

Approved: 4-7-95
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Chairperson Tim Emert at 10:00 a.m. on March 15, 1995 in Room 514-S of the Capitol.

All members were present except:

Committee staff present: Michael Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Revisor of Statutes
Janice Brasher, Committee Secretary

Conferees appearing before the committee:

Janet Stubbs, Kansas Building Industry Association and Coalition for Private Property Rights
Mary Jane Stattelman, Farm Bureau
Jim Edwards, Kansas Chamber of Commerce
Karen France, Kansas Association of Realtors
Bill Craven, Kansas Natural Resources Council
Spencer Tomb, Kansas Wildlife
Blaise Plummer, Assistant City Attorney
Jim Reardon, Director of Legal Services, Kansas Association of Counties

Others attending: See attached list

The meeting was called to order by Chairman Emert at 10:05 a.m., and the Chair directed the members attention to minutes of February 17, 1995.

Motion by Senator Parkinson, second by Senator Reynolds to approve the minutes for February 17, 1995.
Motion carried.

HB 2015--Private property protection act

Janet Stubbs, Kansas Building Industry Association and also representing the Kansas Private Property Rights Coalition spoke in support of **HB 2015**. Ms Stubbs referred to the list of the Coalition membership on the left side of her handout. Ms Stubbs related the history of the Private Property Rights Coalition and its growth to some 43 organizations who believe they are being subjected to "confiscation without compensation" when government deprives them of the use of their property. Ms Stubbs related a 1922, Justice Holmes opinion, "While property may be regulated to a certain extent, if a regulation goes too far, it will be recognized as a taking." Ms Stubbs pointed out that during the next 65 years the courts followed the 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. Ms Stubbs continued that the Coalition members believe that if government requires that land should be used for public purpose, then compensation should be given the named owner for the land removed from his/her use. Ms Stubbs stated that **HB 2015** will give needed safeguards to private property owners, as many cannot afford expensive legal cases. Ms Stubbs cited the Fifth Amendment of the Constitution which states, "nor shall private property be taken for public use without just compensation." This bill will require state agencies to consider the ramifications of their rules and regulations before passage and before affecting the lives of citizens, not after actions have subjected taxpayers of Kansas to legal action which will be costly to defend in addition to the cost of compensation which may be awarded. Ms Stubbs stated that this bill does not interfere with eminent domain, or with a law enforcement activity which includes seizure or forfeiture of private property for violations of law or for evidence in criminal proceedings. This bill does require annually updated guidelines by the Attorney General to assist state agencies in assuring that their actions do not have taking implications. Ms Stubbs stated that in traveling Kansas, she has talked with many private property owners that believed they were victims of takings, but have not filed law suits because of government intimidation, by using the granting of permits and using delays, using requirements and often using denial of request. All of these things are expensive because of professional fees involved. Ms Stubbs emphasized the support of both organizations she represents, for **HB 2015** as amended by the House. (Attachment 1)

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY, Room 514-S Statehouse, at 10:00 a.m. on March 15, 1995.

Ms Stubbs responded to a question by the Chair, of which amendment was added on the floor of the House, by stating the amendment dealing with attorney fees, Section 9. The Chair stated that Section 7 was added by the House Committee. Ms Mary Jane Stattelman responded that it was an administration amendment, it deals with their time frame.

Mary Jane Stattelman, Assistant Director, Public Affairs Division Kansas Farm Bureau spoke in support of **HB 2015**. Ms Stattelman referred to her handout and the letter from Utah, after which this bill is modeled. Ms Stattelman stated that Utah has had a similar bill for almost two years and has not had any fiscal impact. Ms Stattelman referred to page two of her written testimony referring to the role of the Attorney General's Office in developing guidelines. This bill only instructs state agencies to review their proposed actions. Ms Stattelman cited the Dolan case in which the U.S. Supreme Court stated that government, not private individuals, should bear the burden of making sure governmental actions are constitutional. There is no place in this bill where private property owners would have more rights than they do under the Fifth Amendment to the Constitution. Ms Stattelman stated that there has been some controversy over the word "substantially" found on page 3, line 6 and line 24. This provision came from Utah's law. There are ten other states that have the private property law and there have not been significant problems with them. Ms Stattelman continued by stating that no power or authority of the agencies have been lessened. Ms Stattelman emphasized that the addition of Section 9 dealing with attorney fees is a very important aspect of this bill. This section allows someone to seek attorney fees only if they are successful in establishing a taking. Representative O'Neal and Kansas University Professor of Law, Michael Davis both think this provision is important if this law is to be accessed. The Governor and his cabinet have not objected to this provision. State law already allows attorney fees in an eminent domain case. Ms Stattelman stated that the associations in this Coalition want the government to continue to make our state safe and healthy, but the associations want the ramifications of actions by state agencies to be considered. This bill only asks agencies to do what they should have prudently been doing. (Attachment 2)

Questions and discussion followed regarding the application of this bill to state agencies only, and the payment of attorney fees. Discussion also addressed last year's vetoed bill, **SB 293**, and the definition of "taking."

Karen France, Kansas Association of Realtors, spoke in support of **HB 2015**. Ms France referenced line 42 on page 4, referring to cause of action. This bill creates nothing new as far as a "taking." (Attachment 3)

Jim Edwards, Kansas Chamber of Commerce and Industry, spoke in support of **HB 2015**. Mr. Edwards capsulized his comments by stating from his written testimony that 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 government accountability for its actions. Mr. Edwards concluded that the Kansas Chamber is in support of **HB 2015**. (Attachment 4)

The Chair referred to written testimony from Marti Vanier, Kansas Agricultural Alliance. The Kansas Agricultural Alliance expressed support for **HB 2015** "as a method of assuring the establishment of guidelines to assist state agencies in the identification of actions that have constitutional takings implications, and, where there is a taking, assures compensation." (Attachment 5)

Written testimony from Kansas Grain & Feed Association-Kansas Fertilizer & Chemical Association was submitted in support of **HB 2015**. An important focus of the report from the KGFA and KFCA was the takings assessment portion in **HB 2015**. The "takings" assessment will be a valuable tool so reasonable choices can be made in the effort to solve increasingly complex problems. This report also included an Economic Impact Statement Comparison in matrix form showing current EIS requirements, Takings Assessment requirements of **HB 2015** as well as Environmental Impact Statement requirements of **HB 2120** and proposed changes to EIS requirements **HB 2120**. (Attachment 6)

Written testimony from Kansas Livestock Association was presented in support of **HB 2015**. The written testimony concluded by stating that Kansas should follow the lead of other states by formalizing the process of reviewing agency actions which may cause constitutional taking implications. **HB 2015** outlines such a process and KLA supports the passage of the bill. (Attachment 7)

Written testimony from Joe Lieber, Kansas Cooperative Council, in support of **HB 2015** stated that because individual property rights have dwindled over the last few decades, this bill is needed to ensure individual rights. (Attachment 8)

Bill Craven, Kansas Natural Resources Council stated that the groups he represents strongly oppose this bill. Mr. Craven stated that this bill is unnecessary and creates a risk of additional litigation. Mr. Craven asked,

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY, Room 514-S Statehouse, at 10:00 a.m. on March 15, 1995.

"why do we need a bill that the proponents admit tracts the constitution?" Mr. Craven addressed concerns with the amendments that were made on the House side. Mr. Craven stated that the word "substantially" should be taken out, because the word refers to changing the thresholds that government can now regulate. Mr. Craven stated that the groups he represents support existing law. Under existing law, regulations must "reasonably advance" the purpose of the regulation. Mr. Craven addressed the attorney fee amendment. Mr. Craven cited that the legislature has never granted prevailing party plaintiff's attorney fees when it comes to bill of rights issue. Mr. Craven offered an alternative, if the attorney fee amendment was to stay, it should make the paying of attorney's fees discretionary. That avoids the problem of the \$200 judgment and the \$20,000 legal fee. (Attachment 9)

Jim Reardon, Kansas Association of Counties spoke in opposition to **HB 2015**, but stated that his association is pleased with the amendments. Mr. Reardon noted an amendment to be offered by the League of Municipalities that his associations supports. Mr. Reardon discussed what constitutes a taking and who benefits and who loses. Mr. Reardon pointed out that not one legitimate case has been brought forward to show why this legislation is necessary. Mr. Reardon related four cases of county residents that have been protected by the regulations. According to Mr. Reardon it would appear that big agri-businesses, including confinement and packing operations, (which are consistently the state's top 10 polluters) would gain more from weakening the protection of health, environmental quality regulation than the average farmer. Mr. Reardon cited that the advocates suggest that this legislation will not affect county governments, but it would affect waste dumping, water rights, conservation requirements, landfill regulations, and other county interest protected by state regulations. Mr. Reardon suggested that county planners have begun to implement procedures, recognizing that courts have tilted on the side of property owners, that there are guidelines and protections already. Mr. Reardon questioned the compelling need for the state to add burdensome regulations to state agencies. (Attachment 10)

Discussion followed.

Blaise Plummer, Assistance City Attorney for Wichita, Kansas and on behalf of City Council spoke in opposition to **HB 2015**. Mr. Plummer stated that he had proposed language in the House on page 2 of the bill, line 21, redefining or add language to state agency, this is not intended to include other political entities, but we do mean to include language that expresses what a state agency is not. It is not to include: legislative or judicial branches of the state of Kansas or any, "city, township, and county or other" political subdivisions of the state of Kansas. Mr. Plummer cited two reasons for this change. First the way the bill reads now leaves it open to come back and include cities, counties and townships. That is a policy decision that may at some point be made. Mr. Plummer asked the Senate to go ahead and exempt cities, townships and counties from the scope of this bill. The second reason of concern expressed by Mr. Plummer was that there have been statements that the idea was to get this bill passed and then come back and include other political subdivisions. Mr. Plummer addressed the issue of attorney fees. Mr. Plummer stated that it is superfluous to have "does not create a cause of action." Mr. Plummer cited civil rights law and an example of an inverse condemnation case, if the state, city is going to lose that case it goes into a condemnation case where the attorney fees are going to be awarded.

Spencer Tomb, Kansas Wildlife Federation, Inc. spoke in opposition to **HB 2015** stating that the bill is unnecessary. Mr. Tomb cited 30 property owners in the state of Kansas that have used the state regulations to protect their private property. Mr. Tomb continued that this is an expensive solution for a non-existent problem, stating that there are no cases of state regulatory takings. (Attachment 11)

Written testimony from Chris McKenzie, Executive Director, League of Kansas Municipalities in opposition to **HB 2015** was noted by the Chair. The written testimony included a proposed balloon in Section 10. (Attachment 12)

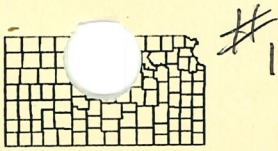
action pursuant to other statutes or at common law, or be used in making a judicial determination of a taking by a political or taxing subdivision.

In written testimony from the Kansas Rural Center, the KRC opposes **HB 2015** because this bill would eliminate or inhibit the basic balance between individual rights and the common good. The testimony stated that complying with often complex regulations, must not be confused with the reason for the regulations. (Attachment 13)

Having no other conferees, the Chair closed the hearings on **HB 2015**.

Meeting adjourned at 11:05 a.m.

The next meeting is scheduled for March 16, 1995.



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
SENATE JUDICIARY COMMITTEE
March 15, 1995

HB 2015

CHAIRMAN EMERT AND MEMBERS OF THE COMMITTEE:

My name is Janet Stubbs, Executive Officer of the Kansas Building Industry Association. In the absence of the chairman of the Kansas Private Property Rights Coalition, I am appearing today in support of HB 2015 for both organizations. The list of the Coalition membership is listed at the left on the first page of this testimony.

In 1992, after attending meetings at the National level at which the subject of Private Property Rights was 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 of the use of their property.

As I reviewed the material I have collected over the past months 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.

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.

4210 Wam-Teau Drive, Wamego, Kansas 66547

*Senate Judiciary
3-15-95
Attachment 1*

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. Public use should mean at public expense not the individual landowner's expense.

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.

I am sure you all remember that 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.

We have heard that supporters of private property rights legislation are attempting to have a "chilling" effect on the state agencies. What we are intending to say to state agencies is consider the ramifications of your rules and regulations BEFORE passage and BEFORE you affect the lives of the citizens, not after these actions have subjected the taxpayers of Kansas to legal action which will be

costly to defend in addition to the cost of compensation which may be awarded.

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 make clear that compensation is required for "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. I am speaking to State issued permits. All are extremely expensive due to interest expense and professional fees. They find legal action not worth the time, expense and penalties. 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 great 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". In the interest of time, I will not go into detail on that.

HB 2015, as amended by the House, has the support of the Administration and passed the House with 119 votes. The Coalition has worked with the various agencies to reach this point. It is a bill which we accept and support and respectfully request this Committee recommend HB 2015 favorable for passage as amended by the House Committee of the Whole.

#2



PUBLIC POLICY STATEMENT

SENATE COMMITTEE ON JUDICIARY

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

March 15, 1995
Topeka, 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 Kansas 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.

Senate Judiciary
3-15-95
Attachment 2

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. This approach is consistent with the U.S. Supreme Court's opinion issued approximately 35 years ago in which the court stated that "the principal purpose of the Takings Clause is to bar government from forcing some people to bear public burdens which in all fairness and justice should be borne by the public as a whole."

This bill reflects the efforts of the members of the coalition and members of the administration to create a good bill for all concerned. This bill is similar to previous property rights legislation, however there are several changes we want to bring to your attention. One of the administration's main suggestions can be found in Section 7 - the regulation's review section. The administration developed this provision including the time frame of January 1, 1997 to have all regulations reviewed.

H.B. 2015 contains a role for the Attorney General. This too, is different from H. Sub. for S.B. 293. This 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 U.S. Supreme Court stated that government, not private individuals, should bear the burden of making sure governmental actions are constitutional. The opponents have stated that this legislation would prohibit a state agency from exercising its authority over individuals who are violating the law for fear that it would be deemed a "taking". This is an inaccurate review of the bill. First on all, on page 2, lines 10-15, any time an agency acts pursuant to statutory authority or a valid court order in response to a violation of state law, such action is exempt from this bill. Secondly, this bill does not enlarge the coverage given to private property owners under the 5th Amendment or diminish the state's authority to protect the public.

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. This list of exemptions allows agencies to continue to function effectively.

R There has been some controversy over the word "substantially" found on page 3, line 22. This provision comes from Utah's law. One of the leading regulatory taking cases, Lucas v. South Carolina Coastal Commission, 112 S.Ct. 2886 (1992) has held that the 5th Amendment is violated when regulations "do not substantially advance legitimate state interests." The most recent 5th Amendment case decided by the U.S. Supreme Court, Dolan v. Tigard, 114 S.Ct. 2309 (1994) rejected using the reasonable standard because they felt it was too close to the rational basis test.

As stated previously, 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. Other benefits of this legislation are that we should have better, well-thought-out regulations, and increased sensitivity to private property rights.

The opponents to this legislation do not like the attorney fees provision, (Section 7) which was overwhelmingly supported by the House of Representatives. We believe this provision is vital to this bill. Without such a provision it would put a chilling effect on anyone who has a good case but lacks the funds to retain an attorney. This section only allows someone to recoup their attorney fees if they are successful in establishing a taking - if they are not successful - attorney fees are not awarded. Rep. O'Neal, Chairman of the House Judiciary Committee and Kansas University Professor of Law, Michael Davis both concur with the Coalition that this is a necessary and meaningful, yet reasonable provision. You should also be aware that

Governor Graves and his cabinet have not objected to the inclusion of this section.

It has been said that the members of the Coalition are trying to make it difficult for agencies to issue regulations and therefore make it so people can do whatever they want with their property. This is ludicrous! First, you will notice that no state agency testified in the House Judiciary Committee against this bill or raised this concern. Secondly, as stated before, no power or authority of the agencies have been lessened. Thirdly, I do not know of a trade association that would support the bad actors in their group. The associations in this Coalition want the government to continue to make our state safe and healthy. We are only asking that when regulations are being drafted that the real life ramifications have been taken into consideration before they are enacted and not after the fact.

Finally, Mr. Chairman, this bill only asks 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

#3



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

TO: THE SENATE JUDICIARY COMMITTEE
FROM: KAREN FRANCE, DIRECTOR, GOVERNMENTAL AFFAIRS
DATE: MARCH 15, 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. We, however, cannot support the use of government authority that constitutes a "regulatory taking" of property.

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 insure 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 prior to finalizing them, 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 Fourteenth 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.

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.

Senate Judiciary
3-15-95
Attach. 3

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", and "action" are clearly defined in the bill.

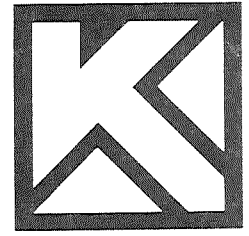
We have tried to address many of the concerns raised in the legislation presented last year as it related to the actions of the agencies. The bill does not impact all agency actions, only those state agency actions which have "takings" implications. Most agency actions do not have "taking" implications. 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 be able to 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 legal fees.

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.

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

March 15, 1995

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the
Senate 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.

One constant theme in bills up for consideration is legislative intention to channel the regulatory arm of government in a desired direction. Tax bills tell revenue agencies how to handle their collection efforts. Human resources bills often set new guideposts for state officials to determine if this individual qualifies for unemployment compensation benefits, or whether that person

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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.

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 government 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.



KANSAS AGRICULTURAL ALLIANCE

STATEMENT OF THE
KANSAS AGRICULTURAL ALLIANCE
BEFORE THE
SENATE JUDICIARY COMMITTEE
TIM EMERT, CHAIRMAN
REGARDING HB 2015
MARCH 15, 1995

The Kansas Agricultural Alliance (KAA) is a coalition of 29 agribusiness organizations that spans the entire spectrum of Kansas agriculture, including crop, livestock, and horticultural production, suppliers, allied industries and professions.

The Alliance supports HB 2015.

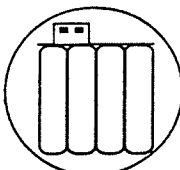
The Fifth Amendment to the Constitution prohibits the taking of private property without just compensation. Takings include not only a literal change of ownership from private to public hands, but also now include restrictions on use of private property by state and federal agencies which reduce the value of the property. KAA members are confronted daily with rules and regulations that limit the use of their property. Examples include:

- state control of agricultural water rights
- wellhead protection programs
- expansion of endangered species legislation
- public protection of wetlands and riparian areas
- delays in watershed dam construction

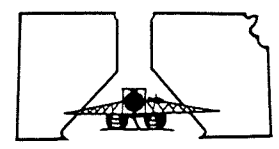
Even though the above examples are environmental in nature, please be assured that the hundreds of thousands of people involved in agriculture in the state of Kansas are aware of their responsibilities toward the environment. In fact, being successful in agriculture demands diligent stewardship of the land and natural resources.

The Kansas Agricultural Alliance supports HB 2015 as a method of assuring the establishment of guidelines to assist state agencies in the identification of actions that have constitutional takings implications, and, where there is a taking, assures compensation.

#6



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



STATEMENT TO
THE SENATE JUDICIARY COMMITTEE
REGARDING H.B. 2015
SENATOR TIM EMERT, CHAIR
MARCH 15, 1995



KGFA & KFCFA 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.

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The Kansas Grain and Feed Association
..... a voluntary state organization founded in 1896 providing governmental representation, educational opportunities and a wide variety of other services to the vast and indispensable grain and feed marketing system. The 1200 members of the KGFA include country elevators, subterminal and terminal elevators, feed manufacturers, grain merchandisers and allied industries such as railroads, grain exchanges, equipment manufacturers and insurance firms.

The Kansas Fertilizer and Chemical Association.....
..... a voluntary professional association for those involved in the plant nutrient and crop protection industry. KFCFA represents our nearly 500 members interests in legislative matters at all levels of government, as well as providing educational opportunities and business services. The industry is committed to professional development and business viability for the plant nutrient and crop protection retail industry.

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, requiring state agencies to examine existing rules and regulations for taking implications. (The provision requiring agencies to examine existing rules and regulations was added in the House Judiciary Committee at the request of the Administration.)

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. H.B. 2015, as amended by the House Judiciary Committee requires an assessment of existing rules and regulations for takings implications. Administration witnesses implied that this could be done during the regulatory review the Governor instructed his Secretaries to undertake.

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 KGFA 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

6-6

	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.	Description of rule and what it is intended to accomplish. Mandated by feds and required to implement their programs?	Specifically identify the public health or safety risk created by property use and how the action will protect public health and safety	* Description of the need for the rule and the environmental benefits gained * level of risk to the public health being removed or controlled * level at which substance considered harmful	No Change
What's it cost	Description of cost, who bears cost, who will be impacted	Set out the facts that make the restriction or limitation necessary [do the costs equal the benefits?] <div style="border: 1px solid black; padding: 5px; width: fit-content; margin: 10px auto;">Is there a takings?</div>		Description of capital cost and annual cost of compliance Initial and annual cost of implementing and enforcing Paperwork Burden Detailed statement of data and methodology
Is there a better way?	Description of less costly or less intrusive avenues considered. Why were they rejected.	Identify alternatives to reduce the takings impact.		No Change



*A Century of Service
1894-1994*

March 15, 1995

To: *Senate Judiciary Committee
Senator Tim Emert, Chairman*

From: *Mike Beam, Executive Secretary, Cow-Calf/Stocker Division*

Re: *Support of HB 2015 Creating the Private Property Protection Act*

The Kansas Livestock Association (KLA) is proud to be a member of the Kansas Property Rights Coalition which advocates the passage of HB 2015.

Protection of private property rights has always been a priority of the KLA membership. Our organization consists of approximately 7,000 farmers, ranchers, and livestock producers, all of whom depend on the resources of our state's land which is owned and managed by private sources.

Through the years, state and federal lawmakers have enacted policies affecting landowners. By legislative enactment, the state has given state agencies certain authority to regulate the natural resources which exist on land owned by private individuals. For example, the Wildlife and Parks Department is responsible for managing the state's wildlife, the Division of Water Resources and Kansas Water Office regulate the use of ground and surface water in Kansas, and the Kansas Department of Health and Environment is responsible for overseeing many environmental aspects relating to the use of private land and its resources.

KLA believes landowners must be sensitive to the use of private land because our actions may, in fact, jeopardize the state's resources and/or impact the property rights of others. We also believe, however, the state must always balance the degree of influence over private property against the rights of private property owners. HB 2015 speaks to this balancing act and we believe it deserves your favorable consideration.

This legislation instructs the attorney general to adopt guidelines to assist state agencies in identifying actions that constitute a taking under the United States and Kansas Constitutions. Except for the "protection of public health, safety or welfare," state agencies would be required to prepare a written report that follows these guidelines. Subsection b, of section 6, allows agencies to submit such reports following these actions in emergency situations that are an "immediate threat to public health and safety."

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We don't intend this bill to be interpreted as an assault on our state agencies. I believe most of our agency personnel in Kansas are respectful of private property rights and sensitive to the extent their authority can impact responsible business activity.

It's our contention the state of Kansas should follow the lead of other states by formalizing the process of reviewing agency actions which may cause constitutional taking implications. HB 2015 outlines such a process and KLA supports the passage of the bill.

Thank you.

#

TESTIMONY ON HB 2015
Senate Judiciary Committee
March 15, 1995

Prepared by Joe Lieber
Kansas Cooperative Council

Mr. Chairman and members of the committee, I'm Joe Lieber, Executive Vice President of the Kansas Cooperative Council. The Council's membership consists of nearly 200 cooperative businesses having a combined total of nearly 200,000 members.

As a high school teacher I taught government and American history for fourteen years. I have had the opportunity to discuss the Constitution of the United States and our individual rights many times. I am very proud to say that I taught the importance of Property Rights to a free society.

As you know, an individual's property rights have dwindled over the last few decades, and it appears property owners will lose more rights if something isn't done.

This is why the Kansas Cooperative Council supports HB 2015.

If a free society is going to survive, individual property rights need to be preserved.

The Council realizes there are times when the public good becomes part of the equation, but at no time should an individual's property be taken without first being paid a fair price. Or, should an individual be told what to do with his or her property without first being paid a fair price. This price should include future earnings.

It's a shame that a bill such as 2015 has to be introduced to ensure individual rights.

We support 2015, and I thank you for allowing us to visit with you today.

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Attachment 8



Kansas Natural Resource Council

P.O. Box 2635
Topeka, KS 66601-2635

Officers

President
Bill Ward, Lawrence

Vice President
Joan Vibert, Ottawa

Secretary
Ann Fell, Winfield

Treasurer
Art Thompson, Topeka

William J. Craven,
Legislative Coordinator
701 Jackson
Suite 220
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913-232-1555
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H.B. 2015
Senate Judiciary Committee
Testimony of Bill Craven
Kansas Natural Resource Council
and Kansas Sierra Club
March 15, 1995

I appreciate the opportunity to testify on the most inappropriately titled bill 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. This bill is part of the anti-regulatory agenda supported by special interests whose memberships are at odds with regulations designed to protect natural resources. 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. This anti-regulatory agenda isn't limited to environmental issues, however. Regulations which protect the public health and safety or which underscore civil rights protections are also at risk. The committee should note that there aren't any grassroots groups here today asking for implementation of this legislation.

A great deal of misinformation has been promulgated which tries to make the case that various federal 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 from about a month 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.

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Obviously, my strong preference is for this bill to be killed. However, if the bill is to be favorably considered, I want to re-iterate my support for two amendments which were originally proposed by the Administration and the cabinet.

In Section 6, paragraph 2, and again in paragraph 6 of the same section, the word "substantially" should be deleted. What is stated in the bill has nothing to do with private property rights. 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.

The intent of the amendments made in the House Judiciary Committee was to have this bill track existing law and the state and federal constitutions. The amendments I am proposing have the same goals.

Under existing law, regulations must "reasonably advance" the purpose of the regulation, or else they are unreasonable and fail the arbitrary and capricious test of judicial review. Regulations may be reasonable if they moderately advance a given purpose, substantially advance a given purpose, or greatly advance that purpose. The usual course of events is for the legislature to empower the executive branch to regulate when reasonably necessary to advance some purpose under the police powers. If the test becomes "substantially," the executive branch may deem the risk of uncertainty too significant when otherwise it would act to protect the public. For example, some pollutant in drinking water might be shown to lower the IQ of non-human primates by a few points. Should KDHE be required to show that the pollutant does the same thing to humans before taking regulatory action? Should those regulations be required to meet the "reasonable" test or the "substantial" test?

Requiring that the regulation substantially advance its purpose hobbles the governor and his or her appointees. If their judgment proves faulty, the traditional remedy is at the ballot box.

The second amendment I would suggest involves Section 10. The Administration recommended deletion of Section 10, the House Judiciary Committee concurred, but on the floor, during debate, the House re-instated it. It should be deleted. Alternatively, an award of attorneys fees should be discretionary with the trial court. This is truly an example of a law with wide-ranging unintended consequences. It has never been the policy of the legislature to award attorney fees to prevailing plaintiffs in cases involving constitutional rights. It is a very complicated subject, one which will certainly require extensive litigation. This provision will certainly attract a few "ambulance chasers" who might succeed in getting a very small judgment for a client while running up thousands of dollars in legal bills. That is why the section should be deleted, or at least be made discretionary.

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 reject that absolutist version of private property rights. We believe in the old adage that "the right to swing your fist stops where my nose begins."

Thank you for the opportunity to testify.

Attach 10

KAC KANSAS ASSOCIATION OF COUNTIES

"Service to County Government"

215 S.E. 8th
Topeka, Kansas 66603-3906
(913) 233-2271
FAX (913) 233-4830

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Executive Director

John T. Tarbert, CAE

Date: March 15, 1995
To: Senate Judiciary Committee
Senator Tim Emert, Chairman
From: Jim Reardon, Director of Legal Services
RE: H.B. 2015 Takings Legislation

Thank you for the opportunity to speak in opposition to H.B. 2015.

Government regulations, (especially environmental regulations) are seen as the enemy by the proponents of H.B. 2015. Supporters of unbridled agribusiness claim that their ability or right to make a living (use their property as desired), is being destroyed by government regulations and bureaucratic red tape. They argue that they're entitled to the highest use of their property and that it's wrong for government to deprive them of that opportunity. And if they are deprived, they should be compensated.

What constitutes a "taking"?

The drafters of the Constitution never intended that the use of private property be an entirely private affair. Property rights have always been subject to the power of the courts to limit uses to protect the interest of other landowners. They are also subject to the power of government to enact reasonable restrictions to protect public health and safety.

Who benefits and who loses?

While takings legislation is touted as "protection for the common man versus big, powerful government," who really benefits and who loses? In terms of agriculture, it would appear that big agri-businesses, including confinement and packing operations, (which are consistently the state's top 10 polluters) would gain more from weakening the protection of health, environmental quality regulation than the average farmer. It is no accident that small farming groups such as the Farmer's Union and the Kansas Rural Center oppose this legislation.

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During testimony last year before the Legislature, supporters of takings legislation held up one case of a south central Kansas farmer losing his gravel dredging operation due to the enforcement of a federal law. (The farmer was eventually awarded \$38,000 by the State of Kansas even though this was a federal case). **But not one case could be found where a state program led to a taking without compensation.**

On the other hand, the Kansas Wildlife Federation has compiled a list of examples where small farmers and private property owners were protected by some of the very laws that would be affected by H.B. 2015:

1. A southeast Kansas citizen used the Clean Water Act, Kansas Water Quality Standards and other state and federal laws to require significant improvements in the design of a 30,000 head turkey farm upstream.
2. A citizen from rural Pratt county used state agencies to force oil industry clean-up and restitution for salt water spills on his property.
3. Farmers in south central Kansas suffering from flooding on their property due to upstream channel modification are using federal and state laws to get their stream banks restored and stabilized.
4. In Jackson county, the state's "separation distance" requirement prevented construction of a large scale swine confinement facility near a rural residence and a small town.

It was these kinds of protections for small farmers and private property owners that led Governor Finney to veto similar legislation last year.

Advocates suggest that this legislation does not affect county governments.

All of these state agencies mentioned in the examples above, helped protect county residents from neighbors who would suggest that as property owners, they should have to be paid to protect the resources (land, air, and water). H.B. 2015 will hamper or remove some of the protection now available to property owners and the public. It could affect waste dumping, water rights, and conservation requirements, landfill regulations, siting of feedlots and other county interests protected by state regulations.

Is weakening the protection of health and environmental quality the solution?

No one is against private property rights or their protection. No one is saying that people should not be compensated if government action takes their property. Everyone understands that the U.S. Constitution and the courts protect private property. (Regulatory takings have long been acknowledged by our court system). So what is the issue? Are property rights really being threatened? Whose property rights? Is legislation really needed? Who stands to gain or lose?

KAC urges you to tread cautiously with this important issue. As KU law Professor Davis so eloquently warned this committee: "You are in heavy, difficult, constitutional seas..."

To think we can solve the issues with bumper sticker logic ("Honk if you're for private property") is a mistake.

Portions of these remarks are adapted from "On Property Rights and Wrongs: Can A Middle Ground Be Reached?", an article by Mary Fund and published by the Kansas Association of Counties. Mary Fund is Communications Director and Editor of Rural Papers published by the Kansas Rural Center.

#11
#11
#11
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

March 15, 1995

Testimony before the Senate Judiciary Committee
in Opposition to House Bill 2015

Good morning, Mr. Chairman and Members of the Committee, my name is Spencer Tomb. I am from Manhattan and I currently serve as Vice President of the Kansas Wildlife Federation. I am here in opposition to House Bill 2015.

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 is unnecessary. We are concerned that bills such as this one may have the long term effect of a reduction in health, safety and environmental regulation by state agencies. Takings legislation trample on a basic and fundamental property right that we all have to not have those up stream or up wind or near by damage your land or the enjoyment of it.

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.

Many landowners have used the Kansas health safety and environmental laws and regulations such as the Kansas Stream Obstruction Act and the Kansas State Water Quality Standards to protect their property from less careful 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.

The reality is that this bill is an expensive solution for a non-existent problem. It makes no sense. At a time when we are asking government to be less costly and more efficient, even this takings bill is a step in the wrong direction. We urge you not to pass this bill.

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**League
of Kansas
Municipalities**

PUBLISHERS OF KANSAS GOVERNMENT JOURNAL 300 S.W. 8TH TOPEKA, KS 66603-3896 (913) 354-9565 FAX (913) 354-4186

LEGISLATIVE TESTIMONY

TO: Senate Judiciary Committee
FROM: Chris McKenzie, Executive Director ✓
DATE: March 15, 1995
RE: Comments on HB 2015

Good morning 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 may discourage state government from carrying out its proper regulatory role.
- It sets a precedent for extension of similar mandates on local governments.
- 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 federal water quality laws and state nuisance 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

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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 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 3, 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. Confusion Over What Constitutes A "Taking." We understand and appreciate 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 taking by a political or taxing subdivision."

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 agency action, create a new private cause of action or limit any right of
2 action pursuant to other statutes or at common law.

3 Sec. ~~12 10~~ [11]. If any provision of this act or the application thereof
4 to any person or circumstance is held invalid, the invalidity does not affect
5 other provisions or applications of the act which can be given effect with-
6 out the invalid provision or application, and to this end the provisions of
7 this act are severable.

8 Sec. ~~13 11~~ [12]. This act shall take effect and be in force from and
9 after its publication in the statute book.

or be used in making a judicial determination of
a taking by a political or taxing subdivision.

Amendment Proposed By League of Kansas Municipalities

12-3

at h 13

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**Testimony concerning House Bill No. 2015, The Private Property Protection Act
Before the Senate Judiciary Committee, March 15, 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

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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.

On the other hand, during testimony before the House Judiciary Committee, proponents of this legislation were unable to point to any single instance of a regulatory "taking" by the state that would be prevented by this legislation. This is legislation in search of a problem to solve.

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.