

MINUTES OF THE HOUSE TOURISM AND PARKS COMMITTEE

The meeting was called to order by Chairperson Becky Hutchins at 3:30 p.m. on March 10, 2004 in Room 241-N of the Capitol.

All members were present except:

- Representative Candy Ruff - excused
- Representative Clark Shultz - excused

Committee staff present:

- Hank Avila, Legislative Research Department
- Mary Torrence, Office of Revisor of Statutes
- Lura Attig, Committee Secretary

Conferees appearing before the committee:

- Senator Derek Schmidt
- Derenda Mitchell, Kansas Livestock Association
- Debra Brown, Red Rock Guest Ranch
- Marci Penner, Travel Industry Association of KS
- Terry Holdren, Kansas Farm Bureau
- Lynn Johnson, Kansas Trial Lawyers
- Representative Doug Patterson
- Matt Jordan, Kansas Department of Commerce

Others attending:

See Attached List.

The minutes of February 16, 18, 23, and March 3, were reviewed by the committee. A motion was made by Representative Morrison to adopt the minutes. Representative Merrick seconded the motion. The motion carried.

Hearing on: SB 334 - Limiting liability of persons involved in agritourism.

Hank Avila, Legislative Research Department, gave an overview of **SB 334**, beginning with the history of this bill: **SB 134** was introduced in the Senate Commerce Committee. It was passed there, then went on to the Senate floor where it passed 40-0. It was then sent to us (House Tourism and Parks) and we made some clarifying amendments. It went on to the House floor where it passed 86-39. It was sent to the Governor who vetoed it based on the liability issue. A motion to override the veto passed in the Senate 37-3, and failed in the House 72-51, therefore sustaining the veto.

He also briefed the Committee on the interim study, their conclusions and recommendations were (Attachment 1):

- “The Committee recommends that the Kansas Insurance Commissioner open a dialog with the Kansas insurance industry about the lack of liability insurance for farmers and ranchers who are developing an agritourism enterprise and report back to the appropriate standing committees during the 2004 Session. In addition, the Commissioner is asked to encourage Kansas insurance companies to assist in providing coverage.”
- “The Committee wishes to acknowledge Senator Schmidt’s proposed bill regarding limiting liability in agritourism. At this time, the Committee recommends that all of the interested parties come together to propose a cooperative bill early in the 2004 Session that addresses their differences. If there is no new legislation with significant consensus and support introduced by this group, the Committee recommends that the language from 2003 **SB 134** as presented to the Governor be reintroduced as the basis for discussion for agritourism during the 2004 Session. In addition, any agritourism bill sponsor is asked to consider including both entities and individuals in the definition of the operator.”

Chairperson Hutchins asked Mr. Avila when you gave the history of this bill, who did you say supported

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the bill by Senators Schmidt and Brownlee? Mr. Avila answered, the recommendation of the committee was that they endorse the idea of **SB 134** but recommend that all the entities get together to address the issues.

Proponents:

Senator Schmidt spoke as a proponent to **SB 334 (Attachment 2)**. The time line on this bill goes back at least two years when Senators Schmidt and Morris introduced the bill in the Senate Agriculture Committee, legislation to address this subject, the liability issue with regard to agritourism promotion. The original bill had problems, and didn't get worked the first year. The next year, Senators Brownlee and Jordan became interested in the bill. It became **SB 134**. There was extensive work on the bill during that session in an attempt to get all parties on the same track. After the veto of the last session, and the override in the Senate and the failure to override in the House, the Governor related publicly, her support of agritourism. Saying that although she had vetoed the bill she was not opposed to agritourism. In the fall of 2003, during the Governor's annual farm tour, which is sponsored by the Kansas Farm Bureau, the Governor was asked about the liability agritourism issue. She stated that she was working with Kansas Farm Bureau to try to reach an agreement. A reporter from the Associated Press out of Wichita, wrote a story about the event and her story related that the Governor had reached out to Farm Bureau and was actively working on trying to develop a liability bill related to agritourism. Senator Schmidt does not believe there actually had been an overture made to Farm Bureau at that point in time. Senator Schmidt is certain there has been no ongoing effort by the administration to engage Farm Bureau or any of the other agritourism groups on this subject in the months since then. **SB 334** is now supported by the Farm Bureau and the Kansas Livestock Association. On the Senate side, the only conferees who testified in opposition were the Trial Lawyers. The basic concept is the domestic animal law, where it is required to give notice to warn patrons of the inherent risk, therefore there is no liability that attaches to the operator of the arena. The sign warns: You are assuming the risk inherent to this domestic animal activity etc. The law says if the signs are posted, notice has been given to the participants that they are assuming risks, therefore there is not liability that attaches to the operator of the arena.

Committee questions followed.

Representative Beggs asked, regarding a signed liability release form, is that a valid protection? Senator Schmidt replied, if you were my client, I would say you should get the form signed even though it may not work. Basic court law is you cannot waive liability for negligent acts, unless there is specific authority that allows you to. That is the specific authority we are proposing to create in this bill.

Representative Kauffman asked the Senator what are the major difference between **HB 2844** and **SB 334**. Senator Schmidt replied, there are two major differences, **HB 2844** has two broad components, one relates to a limitation on liability, which is parallel to **SB 334**, the other relates to tax credits, trying to make insurance more affordable to operators. Our bill has a substantially higher level of protection for landowners or operators. The competing proposal has an inherent negligence concept in it where you get in and litigate based on the facts, how much the land owner is responsible and how much the participant is responsible. Ours just says it is an assumption of risk. As long as the notice is given, the liability shifts.

Representative Novascone asked, is the bill constitutional? Senator Schmidt replied. It is a new argument being advanced this year by critics of liability limitation and the argument goes the Kansas Constitution does not allow us to do that. This issue has not been raised before in the years we have discussed this topic, and I would suggest it is "grasping at straws," trying to find new arguments. If it is true, we would have problems with not only this bill, but many others.

Chairman Hutchins stated that the House Tourism and Parks Committee had received **HB 2844** on February 12, which was very late in the first half of the session. We had only three meetings left and our agenda was full. We didn't have time to hear or work the bill. That bill, in essence, is gone.

Derenda Mitchell, Assistant Counsel, Kansas Livestock Association, spoke in support of **SB 334** and for the efforts of those who have worked to support agricultural heritage (**Attachment 3**). Kansas is uniquely

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suiting for economic growth in the area of agritourism. Kansas Livestock Association will not support any amendment that weakens the current law in the recreational use statutes that were discussed in **SB 134** last year. Nor will we support any amendment that would dilute the protections proposed in **SB 334**. Agritourism protection should not be weakened by amendments by the legislature, by the courts, or by anyone seeking to undermine the protections offered under current law and under the proposals that have been hammered out in this bill. The point of this bill is to foster opportunity for cultural, educational, historical and recreational experiences. The point is not to create some sort of new injury recovery mechanism. Kansas Livestock Association supports broad protection and does not wish the current law lessened, removed, or substituted for a different set of liability requirements.

Committee questions followed.

Staff asked Derenda Mitchell if the Kansas Livestock Association approves of the amendment on page four. Miss Mitchell replied that she believes the Kansas Livestock Association proposed that amendment to clarify that there be no adjustment or change to the recreational use statute and that someone who qualifies for protections under both bills would not suffer any loss of protection.

Debra Brown, Proprietor of The Red Rock Guest Ranch spoke in support of **SB 334 (Attachment 4)**. She believes the language of this bill will help the agritourism business. Many farm families are struggling to hold on to their land. Often both parents are working full time off the farm, just to make ends meet. Agritourism is their opportunity to change these events. Liability issues are a large concern at the Red Rock Guest Ranch. She related stories of unpredictable animals and visitors that are perfect examples of why liability insurance should be readily available. Kansas has so much to offer. Many farmers and ranchers such as her and her husband, are willing to open up their land and their home, to share with others. This type of legislation would certainly give them that opportunity.

Marci Penner, representing the Travel Industry of Kansas, supports the bill (**Attachment 5**). It is her job as the Director of the Kansas Sampler Foundation to work with rural communities and rural people every day. It is her experience that many cannot find companies to write insurance for their agritourism enterprises. They must engage in a national search for an underwriter. She hopes this bill will encourage insurance companies to write affordable policies for agritourism.

Terry Holdren, Associate State Director, Kansas Farm Bureau, Governmental Relations, spoke in support of **SB 334 (Attachment 6)**. Members of Kansas Farm Bureau have supported limits on liability for many years. Kansas Farm Bureau's current policy supports legislation which will prevent any increased liability for landowners who invite people on their land to participate in agritourism activities. We opposed the bill last year because of concerns with the recreational use statute. The domestic animal law, which is the basis of **SB 334**, is the appropriate place for this type of legislation, those are the same types of activities that you would find people going to county fairs and animal shows to experience agriculture and to be involved in agriculture activities. That law with its notice requirement and limits on liability or limits which would result in liability only after a showing of willful conduct on the part of the operator are appropriate in this case. We are opposed to amendments which would weaken the liability provisions of **SB 334**. **HB 2844** that was in this committee does weaken the liability provisions. We are however, supportive of the concept of tax credits for insurance premiums if you would choose to add that to **SB 334**. Our members embrace the concept of agritourism.

Committee questions followed.

Representative Osborne asked Marci Penner had she discussed this problem with the Insurance Commissioner? She replied that she had a few years ago and was both discouraged and overwhelmed by the lack interest on the part of insurance companies. Later in the meeting Ms. Penner mentioned that she had not spoken personally with the Commissioner. Representative Osborne suggested that a meeting with the Insurance Commissioner, representatives of insurance companies and those in agritourism would be helpful to get over the insurance hurdle.

Representative Osborne asked Terry Holdren, in section 3, the description of activities, farming, ranching,

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natural or rural culture. Does that include all the items you previously discussed? Mr. Holdren believes it does cover those items. Representative Osborne asked, Is selling produce on a street corner part of this description? Mr. Holdren replied that he does not believe it is. It is when a person comes onto your property to buy the produce that is it considered agritourism.

Representative Kauffman asked Marci Penner if this bill passed, do you think the insurance companies would then be willing to insure? Ms. Penner replied that regarding the domestic animal act, there has been more willingness on the insurance companies' part to write for the people who have the warning signs. If this bill passes, we would use the warning signs and maybe the companies would be more willing to write our insurance. She also stated that she had not spoken to the insurance commissioner.

Terry Holdren addressed the Chairperson saying he may be able to answer some insurance questions even though Farm Bureau no longer owns an insurance company they are affiliated with insurance companies. When these companies were asked last year about insurance for agritourism, they did not reply with a solid answer.

Representative Morrison asked Marci Penner does the sign saying you are not responsible really work in court? Is the sign just a scare tactic? Ms. Penner replied that if the signage is backed up with legislation, it would certainly carry more weight in the courts. We currently have no history of agritourism litigation because it is a new type of enterprise. Rep Morrison asked have any agritourism groups tried to discuss as a group their insurance problems with the insurance commissioner? Ms. Penner, they are not receiving any assistance from the insurance industry. Ms. Debra Brown said the only insurance they could get is from Lloyd's of London and it is very expensive. We just have to tell ourselves that it is just the cost of doing business.

Chairperson Hutchins informed the Committee that Thomas Etheredge from The Prairie Rose Chuckwagon also could not find insurance locally and ended up with a New Hampshire company.

Representative Thull asked Terry Holdren, in your written testimony you state that Farm Bureau represents 40,000 farm and ranch operators throughout the state. What percentage of the Kansas agricultural operation do you insure? Terry Holdren replied that he cannot answer that question exactly, but would say probably the majority of the operations. Farm Bureaus insurance division is now located in Iowa. They sold their insurance

Opponent:

Mr. Lynn Johnson, Kansas Trial Lawyers Association spoke in opposition to **SB 334** (Attachment 7).

Committee questions followed.

Rep. Schwab, asked Mr. Johnson to explain why he categorized agritourism with the farming and ranching, they are not the same and we aren't talking about immunity for farmers and ranchers, we are talking about agritourism. I am not buying the argument that we are giving immunity to the most dangerous activity.

Rep. Morrison asked Mr. Johnson regarding the signed agreement in the other states, is that working well? People and animals are unpredictable we need to find out how other states have worked this out.

Rep. Hayzlett asked, if someone signs a waiver, then gets injured, does that mean they can't sue the property owner? Mr. Johnson replied that is true just like SB 334 doesn't prevent someone from filing a lawsuit it just provides a defense. Rep. Hayzlett said did you state that people would stay away from Kansas because they don't want to sign a waiver. Mr. Johnson said he may have exaggerated to prove a point, but it could happen.

Rep. Osborne said that Mr. Johnson mentioned a contract in other states, in your testimony you are implying that those contracts do the same as our bill. We are using a bill instead of a written contract that must be signed every time one enters an agritourism operation. What is the difference? Mr. Johnson

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replied, this will become a statutory law as opposed to people making their own decisions in reaching a contract.

Rep. O'Malley asked, this bill was changed dealing only the inherent risk would your organization support the bill? Mr. Johnson said they probably would.

Rep. Beggs asked, would you expect that we incorporate a combination of liability release that this could indirectly be more palatable to an insurer? Mr. Johnson said yes.

Written:

Testimony from Governor Kathleen Sebelius as an opponent to **SB 334** (Attachment 8).

Neutral:

Rep. Doug Patterson has had clients who have had slight injuries while participating in agritourism and one in particular who received devastating leg injuries in a pumpkin patch, it is for her that he offers a balloon amendment to eliminate frivolous actions (Attachment 9).

Matt Jordan, Director of Community Development, Kansas Department of Commerce, is neutral (Attachment 10).

Rep. Morrison asked Matt Jordan if the Department had gone into other states to see how they have implemented agritourism? The Dept. Of Commerce consulted with an agritourism expert in Illinois. It would seem that liability is an issue but not more of an issue than any other business. The Department hopes to find an approach that doesn't unduly regulate these operators. In other states, it is generally considered a business liability issue. The Department believes that **HB 2844** is a solid approach.

Rep. Kauffman asked Rep. Patterson if the lady with the severe leg injuries sued? He answered, not yet. Rep. Kauffman continued, did the owner of the pumpkin patch enterprise stay in business? Rep. Patterson said that the man did open for the next pumpkin season.

Rep. Flaharty asked Mr. Jordan this bill requires the Department of Commerce to keep a list of agritourism enterprises. Will the public interpret it as the state having rules and regulations for quality, safety, doesn't it imply some standards? Mr. Jordan replied that while they would do their best to implement the law, they are not a regulatory agency and are unaccustomed to enforcing measures called for in this bill.

Chairperson Hutchins asked Mr. Jordan if he had gone before the Senate Commerce Committee with the same concerns? He did not recall who testified in that committee. She also asked Lynn Johnson if he had gone before the Senate Commerce Committee with any amendments? He answered, no. She asked if there were any amendments on the Senate floor dealing with these issues? He replied that there were amendments on the Senate floor and one was to change the word willful to wanton.

Terry Holdren replied to the Chair that amendment was also in the Senate Commerce Committee and that the intention was not that the Commerce Department develop new positions, but that they simply register the agritourism people that apply and help with promotional activities.

Chairperson Hutchins closed the hearing on **SB 334**.

The next meeting is Monday, March 15.

Committee adjourned at 5:30 pm.

HOUSE COMMITTEE ON TOURISM AND PARKS

GUEST LIST

DATE: March 10, 2004

NAME	REPRESENTING
Joe Hunt	KSLA
LYNN JOHNSON	" "
Gary White	KTLA
Tommy Humphrey	KTLA
Judy Benoit	nyag
TERRY HOLDREN	KS Farm Bureau
Derenda Mitchell	KLA
Koyne Heffler	Budget
Bob Runson	LAS
Dwight Carswell	
Dan Murray	Federico Consulting

Joint Committee on Economic Development

AGRITOURISM LIMITED LIABILITY

CONCLUSIONS AND RECOMMENDATIONS

- The Committee recommends that the Kansas Insurance Commissioner open a dialog with the Kansas insurance industry about the lack of liability insurance for farmers and ranchers who are developing an agritourism enterprise and report back to the appropriate standing committees during the 2004 Session. In addition, the Commissioner is asked to encourage Kansas insurance companies to assist in providing coverage.
- The Committee wishes to acknowledge Senator Schmidt's proposed bill regarding limiting liability in agritourism. At this time, the Committee recommends that all of the interested parties come together to propose a cooperative bill early in the 2004 Session that addresses their differences. If there is no new legislation with significant consensus and support introduced by this group, the Committee recommends that the language from 2003 SB 134 as presented to the Governor be reintroduced as the basis for discussion for agritourism during the 2004 Session. In addition, any agritourism bill sponsor is asked to consider including both entities and individuals in the definition of operator.

Proposed Legislation: None

BACKGROUND

The Legislative Coordinating Council assigned this topic to the Joint Committee on Economic Development. Specifically, the Committee was directed to "study the issues surrounding limited liability for agritourism activities within Kansas; review issues related to 2003 SB 134, which was approved by the Legislature, but vetoed by the Governor."

COMMITTEE ACTIVITIES

Staff reviewed the provisions of 2003 SB134 which dealt with "agritourism." The bill expanded the definition of "recreational purpose" as it relates to the liability of a property owner toward an individual entering that property. Recreational farming activities would include an individual's farming activities, but not the operation of

agricultural equipment by a person who is a member of the public on the land for recreational purposes.

Staff from the Office of the Governor appeared before the Committee to explain the Governor's veto. He noted that, in the Governor's opinion, the bill allowed nearly total immunity from liability for activities identified as agritourism. He also noted that few, if any other states, are developing agritourism by limiting liability.

The Committee reviewed and discussed an opinion issued by Attorney General, as requested by this Committee, regarding the Land and Recreational Area Act and the amendments to this law contained in 2003 SB 134.

The Committee received testimony from a representative of the Kansas Farm Bureau concerning the organization's view that current state law provides adequate liability

protections for agritourism. The conferee also noted that the state could assist agritourism providers more by providing incentives for business development and technical expertise in the areas of assessment of tourism potential, calculation of operational costs, and financing.

A representative of the Kansas Sampler Foundation provided the Committee with several examples of the difficulties agritourism providers have in obtaining liability insurance. The conferee stated that the difficulties stem from a lack of consistency in insurance policy guidelines, a lack of consideration on the part of insurance companies for the safety precautions taken by the landowner, and a lack of education on the part of the landowners about liability policies.

The Kansas Livestock Association presented the Committee with several questions which the organization believes must be answered by the insurance industry before the issue can be resolved. These questions include:

- Does the farm or ranch liability policy typically purchased by landowners in Kansas include protection for recreational uses of that property?
- Is the current farm or ranch liability insurance policy purchased by Kansas landowners discounted because of the protections offered by the statute?
- What changes would the insurance industry offer to clarify, simplify, and assure affordable and available coverage to landowners seeking to engage in tourism activities?

Senator Derek Schmidt appeared before the Committee to present a draft of a new bill which he intends to pre-file for the 2004 Legislative Session. The bill would propose a new statute on agritourism rather than amending the current Land and Recreational Area Act as S.B. 134 was intended to do. The proposed statute would be modeled after the current Kansas Domestic Animal Law. The bill includes a provision that the Secretary of Commerce review requests from landowners for protection under the law. In addition, the landowner would be required to post a sign warning tourists of potential risks.

CONCLUSIONS AND RECOMMENDATIONS

The Committee recommends that the Kansas Insurance Commissioner open a dialog with the Kansas insurance industry about the lack of liability insurance for farmers and ranchers that are developing an agritourism enterprise and report back to the appropriate standing committees during the 2004 Session. In addition, the Commissioner is asked to encourage Kansas insurance companies to assist in providing coverage.

The Committee wishes to acknowledge Senator Schmidt's proposed bill regarding limiting liability in agritourism. At this time, the Committee recommends that all of the interested parties come together to propose a cooperative bill early in the 2004 Session that addresses their differences. If there is no new legislation with significant consensus and support introduced by this group, the Committee recommends that the language from 2003 SB 134 as presented to the Governor be reintroduced as the basis for discussion for agritourism during the 2004 Session. In addition, any agritourism bill sponsor is asked to consider including both entities and individuals in the definition of operator.

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Senator Derek Schmidt
15th District

Testimony in Support of Senate Bill 334
Presented to the House of Representatives
Tourism and Parks Committee
By Senator Derek Schmidt

March 10, 2004

Chairman Hutchins, members of the committee, thank you for the opportunity to testify today in support of Senate Bill 334.

You all know the history on this issue. Last year, after two years of work, the legislature passed legislation to limit the liability of landowners who promote tourism and rural economic development by bringing tourists onto their land. We were attempting to establish as a matter of public policy that "agritourism" is important to the Kansas economy.

In a move that surprised many of us, Governor Sebelius vetoed that bill. The Senate voted overwhelmingly to override the veto, but the House of Representatives fell short of the needed two-thirds majority.

In the months since the veto, the governor has repeatedly stated her support for legislation to promote agritourism by limiting the liability of landowners. The administration, however, has not brought forward a bill. Therefore, I have worked with interested parties for several months to craft new legislation. The result of our work is Senate Bill 334.

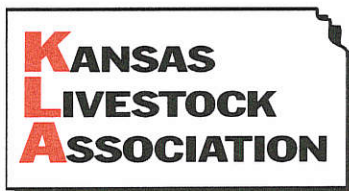
Like last year's vetoed bill, this bill encourages agritourism by limiting the liability of landowners when tourists are on their land. However, unlike last year's proposal, which amended the state's recreational use statute, this bill would create a new statute specifically aimed at protecting and promoting agritourism.

This new statute is modeled on our state's domestic animal law. The concept is one of notice and assumption of risk. In short, this bill requires agritourism operators to give notice to their customers describing what activities are occurring and informing them that risk is involved. Once that notice is given, the customers are considered to have assumed the risk of participating in those activities and the agritourism operators are relieved of liability if the customer is harmed by the activity – unless the harm is caused by the operator's intentional misbehavior.

The coalition supporting this bill is even broader than last year. We are particularly pleased that the Kansas Farm Bureau, which opposed last year's bill because of concerns about its approach to solving the liability problem, supports this bill. The only remaining opponent in the Senate committee hearing was the Kansas Trial Lawyers' Association.

Thank you again for having me here today. I would stand for questions.

Committee Assignments
Agriculture (Chairman)
Legislative Post Audit (Chairman)
Judiciary
Natural Resources
Elections and
Local Government
Message Only (800) 432-3924
During Session
e-mail: schmidt@senate.state.ks.us



Since 1894

Testimony

To: House Tourism Committee

From: Derenda J. Mitchell, Assistant Counsel, Kansas Livestock Association

Subject: Senate Bill 334

Date: March 10, 2004

The Kansas Livestock Association (KLA), formed in 1894, is a trade association representing over 6,000 members on legislative and regulatory issues. KLA members are involved in many aspects of the livestock industry, including seedstock, cow-calf and stocker production, cattle feeding, grazing land management and diversified farming operations.

My name is Derenda J. Mitchell. I am Assistant Counsel for the Kansas Livestock Association (KLA), and I appear today on their behalf.

KLA is supportive of efforts by landowners to capture more income through agritourism. We commend Senators Brownlee, Jordan, Schmidt and all others who have worked to promote our agricultural heritage. This bill addresses the concerns expressed last year and provides for notice and warnings of known hazards.

At our request, the Senate added a simple amendment to clarify this intent. Our amendment, now a part of the bill in Section 8, clarifies that someone who is both an agritourism provider and a provider of land for recreational activities is entitled to the full protections of the recreational use statute. We asked for the amendment because we do not want a court to interpret this new legislation, in any way, as weakening the protections afforded an agritourism provider who currently is entitled to specific protections under the recreational use statutes. Please know that we would oppose amendments that weaken SB 334 protections afforded to landowners or that weaken the current recreational use statutes.

In summary, we support broad protection and do not want to see the current law lessened, removed, or substituted for a different set of liability requirements. Again, thank you for the opportunity to outline our support for the bill.

House Tourism & Parks Committee
Meeting Date 3-10-04
Attachment 3

INTRODUCTION

Agritourism enterprises allow farmers and ranchers to earn higher profits by supplementing traditional farm/ranch operations with innovative on-farm or on-ranch ventures. Alternative enterprises can take many forms. They can produce food and fiber, produce new or unique crops or livestock or add value to traditional agricultural products. They can produce fun, recreation, nature-based, or educational products. They can rely on traditional farm/ranch practices or use alternative methods, such as organic systems. They can be labor and resource intensive or require few inputs. They can operate seasonally, or year-round.

But they all have a common theme: farmers and ranchers rely on the natural resources on their land - the soil, water, air, plants, wildlife, and scenery - to keep their family on the farm and the farm in their family. They also require sound land care. Since the land's resources generate income, conserving those resources makes good business sense. And finally, they provide an opportunity for visitors to experience rural life.

HISTORY OF THE RED ROCK GUEST RANCH

BY DEBRA BROWN - PROPRIETOR

The original 80 acre ranch property in Northwest Jackson County was purchased by my husband Bill and myself in 1995 so that Bill could fulfill his life long dream of owning "cows". The 100-year-old farmhouse, consisting of 700 square feet on two floors, had been a rental property for many years and was in poor condition. The most recent tenants had been a pair of pygmy goats. Many such dilapidated, old, unoccupied farm homes dot rural Kansas. Rather than raze the old farmhouse, Bill and I chose instead to renovate, restore and expand the home. Located 1.5 miles east of Soldier, Kansas, The Red Rock Guest Ranch now consists of nearly 350 acres and the home has grown to 8000 square feet of gracious living area.

When Bill and I first moved to the area, we quickly learned that there was no facility close by where family could stay when visiting Soldier, Kansas. The closest motel was located over twenty minutes away in Holton. In January, 2000 I opened our home as a three bedroom Bed and Breakfast (Soldier Inn Bed and Breakfast) to serve the needs of the local community. For the next three years Soldier Inn B&B provided lodging for visiting family and friends of local residents. They came for holidays, weddings, funerals, vacations, and reunions and without exception, the visitors to Soldier Inn enjoyed the quiet country setting along with the activities inherent in running a ranch. The "city folk" were eager to help with the daily chores of caring for the ranch animals, to ride on the tractor, pick up

eggs from the hen house, repair barbed wire fence, help remove honey from the hives, walk among the cattle, fish in the ponds or just take long walks in the country setting. Many people have fond memories of visiting the farms of their grandparents, aunts and uncles or other relatives. Our ranch rekindles the positive emotions from those family visits. Others have no connection to rural living and take great pleasure in new experiences unlike any offered in the city.

In the spring of 2003 I decided that the name Soldier Inn Bed and Breakfast no longer described what was offered at the ranch and the name was officially changed to The Red Rock Guest Ranch. Bill had retired in 1999 and I was looking for a way to increase revenues at the Ranch sufficiently to allow me to work from home. We had attended a Chuckwagon Supper and Western Show in Calgary, Canada in 2002 and I felt that a similar venture might be feasible on our ranch. Thus the "Red Rock Guest Ranch Chuckwagon Suppers and Western Show" was born! The initial plan was to offer a supper and show once each month May through September and the goal was to seat at least 50 guests for each event. The first show opened on May 17, 2003 to a packed house of 165 guests. There was no looking back! The Red Rock Guest Ranch Chuckwagon Supper and Western Show was held nearly every Saturday night from May 17th through the end of November seating an average of 125 guests each night. Two Christmas dinner/show events were held in December with over 165 guests at each event. In total, nearly 4000 guests visited the Red Rock Ranch during our first season.

MORE THAN JUST ANOTHER RESTAURANT

One of my goals was to bring top notch musical talent to Northeast Kansas for the enjoyment of my guests. One of our visiting entertainers was Mr. Les Gilliam "The Oklahoma Balladeer" from Ponca City, Oklahoma. Les tells the story of the American Cowboy through his music. He played to a packed house and received a standing ovation from the crowd. Les and his lovely wife Martha stayed with us that night in our B&B. While visiting with him after the show, he confided in me that as he was driving through Soldier on his way to the ranch he commented to Martha that he wasn't sure "what he had gotten them into". The 1.5 mile on a narrow gravel road to our ranch didn't help matters any. He was pleasantly surprised to find our large, well appointed Bed and Breakfast along with our wonderful "Chuckwagon Supper Barn" with a modern kitchen and indoor bathrooms!

He was even more surprised when 165 people showed up for dinner and his show. Les asked me how I managed to get people to drive to Soldier, Kansas in the middle of nowhere for dinner and a show every Saturday. The answer is simple. We are not just another restaurant; we are a "destination". Our guests leave the city and travel to the Red Rock Guest Ranch to experience a bit of the "Old West" right here in Northeast Kansas. They are greeted by cowboys on horseback and can try their hand at roping a dummy calf. They enjoy seeing our vintage 1800's Chuckwagon and hearing the cattle trail tales as told by our 85 year old Wagon Master who has driven long-horned cattle on the Oregon Trail. They delight in seeing our ranch animals up close and personal. Without exception, they enjoy our narrated hay rack rides, saloon girl, vintage player piano and sarsaparillas from the Long Horn Bar. And we consistently provide an excellent meal with good wholesome entertainment. Ours is a smoke free, alcohol free facility and we start each dinner and show with the Pledge of Allegiance to this great country and a blessing. These are our values, which we share with our guests at the Red Rock Ranch. I firmly believe that rural Kansas has a lot to offer visitors, and that's what keeps our guests coming back. Through agritourism activities such as this, we can plant a seed, especially in children, who become educated about agriculture and its importance to feed our nation. When visitors pick an apple from the orchard, a pumpkin from the patch, collect an egg from the nest, or when they see for themselves how livestock is raised, they learn the basics of farming and ranching and form an important connection to the land.

WHAT WE HAVE LEARNED

Based on the overwhelming response to our opening season, we have learned that there is a demand in northeast Kansas for a venue where families can enjoy rural Kansas in a smoke and alcohol free environment. Visitors are eager to participate in ranch activities even though there may be inherent risks associated with the activities. Ours is a real working cattle ranch and our animals and activities are real. We take extreme care in making sure our facility is safe for visitors. Although we carry liability insurance, there are some requested activities we don't feel we can offer our guests due to liability risks. The most commonly requested are guided horse trail rides and pony rides for children. We have to carry additional insurance just to allow guests to dance during our western show if they so desire. Clearly guests to our ranch need to understand that they assume some risk

when voluntarily participating in these types of ranch activities. Legislative support of this would help to continue to promote agritourism in Kansas.

OUR GOALS

- TO BE A LEADER IN CREATING A RANCH/FARM EXPERIENCE THAT IS PLEASING, SAFE, WHOLESOME AND ACCESSIBLE TO ALL
- TO BE RESPONSIBLE AND PRO-ACTIVE IN MEETING THE NEEDS OF FAMILIES, SCHOOLS, CHURCHS, COMPANIES AND ORGANIZATIONS VIA THE USE OF AGRI-TOURISM. THIS INCLUDES SERVING AS AN EDUCATION AND INFORMATIONAL RESOUCCE CENTER THROUGH RECREATION, NATURAL RESOURCES AND RANCH ANIMAL CARE.
- TO PRESERVE AND SHARE THE HISTORY OF THE GREAT CATTLE DRIVES OF THE 1800'S AND THE IMPORTANT ROLL THAT KANSAS PLAYED
- TO PROVIDE FUN EMPLOYMENT OPPORTUNITIES FOR LOCAL RESIDENTS
- TO PROVIDE A SAFE, SMOKE FREE, ALCOHOL FREE AND DRUG FREE ENVIRONMENT FOR ALL WHO VISIT OUR RANCH
- TO PROVIDE A "DAY AT THE RANCH" OPPORTUNITY FOR ELEMENTARY SCHOOL CHILDREN
- TO TAKE AN ACTIVE ROLL IN PROMOTING AGRITOURISM IN KANSAS



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**House Tourism & Parks Committee
Testimony in Support of SB 334
Marci Penner
March 10, 2004**

Representative Hutchins and Committee, thank you for hearing my testimony. My name is Marci Penner and I'm testifying on behalf of TIAK. I am the director of the Kansas Sampler Foundation.

There are two major problems to address with an agri-tourism liability bill. The first is to write a bill that will encourage Kansas insurance companies to simply write a policy for agri-tourism operators. The second thing is to get the premiums closer to or in the affordable range.

The language of Senate Bill 334 makes sense and that is why it has gained our support. I will leave it to KDOC to comment on the fiscal prudence of the other part of the bill, which refers to registration. One of the more important issues is making it possible for agri-tourism operators to find and obtain insurance that is affordable and reasonable. Without that issue resolved, there will not be a thriving agri-tourism industry in this state. More importantly, without a limited liability bill farmers and ranchers who need supplemental income desperately won't be able to engage in this activity. The question is, does this bill close the gap between insurance companies and agri tourism operators?

The rest of the testimony provides examples to state the case about how difficult it is to find and obtain insurance and how much of a hindrance and frustration this issue has been.

House Tourism & Parks Committee
Meeting Date 3-10-04
Attachment 3

An operative definition of agri-tourism for this testimony is activities designed to share farm or ranch culture to people that pay to enjoy that activity. You will hear examples that range from taking a tram into a buffalo herd to enjoying activities at a winery and vineyard. I will use examples in an attempt to explain some of the problems regarding liability from the farmer or rancher's point of view. It must also be noted that I'm only representing one part of the problem and don't have the knowledge to speak for the legal or insurance viewpoint nor am I representing the consumer. My obvious perspective is from the rural viewpoint.

A quick overview of the issue is this. Agri-tourism is a fairly new concept, at least in Kansas. We are in the awkward stage of getting everyone from the farmer and rancher to the insurance industry and financial institutions to understand it and to share a standard and agreed upon number of givens. Farmers and ranchers have become aware that activities in their daily life are of interest to school kids, urban dwellers, and international visitors. This interest creates an opportunity to supplement a failing traditional farm income. There doesn't appear to be any insurance companies in Kansas willing or able to underwrite agri-tourism liability policies. Farmers and ranchers have trouble finding local agents who understand agri-tourism and end up searching nationwide themselves to find an underwriter. The cost of the premium is often prohibitive for small-scale operations. Lack of consistency in policy guidelines, lack of consideration for safety precautions, and lack of education about liability policies are also part of the problem. Below are some issues illustrated by examples.

EXAMPLE ONE

A buffalo rancher/farmer has recently put up a new visitor center near their buffalo pasture. They have a multi-faceted operation that includes selling buffalo meat, catering parties in their facility, and offering a tram ride into the buffalo herd. The rancher custom built a tram (with safety in mind) for this purpose. They had a major problem finding anyone that would insure

them. They said that once a company heard phrases like “tram ride”, “buffalo”, “farm tours”, and “school children” they weren’t interested. They finally found someone who would insure them. The premium was \$4,000. They charged \$10 per person for a tram ride into the buffalo herd. In their first year, they only had 75 or 15% of their customers who would pay the \$10 to see the buffalo. They are in a prime location. The rancher’s wife says, “We are trying to provide a rural learning experience for those that don’t have ties to agriculture. “ It will take a lot of buffalo steaks and parties to make up the remaining \$3,250 for that policy. The underwriter they eventually found was from out-of-state so the policy was written without anyone seeing the safety precautions that had been put in place. This is a quality facility and experience.

EXAMPLE TWO

This family has a corn maze that is open for three months of the year. The local carrier would not cover them and they had a very difficult time finding someone that would write a policy. They found an out-of-state company who wrote a million dollar policy for a \$1,250 premium, which was equivalent to half of their profit. One of the issues is that they haul people to the corn maze on a hayrack. “Hay rack”, of course, is one of those words that insurance companies don’t like. The premium was increased when they found out about this. This family is pleased with the number of people who come to their corn maze so marketing is not a problem. They do all the work themselves and like to show city folks the country life. As they say, “We are just trying to stay on the farm.” I have been to this corn maze operation. It is a tremendous experience and a quality representation of farm life. Now, it will be even harder as a claim was filed against them. Here’s what happened in brief. The family cow dog was sleeping behind the gift shop desk in the barn. A little boy came behind the desk and literally jumped on the dog. The dog nipped at the boy but did not break the skin. A claim was filed and the insurance company has said they will not renew the policy next year. There is concern about protecting the consumer but how can we protect the producer from the consumer?

EXAMPLE THREE

This family offers a chuck wagon meal prior to live family/country entertainment in their arena. Livestock are involved in the show. They give horse-pulled wagon rides prior to the meal. They don't charge for the wagon ride operating under the commonly held belief that if you offer something for free you aren't liable. Anyway, they have been offering the live entertainment for several years. It took them forever, as they said, to find a liability insurance policy but they finally found one out of state. After about a year and a half they realized that they couldn't make it with the cost of the premium so they dropped the insurance and now operate without it. Is that what we want?

EXAMPLE FOUR

A couple in western Kansas offers guided fossil hunts. They are under the impression that if they have people sign a waiver they are not liable.

EXAMPLE FIVE

This diversified farm has brought two adult children and a spouse not only back to the farm but also back to Kansas. The value-added operation includes a corn maze, pumpkin patch, squirrel corn, and summer sweet corn stands. The son-in-law is on a local insurance company board of directors and has heard the talk from the inside. He says that if anyone doing agri-tourism has a claim against them that they can count on being dropped. He also says that the liability issue almost kept them from diversifying the farm this way. He asks these questions: What if some kids are going through the maze and pick corn off the plant and throw it at each other and hurt someone? Who is liable? What if hayracks are made for safety and rules are given but someone is screwing around and falls off and sues? Also, some policies charge more if your hay rack is pulled by a tractor than a truck; others don't make a differentiation. What is the standard?

EXAMPLE SIX

This winery and vineyard had liability insurance until a lady claimed that she twisted her back at the vineyard and filed a claim. The insurance company dropped the vineyard and they can't find anyone else to cover them. They no longer are able to have events at the vineyard because they can't find liability insurance.

EXAMPLE EIGHT

A rancher in the Red Hills has been promoting trail rides on his property for over 30 years. He has never had a claim. He is currently paying \$1,600 for a million dollar policy to an out-of-state underwriter through a local agent. The underwriter has never been out to the ranch. The man has a local agent who has been tremendous in finding liability companies for him and he sends every trail ride outfit in the state to this Kansas insurance agent who helps find the policies.

EXAMPLE NINE

This is another pumpkin patch and corn maze operation. They have tree houses, tree swings, playground equipment, pull wagons, and trails. They charge for wagon rides and a corn maze, and pumpkins. They finally found someone who would cover the farm and pumpkin patch but wouldn't include the tractor-pulled hayrack. So, they had to buy a separate million-dollar policy with a premium of \$848 from an out-of-state company for the hayrack.

One of the most positive things I heard when researching came from this family. They attend the NAFDMA (North America Farmers Direct Marketing Assoc.) national conference and say they have learned so much that they tripled their gross income this past season. They learned simple things that could and should be taught through workshops in Kansas about such things like writing effective news releases and how to promote to schools.

Because of the lack of information and education about the liability issue and because local insurance companies aren't able to answer questions, there are a lot of fears, concerns, and possibly misconceptions. A family in western Kansas had a beautiful ranch and stables and saw the potential to make much more money renting horses than farming. In fact they did this for a while but were so constantly fearful of lawsuits that they quit. Unless you've owned and made your living off land that has been in your family for generations it may be difficult to understand the fear of losing the farm.

I called a Farm Bureau agent. He said that it's difficult to underwrite agri-tourism because there is little history of claims and that guidelines are different from company to company. He said blanket statements are usually written without any regard to specific safety precautions. He also cited the changing market as a factor in not knowing how to handle this issue. He thought one solution would be for underwriters to listen to stories from those engaged in agri-tourism.

Here is a quick summary of the issues.

- 1) There don't seem to be any insurance companies in Kansas that underwrite agri-tourism liability policies.
- 2) It's even hard to find a Kansas agent to help find an underwriter.
- 3) Guidelines from one insurance company to another are inconsistent.
- 4) Safety precautions aren't rewarded with reduction in premium.
- 5) The issue of liability needs to be included in agri-tourism workshops to help separate facts from misconceptions.
- 6) The cost of premiums makes it unprofitable or barely profitable to engage in small-scale agri-tourism.

It is our hope that by supporting the concepts outlined in SB 334, Kansas insurance companies will begin to write agri-tourism liability policies. Thank you for considering this testimony.



Kansas Farm Bureau

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PUBLIC POLICY STATEMENT

HOUSE COMMITTEE ON TOURISM AND PARKS

Re: SB 334 - Liability protection for providers of agritourism activities.

**March 10, 2004
Topeka, Kansas**

**Presented by:
Terry D. Holdren
Associate State Director
KFB Governmental Relations**

Chairwoman Hutchins and members of the House Tourism and Parks Committee, thank you for the opportunity to appear today and share our support for legislation that promotes rural economic development. We fully support SB 334.

I am Terry Holdren and I serve as Associate State Director – Governmental Relations for Kansas Farm Bureau (KFB). As you know KFB is the state's largest general farm organization representing more than 40,000 farm and ranch families through our 105 county Farm Bureau Associations.

We are very appreciative of the time many of you have spent during the 2003 session, over the interim and during the first half of this session considering rural economic development initiatives. Our members care deeply about these issues. The revitalization of rural communities must be a high priority for private citizens, as well as local, state and national governments. We support initiatives that will:

- Enhance the economic and social climate for farm and rural families;
- Strengthen activities designed to help rural communities obtain grants and loans for infrastructure improvements;
- Improve the general potential of rural communities to attract and retain people, business and industry; and
- Include all types of farming operations in economic development and incentive programs.

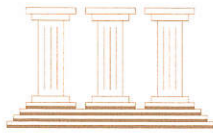
Our members have supported limits on liability for many years. Current KFB policy supports legislation, which will prevent any increased liability for owners of land or livestock.

Our national policy also supports agritourism activity and the promotion of those business ventures. AFBF policy supports limiting liability for farmers and ranchers who are maintaining compliance with statutes and regulations.

SB 334 through its registration process will identify and approve agritourism activities. The Kansas Department of Commerce will work with venue owners to market and promote these activities. Providers will, with adequate notice to participants, be exempt from liability via an affirmative defense for assumption of the risk by the participant. Providers who by willful conduct or knowledge of dangerous conditions cause injury will not be protected by this legislation.

Our members are embracing the concept of inviting the public onto their lands for hunting and fishing activities. They are also creating other opportunities through farmers markets, sporting clay activities, pumpkin patches, bakeries, etc. This legislation will encourage them and others to expand their activities.

Thank you for your attention today. We respectfully ask that the committee act favorably on SB 334.



KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

TO: Members of the House Tourism and Parks Committee

FROM: Lynn R. Johnson, Kansas Trial Lawyers Association

RE: SB334

DATE: March 10, 2004

Chairman Hutchins and members of the House Tourism and Parks Committee, I am Lynn Johnson and I appear before you today on behalf of the Kansas Trial Lawyers Association. KTLA is a statewide, nonprofit organization of lawyers who represent consumers and advocate for the safety of families and the preservation of the civil justice system. We appreciate the opportunity to present written and oral testimony in opposition to SB334.

I have a personal ongoing interest in the agricultural economy of Kansas, including what is currently referred to as “agritourism.” My interest and concern is based upon the fact that I grew up on a family farm 10 miles east and two miles south of Oberlin, Decatur County, Kansas. My father and mother were third-generation farmers and ranchers, and my brother and I still own and operate the family farm. I am personally concerned about the ongoing economic viability of family farms and the communities—such as Oberlin and Decatur County—that they support.

In addition to my personal concern, KTLA certainly supports the concept of promoting rural tourism and rural economic development—but without creating a new and unnecessary immunity through the legal doctrine of assumption of risk for “qualified agritourism operators” who engage in “specified agritourism activity” at a “designated agritourism location.” We believe that the Agritourism Promotion Act (HB 2844) is a much better way to promote rural tourism and rural economic development and still protect the safety of Kansas families and

Terry Humphrey, Executive Director

visiting agritourists. Conversely, enactment of SB334 would create a new and unprecedented immunity from personal responsibility for “agritourism operators” that is not recognized by statute or common law in any other state. SB334 creates immunity through the application of the doctrine of assumption of risk, which is not currently recognized by the common law of Kansas or any other state. KTLA opposes this creation of immunity for commercial agritourism enterprises in derogation of the common law because there is no demonstrated need for the immunity; there is no demonstrated evidence that the purpose of the act would be furthered by the immunity granted; and the immunity granted by the legislation would violate §18 of the Kansas Constitution’s Bill of Rights as well as Article II, §17, and Article II, §21, of the Kansas Constitution.

It is well-recognized that farming and ranching is hazardous and dangerous. Activities and machinery associated with farming and ranching pose countless dangers to those who work on farms and ranches—and to those who visit as agritourists. Tractors, farm machinery, and livestock pose the greatest risks of personal injury and death on farms and ranches. Pesticides, dangerous gasses and airborne irritants also pose serious health hazards. The National Safety Council estimates that 50% of the total agricultural deaths are tractor-related with rollovers and runovers being the major cause.

Historically, children account for about 30% of the total agriculture, farming and ranching related fatalities. According to a Colorado State University Department of Environmental Health study, farm accidents involving machinery are the second leading cause of fatalities and injuries to children. The Colorado State University study also opines that an estimated 30,000 children under the age of 20 are injured each year in farming and ranching accidents. Significantly, the study also opines that if children who visit or work on non-family farms are included, the total is

estimated to be close to 100,000 injuries each year. This data demonstrates the hazards and risks to Kansas and out-of-state agritourists visiting and engaging in agritourism activities run for profit by “qualified agritourism operators” at “designated agritourism locations.”

SB334 creates immunity from personal responsibility and liability for personal injuries and wrongful death in what has to be conceded is one of the most hazardous and dangerous enterprises—farming, ranching, and agritourism activities. SB334 creates this immunity through the legal doctrine of assumption of risk. We first must understand the status of the doctrine of assumption of risk as recognized by the Kansas common-law. The doctrine of assumption of risk is very restricted in terms of its periphery of application.¹ The restricted periphery of application is limited to cases involving employer-employee relationships. “In Kansas, the common-law assumption of risk doctrine is restricted to cases involving employer-employee relationships.”² In its application to employer-employee relationships, the common-law assumption of risk doctrine constitutes an absolute bar (immunity) to recover for personal injury or wrongful death damages.³ Assumption of risk arises as a result of either an express or implied contract between the employee and employer wherein the employee assumes the risk of the known dangers of employment. In essence, the employee agrees that there are certain dangers of personal injury inherent in the employment, and through the employee-employer relationship the risks are to be borne by the employee and not the employer.⁴ In order to successfully assert assumption of risk against the employee’s claim for recovery, the employer must be free of any negligence.⁵

¹ *Jackson v. City of Kansas City*, 235 Kan. 278, 306, 680 P.2d 877 (1984).

² *Tuley v. Kansas City Power & Light Co.*, 252 Kan. 205, 210, 843 P.2d 248 (1992).

³ *Jackson v. City of Kansas City*, 235 Kan. 278, 302-306, 680 P.2d 877 (1984); *Tuley v. Kansas City Power & Light Co.*, 252 Kan. 205, 210-211, 843 P.2d 248 (1992).

⁴ *Id.*

⁵ *Jackson v. City of Kansas City*, 235 Kan. 278, 305, 680 P.2d 877 (1984).

SB334 creates a statutory assumption of risk outside of the employee-employer relationship—a “participant” assumes the risk of “agritourism activities” which bars recovery by providing immunity to an “agritourism operator.” This would be directly contrary to and in derogation of established Kansas common-law. There is certainly no demonstrated necessity for any legislatively created immunity and elimination of personal responsibility through the application of the doctrine of assumption of risk outside of its limited common-law application to employee-employer relationships.

We have reviewed the testimony of the proponents of SB334 as presented to the Senate Commerce Committee January 29, 2004. We have reviewed the testimony of Marci Penner, Executive Director of the Kansas Sampler Foundation. Ms. Penner cites anecdotal examples that certainly do not provide any firm basis for establishing any public policy need for a dramatic change in the current common-law through legislatively enacted immunity for certain “qualified agritourism operators.” Further, Ms. Penner’s testimony reflects six specific points that are “not addressed directly by the Bill” but “hopefully will be positively affected by the Bill.” In essence, Ms. Penner “hopes” that by granting immunity, certain “good things” will follow that will be of benefit to the agritourism industry. The questions raised by Ms. Penner should be addressed by the insurance industry and the Kansas Insurance Commissioner in a study of the availability and cost of providing insurance to agritourism operators.

Additional support for the Bill was provided by testimony of the Kansas Farm Bureau. It is interesting to note that according to the Kansas Farm Bureau testimony, current KFB policy supports legislation that will “prevent any increased liability for owners of land or livestock.” We certainly agree that legislation should not be enacted to increase liability for owners of land or livestock—but that policy should not be the basis for supporting legislation that grants

immunity for reckless and careless conduct by owners of land or livestock under the guise of agritourism. Further, the KFB notes that it is national policy to support “limiting liability for farmers and ranchers who are maintaining compliance with statutes and regulations.” Unfortunately, SB334 does limit liability—but does not require the farmers and ranchers who engage in agritourism to comply with any safety related statutes or regulations. There are no safeguards through statutory or regulatory safety requirements in order to obtain the protection of SB334. There is no attempt in SB334 to establish any oversight by the Secretary of Commerce, nor is there any attempt in SB334 to establish any statutory or regulatory minimum safety standards for the “qualified agritourism operators” who receive the assumption of risk immunity from liability and responsibility for negligently and recklessly causing personal injury and death. This failure of oversight and failure to establish minimum safety standards policies and procedures is yet another reason why KTLA opposes the enactment of SB334.

It appears that the proponents of SB334 want this legislature to grant immunity to certain for-profit enterprises designated as agritourism in hopes that that grant of immunity will have a beneficial effect on the agricultural economy of Kansas through the promotion of agritourism. The elimination of liability and personal responsibility in one of the most hazardous and dangerous enterprises and activities—farming and ranching—is certainly not good public policy. Immunity for the sake of immunity is never good public policy.

There simply is no objective evidence that the legislative grant of immunity is needed or necessary to “promote rural tourism and rural economic development” through “owners or operators of farms, ranches, and rural attractions” inviting “members of the public to view, observe, and participate” in such farming, ranching and rural attraction activities “for recreation or entertainment purposes.” Personal injury and wrongful death litigation in the setting of

“agritourism activity” as defined by SB334 has not been demonstrated to be significant and is in fact very rare—despite the fact that farming and ranching is known to be very hazardous and dangerous. This is borne out by the fact that there are no reported Kansas Court of Appeals or Kansas Supreme Court cases that cite the law upon which SB334 is based—K.S.A. 60-4001 et seq., Assumption of Risk of Domestic Animal Activity.

Enactment of SB324 would violate §18 of the Kansas Constitution’s Bill of Rights, which provides that: “All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.” As the Kansas Supreme Court has explained, a statute challenged on due process/right to effective remedy grounds (§18) is “reviewed under a standard which is more stringent than the rational basis test” typically used to evaluate equal protection challenges—that is challenges brought under §1 of the Kansas Bill of Rights.⁶ The Kansas Supreme Court will review the constitutionality of SB334 under the *quid pro quo* test, which provides:

“If a remedy protected by due process is abrogated or restricted by the legislature, ‘such change is constitutional if “[1] the change is reasonably necessary in the public interest to promote the general welfare of the people of the state,” and [2] the legislature provides an adequate substitute remedy to replace the remedy’ to replace the remedy which has been restricted.”⁷

There is little doubt that promoting agritourism and recreation is a legitimate state interest. However, there is no evidence that enactment of SB334, which confers complete and absolute immunity to anyone engaged in agritourism, is reasonably necessary to promote the general welfare as opposed to merely being hypothetically desirable. Thus, aside from a few untested, unproven anecdotes from individuals who claim concern about liability or liability insurance, there is no evidence that a crisis exists at all in the nascent agritourism industry—and

⁶ Lemuz v. Fieser, 261 Kan. 936, 947, 933 P.2d 134 (1997).

⁷ *Id.*, 261 Kan. at 948 (internal cites omitted).

certainly no substantial empirical evidence that any crisis exists or that SB334 would cure such a crisis if it did exist.

While we do not know whether there is any crisis that SB334 would cure, we can certainly be sure of who will assume the financial burden for injuries caused by—but no longer insured and paid for by—“agritourism operators.” We can also be certain that granting immunity from personal responsibility to “agritourism operators” may remove the incentive to prevent injuries in the first place. Imposing liability—and personal responsibility—on the persons who can most appropriately avoid and prevent accidents within “agritourism activities” is the most sensible way to reduce the overall number and cost of accidents. SB334 would turn this formula on its head—removing all incentives to investigate hazards and repair dangerous conditions would insure that hazards will go undetected and dangers will be unrepaired. This policy hardly seems appropriate to promote agritourism in the long run; to improve the state’s economy; or to enhance the state’s reputation. Very few churches, schools or out-of-state tour operators will want to schedule visits to Kansas farms and ranches if they know that the owner has no duty to find and fix hidden dangers and has no liability if anything goes wrong, and if they know that they will have to assume the risk of all accidents and bear the cost of all injuries. Such a policy hardly seems reasonably necessary to promote the general welfare and well-being of the State of Kansas.

Even if it could be proven that enactment of SB334 would somehow be reasonably necessary to promote the general welfare and thus satisfy the first part of the due process right to remedy by due course of law standard, that is not where a §18 review stops. In order to ensure due process, the legislature is required to provide an adequate, substitute remedy when a common-law remedy is modified or abolished—which it would be by expanding the assumption

of risk immunity outside of the common-law employee-employer relationship to what are defined as “participant”-“qualified agritourism operator” relationship. As the *Lemuz* court explained, “[o]bviously, this test is more stringent than the rational basis test because it requires a substantive *quid pro quo* to replace any common-law remedy that has been extinguished by statute.”⁸ Clearly, SB334 would flunk this more stringent test because the statute simply provides no *quid pro quo* at all and certainly nothing like the constitutionally requisite substantive, adequate or effective remedy for the common-law rights and remedies it would extinguish. In this respect, SB334 is completely unprecedented and unique. An example of a substantive adequate or effective *quid pro quo* is the Kansas Workers Compensation Act, which was enacted initially in 1911. As the Kansas Supreme Court explained in *Injured Workers of Kansas v. Franklin*, the Kansas legislature’s abolishing an employee’s common-law right to sue employers for personal injuries met a §18 challenge because the legislature simultaneously provided the employees with an adequate substitute remedy for the right abolished—the Workers Compensation Act. That act allowed employees to quickly receive a smaller set amount of money for injuries received at work regardless of whether the injuries were caused by negligence of the employer.⁹

Unlike the historic common-law immunities provided to legislators, judges, police officers and state agencies—all of which are qualified or restricted in one respect or another—the immunities bestowed by SB334 are limitless and unprecedented. No other business in this state enjoys anything remotely like it. No state agency—including potential competitors like the Department of Wildlife and Parks, the Travel and Tourism and Film Services Division of the Department of Commerce, the Great Plains Nature Center, the State Fair, and the State Historical

⁸ *Id.*, 261 Kan. at 948.

⁹ *Injured Workers of Kansas v. Franklin*, 262 Kan. 840, 855, 942 P.2d 591 (1997).

Society to name a few—enjoy similar degrees of immunity. The narrow number of “agritourism operators” who will benefit from the broad immunities both in absolute terms and in comparison to their competitors bestowed by SB334 are unique and historically unprecedented.

SB334 is clearly impermissible “special legislation” in violation of Article 2, §17, of the Kansas Constitution, which mandates, in pertinent part, that: “All laws of a general nature shall have a uniform operation throughout the state.”

Providing immunity from suit is manifestly a law of general nature and the business of offering agritourism to members of the public is likewise a general one throughout the state. But the immunity promised by SB334 will be anything but uniform in operation throughout the state—instead, only certain non-uniform types of businesses will qualify, and only those that are designated by the Secretary of Commerce. It is difficult to conceive how SB334 is anything but “special interest legislation” and thus difficult to imagine how it could survive a constitutional challenge.

Although obviously well-intentioned, SB334 does not meet any demonstrated need and through the establishment of a new immunity not recognized at common-law, it clearly would be in violation of the Kansas Constitution and Bill of Rights. The Kansas Trial Lawyers Association urges that the legislature seek other ways to promote the overall agricultural economy and agritourism activities throughout the State of Kansas. **The grant of absolute immunity is not sound public policy and does not enhance personal responsibility of all citizens of the State of Kansas, including “agritourism operators”—personal responsibility that all Kansans are justifiably proud of and must continue to promote. Safe and responsible agritourism is sound public policy.**



K A N S A S

OFFICE OF THE GOVERNOR

KATHLEEN SEBELIUS, GOVERNOR

March 9, 2004

Rep. Becky Hutchins, Chair
House Tourism & Parks Committee
Kansas Statehouse, Room 502-S
Topeka, KS 66612

Dear Representative Hutchins:

One of the highest priorities of my administration is enhancing the quality of life in our rural communities. I am absolutely committed to rural development in Kansas. Agritourism—that is, attracting tourists to experience life and work on our farms and ranches—can be an integral part of this effort.

I believe agritourism will someday thrive in Kansas. There is no reason Kansas cannot be the world leader in this form of tourism. But it is deceptive and irresponsible to lead our farmers and ranchers to believe that they can build a viable agritourism business without bearing responsibility for the safety of their customers. It would be folly to entice people to participate in organized commercial rural activities and then take no responsibility for their safety. I will never support such a deception.

Jane Eckert, the nation's foremost practitioner and expert on agritourism, has come to our state to teach our folks in the Department of Commerce how to help Kansas farmers and ranchers develop a viable and thriving agritourism industry. She has expressed great surprise that our strategy for advancing agritourism has centered upon immunity for agritourism providers. She has repeatedly stated that agritourism liability is not an issue in any other state. It is handled effectively and efficiently through the insurance that farmers and ranchers carry on their property and their activities.

I am willing to sign a bill that limits the liability for our producers, but I am unwilling to put our consumers at risk for their safety. H.B. 2844 offers a better approach, including tax credits for the liability insurance premiums farmers and ranchers would pay to start their agritourism businesses.

I encourage the Committee to give a full hearing to H.B. 2844, which has strong bipartisan sponsorship, and to adopt its common sense approach to the issue of agritourism liability. We must give wings to this fledgling industry in Kansas.

Sincerely,

Kathleen Sebelius
Governor of the State of Kansas

KS/TF/pl

cc: Members of the House Tourism & Parks Committee

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House Tourism & Parks Committee
Meeting Date 3-10-04
Attachment 8

STATE OF KANSAS

HOUSE OF
REPRESENTATIVES

REPRESENTATIVE, 28TH DISTRICT
JOHNSON COUNTY
12712 EL MONTE
LEAWOOD, KANSAS 66209
(913) 897-6905



DOUG PATTERSON
MAJORITY WHIP

ROOM 174-W
STATE CAPITOL
TOPEKA, KANSAS 66612-1504
(785) 291-3500

VICE-CHAIR: JUDICIARY
MEMBER: COMMERCE AND LABOR
HEALTH AND HUMAN SERVICES
JT. COMMITTEE ON STATE
INDIAN AFFAIRS
HOUSE RULES COMMITTEE

March 10, 2004

To Chairperson Becky Hutchins and members of the tourism committee.

Dear Chairperson Hutchins and members of the committee.

I stand before you today in support of agritourism in Kansas, but, in pursuit of an alternative means of protecting operators than those contained in SB 334.

If SB 334 is passed, I see only a repeat of last year. As an alternative I would suggest for your consideration of the attached balloon amendments to SB 334, which contain the substance of HB 2844. No operator wants injured guests to go unprotected. However, we understand the need to protect the operator from frivolous claims. In addition, it is fair to grant the operator tax credits for insurance premiums paid.

Accordingly, I would ask you to seriously consider the attached balloon amendments to SB 334.

Respectfully submitted.

A handwritten signature in blue ink, appearing to read "Doug Patterson".

Doug Patterson

House Tourism & Parks Committee
Meeting Date 3-10-04
Attachment 9

SENATE BILL No. 334

By Senators Schmidt, Schodorf, Brownlee and Jordan

1-22

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AN ACT concerning land; relating to agritourism.

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

Section 1. This act may be cited as the agritourism promotion act.

Sec. 2. The purpose of this act is to promote rural tourism and rural economic development by encouraging owners or operators of farms, ranches, and rural attractions, including historic, cultural, and natural attractions, to invite members of the public to view, observe and participate in such operations and attractions for recreational or entertainment purposes. This act shall be liberally construed to effectuate that purpose.

Sec. 3. As used in this act:

(a) "Qualified agritourism operator" means a person designated by the secretary of commerce pursuant to section 4, and amendments thereto.

(b) "Specified agritourism activity" means an agritourism activity designated by the secretary of commerce pursuant to section 4, and amendments thereto. "Agritourism activity" includes, but is not limited to, any activity conducted to allow members of the public to view or enjoy farming activities, ranching activities, nature or rural culture. An activity may be an agritourism activity whether or not the participant pays to participate in the activity. An activity is not an agritourism activity if the participant is paid to participate in the activity.

(c) "Designated agritourism location" means a specific parcel of land designated by the secretary of commerce pursuant to section 4, and amendments thereto, at which the warning signs required by section 5, and amendments thereto, are posted and where, a qualified agritourism operator engages in specified agritourism activities.

(d) "Participant" means any person who engages in an agritourism activity.

(e) "Inherent risks of a specified agritourism activity" means those dangers or conditions which are an integral part of such agritourism activity including, but not limited to, certain hazards such as surface and subsurface conditions; natural conditions of land, vegetation, and waters; behavior of wild or domestic animals; and ordinary dangers of struc-

, including an owner, tenant, lessee, occupant, operator or employee of a farm, ranch or rural attraction who invites members of the public to view or enjoy such operations for recreational or entertainment purposes;

but shall not include an employee of a qualified agritourism operator;

(c) "Noneconomic damages" means pain and suffering, disability, disfigurement and any accompanying mental anguish;

(f) "personal injury action" means any action for damages for personal injury or death; and

(g) "Medical treatment" means and includes allowances for all reasonable expenses for necessary health care rendered by practioners licensed to practice any branch of the healing arts or licensed psychologists, surgical, x-ray and dental services, including prosthetic devices and necessary ambulance, hospital and nursing services;

Sec. 4. In any personal injury action against a qualified agritourism operator, the qualified agritourism operator shall not be liable for

1 tures or equipment ordinarily used in farming or ranching operations.
 2 ~~“Inherent risks of a specified agritourism activity” also includes the po-~~
 3 ~~tential of a participant to act in a negligent manner that may contribute~~
 4 ~~to injury to the participant or others, such as failing to follow instructions~~
 5 given by the qualified agritourism operator or failing to exercise reason-
 6 able caution while engaging in the agritourism activity.

Sec. 5. In any personal injury action against a qualified agritourism operator, an injured participant's damages shall be reduced by the participant's comparative negligence

7 Sec. ~~4~~. Any person may apply to the secretary of commerce for des-
 8 ignation pursuant to this act.

Sec. 6. In any personal injury action against a qualified agritourism operator, an injured participant may bring an action against a qualified agritourism operator to recover noneconomic damages only if the qualified agritourism operator failed to exercise reasonable care and the injured participant incurs medical treatment having a reasonable value of \$2,000 or more, or the injury consists in whole or in part of permanent disfigurement, a fracture to a weight bearing bone, a compound, comminuted, displaced or compressed fracture, loss of a body member, permanent injury within reasonable medical probability, permanent loss of a bodily function or death.

9 (a) Such application shall contain all of the following:
 10 (1) Information describing the activity which the applicant intends to
 11 conduct as a specified agritourism activity. If the secretary finds that the
 12 applicant has satisfied the requirement of this subparagraph, he may des-
 13 ignate the activity as a specified agritourism activity.

14 (2) Information describing the specific location at which the applicant
 15 intends to conduct the specified agritourism activity. If the secretary finds
 16 that the applicant has satisfied the requirement of this subparagraph, he
 17 may designate the location a designated agritourism location.

18 (b) In addition to the factors considered above, the secretary in re-
 19 viewing an application shall consider whether granting the application will
 20 tend to further the purpose of this act by promoting economic develop-
 21 ment in the area or region in which the designated agritourism location
 22 is situated.

23 (c) The secretary shall maintain a list of all designated agritourism
 24 locations and of the specified agritourism activities conducted thereon
 25 and qualified agritourism operators engaged therein. Such list shall be
 26 made available to the public. The secretary shall promote and publicize
 27 the designated agritourism locations to advance the purpose of this act
 28 by promoting and encouraging tourism.

29 (d) Each designation granted by the secretary pursuant to this section
 30 shall be for a finite period of time as determined by the secretary but
 31 shall not be for less than five years unless a shorter period of time is
 32 requested by the applicant. *If the secretary has not approved or de-*
 33 *nie*d the application within 30 days after the application is filed,
 34 *then the designation shall be deemed granted for a period of five*
 35 *years.*

36 (e) No fee shall be charged to applicants under this section.

37 Sec. ~~5~~. (a) At every designated agritourism location, the qualified
 38 agritourism operator shall post and maintain signage which contains the
 39 warning notice specified in subsection (c). This section shall be deemed
 40 satisfied if such signage is placed in a clearly visible location at or near
 41 the designated agritourism location. The warning notice specified in sub-
 42 section (c) shall appear on the sign in black letters, with each letter to be
 43 a minimum of one inch in height.

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1 (b) Every written contract entered into by a qualified agritourism
2 operator for the providing of a specified agritourism activity shall contain
3 in clearly readable print the warning notice and language specified in
4 subsection (c).

5 (c) The signs described in subsection (a) and the contracts described
6 in subsection (b) shall contain the following warning notice:

7 WARNING

8 Under Kansas law, there is ~~no~~ liability for an injury or death of a
9 participant in a specified agritourism activity conducted at this des-
10 ignated agritourism location if such injury or death results from the
11 inherent risks of such agritourism activity. Inherent risks of agri-
12 tourism activities include, ~~but shall not be limited to~~, the potential
13 of you as a participant to act in a negligent manner that may con-
14 tribute to your injury or death and the potential of another partic-
15 ipant to act in a negligent manner that may contribute to your injury
16 or death. ~~You are assuming the risk of participating in this specified~~
17 ~~agritourism activity.~~

limited

18 (d) Upon request, the qualified agritourism operator shall provide to
19 any participant a written description of the specified agritourism activity,
20 ~~as set forth pursuant to section 4(a)(2), and amendments thereto~~, for
21 which this act limits the qualified agritourism operator's liability at each
22 designated agritourism location.

23 ~~Sec. 6: Except as provided in section 7, and amendments thereto,~~
24 ~~any participant is assuming the inherent risks of a specified agritourism~~
25 ~~activity when such participant engages in a specified agritourism activity~~
26 ~~conducted by a qualified agritourism operator at a designated agritourism~~
27 ~~location. The qualified agritourism operator, pursuant to K.S.A. 60-208,~~
28 ~~and amendments thereto, shall plead an affirmative defense of assump-~~
29 ~~tion of risk by the participant.~~

30 ~~Sec. 7:~~ Nothing in this act shall prevent or limit the liability of a
31 qualified agritourism operator if:

32 ~~(a) The qualified agritourism operator injures the participant by will-~~
33 ~~ful conduct,~~

34 ~~(b) the qualified agritourism operator has actual knowledge of a dan-~~
35 ~~gerous condition in the land, facilities or equipment used in the specified~~
36 ~~agritourism activity and does not make such dangerous condition known~~
37 ~~to the participant and such dangerous condition causes the participant to~~
38 ~~sustain injuries.~~

or waters or the dangerous propensity of the
particular animal or a dangerous condition in
structure or equipment,

39 ~~Sec. 8:~~ Any limitation on legal liability afforded to a qualified agri-
40 tourism operator by this act shall be in addition to any other limitation of
41 legal liability otherwise provided by law. Nothing in this act, ~~nor failure~~
42 ~~by any person to comply with the provisions of this act~~, shall be construed
43 to limit, restrict or impede the application of K.S.A. 58-3202, *et seq.*, and

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1 amendments thereto, to any person, and a qualified agritourism op-
2 erator entitled to coverage under K.S.A. 58-3202, et seq., and
3 amendments thereto, shall be entitled to the full limits of liability
4 afforded under K.S.A. 58-3202, et seq., and amendments thereto.

5 Sec. 9. The secretary of commerce may issue rules and regulations
6 to carry out the provisions of this act.

7 Sec. 10. This act shall take effect and be in force from and after its
8 publication in the statute book.

33 Sec. 11 (a) For taxable years commencing on and after December 31,
34 2003, and December 31, 2004, there shall be allowed as a credit against
35 the tax liability of a taxpayer imposed under the Kansas income tax act,
36 an amount equal to 25% of the cost of liability insurance paid by an
37 agritourism operator who operates an agritourism activity on the effective
38 date of this act. For taxable years commencing December 31, 2005, De-
39 cember 31, 2006, and December 31, 2007, the agritourism operator shall
40 be allowed as a credit as provided in this subsection an amount equal to
41 15% of the cost of liability insurance paid by the agritourism operator
42 during any such taxable year. No tax credit claimed pursuant to this sub-
43 section shall exceed \$2,000. If the amount of such tax credit exceeds the
1 taxpayer's income tax liability for such taxable year, the amount thereof
2 which exceeds such tax liability may be carried over for deduction from
3 the taxpayer's income tax liability in the next succeeding taxable year or
4 years until the total amount of tax credit has been deducted from tax
5 liability, except that no such tax credit shall be carried forward for de-
6 duction after the third taxable year succeeding the taxable year in which
7 the tax credit is claimed.

8 (b) For the first two taxable years commencing after a taxpayer opens
9 such taxpayer's business, after the effective date of this act, there shall be
10 allowed as a credit against the tax liability of a taxpayer imposed under
11 the Kansas income tax act, an amount equal to 25% of the cost of liability
12 insurance paid by the agritourism operator who starts an agritourism ac-
13 tivity after the effective date of this act. For the third, fourth and fifth
14 taxable years commencing after the taxpayer's business opens, the agri-
15 tourism operator shall be allowed as a credit as provided in this subsec-
16 tion, an amount equal to 15% of the cost of liability insurance paid by the
17 agritourism operator during any such taxable year. No tax credit claimed
18 pursuant to this subsection shall exceed \$2,000. If the amount of such tax
19 credit exceeds the taxpayer's income tax liability for such taxable year, the
20 amount thereof which exceeds such tax liability may be carried over for
21 deduction from the taxpayer's income tax liability in the next succeeding
22 taxable year or years until the total amount of tax credit has been deducted
23 from tax liability, except that no such tax credit shall be carried forward
24 for deduction after the third taxable year succeeding the taxable year in
25 which the tax credit is claimed.

Testimony on SB 334
The House Committee on Tourism and Parks

Matt Jordan
Director of Community Development
Kansas Department of Commerce

March 10, 2004

Chairperson Hutchins and members of the committee, I am Matt Jordan and serve as Director of Community Development for the Kansas Department of Commerce. I stand before you today to share information Commerce hopes the committee will consider before it takes action on SB 334.

The Department of Commerce believes agri-tourism is an important economic development issue and appreciates the efforts underway in the Legislature to help support this emerging industry in our state.

As many of you know, Commerce has launched an Agri-Tourism Initiative to bring forth innovative ways to grow agri-tourism businesses in Kansas. It consists of a multi-phase approach to help family farmers remain on their land and generate additional profits, while expanding the state's tourism product. The initiative centers around a contract Commerce has secured with Eckert AgriMarketing, a nationally recognized expert in this field, to develop a coordinated, strategic, and sustainable agri-tourism approach for Kansas. This effort will develop a set of best practices based on input from tourism and agricultural business leaders as well as a statewide agri-tourism conference scheduled for November 2004.

Moreover, Commerce believes there is broad agreement that this is an important issue for rural communities but more information and support are required. In fact, many questions have been raised with respect to liability issues since this is a new industry and potential operators have not addressed some of these legal issues before. Commerce believes agri-tourism businesses over time will develop effective practices to protect customers and potential operators, as has been the case with virtually every new industry in Kansas. The key question, we believe, is how to best offer this support and guidance. Commerce is actively engaged in learning more from known agri-tourism businesses on liability and a number of other operational issues to gain a better understanding of the needs of this industry.

The current version of SB 334 offers an approach that places responsibility upon the Department of Commerce to designate "qualified agri-tourism operators" through an application process based on certain criteria. Furthermore, the bill requires Commerce to promote and publicize the designated agri-tourism locations to advance the growth of the industry. These goals are laudable; however, the Department of Commerce is concerned about its ability to satisfy these goals in the following ways:

- First, no other industry is currently required to submit an application and receive specific designation from Commerce in order to be considered qualified to run a business. Thus, this is a new responsibility and relationship with the private sector for the Department of Commerce.

- Second, Commerce is concerned that some operators will construe the promotion and publicity requirements in this act to mean an obligation to assist with advertising and marketing efforts for individual businesses beyond which the agency is able to accommodate with existing resources.
- Lastly, the responsibilities set forth in this bill place unique responsibilities upon Commerce to assist one type of industry or selected operators within an industry. Commerce is concerned that this new approach will be demanded by other important businesses in the state and will limit the ability of the agency to coordinate marketing efforts across industries for the betterment of the Kansas economy. Such a responsibility would involve promoting a select list of businesses at the expense of regions or broader cross sections of industries.

Again, Commerce fully appreciates the spirit in which SB 334 was drafted. However, Commerce wishes to offer an alternative suggestion. There is a different approach created by a bi-partisan coalition of Legislators that is also worthy of the committee's consideration to accomplish this important goal of growing agri-tourism in Kansas. HB 2844 creates a financial mechanism, a 25% tax credit, to make liability insurance more affordable for agri-tourism operators. This bill works toward the same ends as SB 334 but does not involve some of the problematic features noted earlier. Commerce believes the private sector driven approach in HB 2844 is a good way to offer needed support for potential agri-tourism operators.

The Department of Commerce understands Governor Sebelius has sent a letter to the committee voicing her support for this important industry and for the concepts outlined in HB 2844. Commerce wishes to reinforce its commitment to assisting a vital tool to develop rural areas of Kansas. The goals outlined in both bills are clearly important issues to the agri-tourism industry. Commerce hopes the committee considers the alternative approach of financial incentives in lieu of government oversight before it takes action on SB 334.

Thank you for this opportunity to share information with the committee. I would stand for questions.