which strives to protect the property rights of all concerned -- not just those who apply for a permit from a state agency, or whose actions are somehow affected by a state agency's regulations. One does not have a right to conduct legal activities on one's land if those activities hurt the private property rights of a neighbor. An example: Even if a certain business is legal, it cannot be operated in a way so as to pollute a neighbor's well. Private property rights protect the private property of everyone.



I am aware that cities and counties are technically exempt from this bill. That fact provides little comfort. As you know, last year the Kansas League of Municipalities opposed this bill. Across the country, the mining, logging, and agribusiness trade groups which support this legislation often try in a later year to extend legislation to cities after it is first applied to state agencies. Utah is a classic case where a bill which applied to state agencies was amended the next year to apply to cities and counties.

If and when this law does apply to local units of government, reasonable regulations like zoning will be under attack. In Johnson County, for example, zoning is what was used to keep an adult novelty store out of residential neighborhoods. Will cities not be allowed to protect their citizens from undesirable businesses? Will it be deemed a "taking" if a city tries to limit where certain industries are located, regardless of the noise levels, the pollution, the discharges into streams and rivers, or the effect on the private property rights of other landowners? These are the kind of issues posed by this bill.

There are no cases of uncompensated "takings" in Kansas. This bill is simply not necessary. We do not need the additional taxpayer expense of doing "taking impact assessments." We do not need a "slush fund" in state agencies to pay for "takings" that have not occurred.

In a sentence, the federal and state constitutions already do a fine job of protecting private property rights. If there are state agency regulations that need fixing, let's fix them. But let us not over-react by passing a bill of this extreme nature.

If, however, it is likely that some version of this legislation is passed, I would like you to consider amending the above referenced "governmental action" section. Specifically, subsections A,B,C, and D of Section 3 (page 1, lines 27-38) need to be changed to make certain that the current constitutional test for a "taking" is preserved. In each of those subsections, the phrase "limit the use of private property" is used. It has never been considered a "taking" whenever a regulation "limits" the use of private property. Just think about it. If that were the case, every regulation would be a "taking" and that is obviously a constitutional and a fiscal impossibility. We cannot pay compensation every time every regulation "limits" private property, no matter how modest the limitation.

I would propose two alternatives: First, the "limit the use of private property" phrase could be replaced with "constitute a taking as defined in cases decided by the U.S. Supreme Court or the Supreme Court of Kansas." That would ensure that how a "taking" is defined reflects what the two highest courts say is meant by the word "taking." The second option is to amend these same subsections to reflect the guidance which is to be provided by the Attorney General. I note that Section 4 (page 2, line 23) also requires the Attorney

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General guidelines to track the current law as articulated by these two courts. So the objectionable phrase could also be replaced with "constitute a taking as described in the attorney general guidelines required in Section 4."

Frankly, there are other amendments of lesser importance I would also like to propose; but this is the major one. Again, I urge you to help kill this bill, but if that is not possible, I strongly appeal to you to consider one of these two amendments.

Thank you for your consideration in this matter, and please feel free to contact me if I can provide further information.

Sincerely,

A handwritten signature in cursive script that reads "Bill".

William Cather  
Council Member  
District II

WC:cr

# *Kansas Wildlife Federation, Inc.*

P.O. Box 5715  
Topeka, Ks. 66605

Affiliate of National Wildlife Federation  
913/266-6185

200 S.W. 30th  
Suite 106  
Topeka, Ks. 66611

February 21, 1995  
Testimony before the House Judiciary Committee  
in Opposition to House Bill 2015

Good afternoon, Mr. Chairman and Members of the Committee, my name is Steve Hawks. I am from Ozawkie and I currently serve as Vice President of the Kansas wildlife Federation. I am a fisheries biologist by training, but I now work here in Lawrence in the private sector.

The Kansas Wildlife Federation is a non profit, state wide, broadly based, conservation and education organization. Our 6,000 members and the 10,000 Kansas members of the National Wildlife Federation for which we are the state affiliate are dedicated to the conservation, sound management and restoration of our wildlife and natural resources.

We support the protections of private property in the 5th and 14th Amendments to the U S Constitution and the similar provisions in the Kansas Constitution. We oppose this bill because it will greatly reduce health, safety and environmental regulation by state agencies and in the process it will trample on a basic and fundamental property right to not have those up stream or up wind or near by damage your land or the enjoyment of it. Many landowners have used the Kansas regulations such as the Stream Obstruction Act to protect their property from less careful neighbors. Do we really want to end this protection?

The state is creeping perilously close to the illogical position of paying polluters not to pollute, irrigators not to drill wells, water users to conserve a limited water supply. What happened to the responsibility of landowners to do things for the common good and not adversely affect their neighbors?

In the four years of talking about this type of legislation, those who want it have not found a single example of an uncompensated regulatory taking of Kansas property by a Kansas regulation. Kansans are not burdened by heavy handed enforcement of overly strict state regulations. Kansas ranks 50th, dead last, in stream water quality. Over regulation and fanatical enforcement have not occurred. The primary reasons given for the passage of House Bill 2015 are based on misinformation on problems caused by federal regulations such as wetland protection (Section 404 of the Clean Water Act) and the Endangered Species Act. This bill will not give regulatory relief from federal law.

This bill will force the state agencies to hire new personnel to make assessments and file reports on the property rights affects for each regulation and permit. The state will have to find funds for lawyers fees and set aside funds for payments to property owners. You will be passing an expensive solution for a non existent problem. At a time when we are asking government to be less costly and more efficient, this is a step in the wrong direction. We urge you not to pass this bill.

House Judiciary  
2-21-95  
Attachment 17