

Testimony of J.R. Carlson
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The Kansas Senate Committee on Natural Resources
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*Qualified Support for SB 118 and Appointment of Blue Ribbon Study Panel;
Creation of Conservation Easement Oversight Commission and Supporting Justification*

Thank you Mr. Chairman and Members of the Senate Committee on Natural Resources.

Today I offer Testimony on Senate Bill 118 - Legislation which proposes a unique approach by the Kansas Department of Agriculture to fulfill US Army Corps of Engineers' Mitigation requirements by allowing the State to purchase, hold and manage Conservation Easements.

As an Engineer I concur with the Department as to the necessity, importance and need for flood control projects, so in that regard I am in full and hearty support of SB 118.

However, as an expert in environmental policy, environmental law, and regulatory compliance and a professional who has a keen interest in Conservation-Easement programs, I have significant reservation about the State holding Conservation Easements without first defining Standards and second appointing an independent Commission to oversee how Conservation Easements are appraised, monitored and fiscally managed - such that reasonable protections are in place to protect the taxpayers and landholders of Kansas from another law of which we are all familiar - that is, Law of Unintended Consequences.

To that end, I am recommending the Senate Committee on Natural Resources consider a tandem proposal along with SB 118 - a proposal that would establish a *Blue Ribbon Study Panel* - who would be given the following charter and responsibilities:

- 1) Research and recommend to this Committee appropriate and necessary *Minimum Standards* for the appraisal, monitoring and financial assurance of Conservation Easement programs;
- 2) Study the need for and mechanics of creating an independent, Conservation *Easement Oversight Commission* to be funded through mitigation windfalls and taxes on Conservation Easement and other Mitigation Programs; and,
- 3) The Blue Ribbon Study Panel would propose the framework for establishment of Policies, Procedures and a Financial Assurance for Land Trusts.

We do not have to travel far to confirm the need for careful deliberation, nor dig deep to unearth problems as our neighbor to the west - Colorado - has ample experience to draw from before they concluded the need to establish a *Conservation Easement Oversight Commission*:

- In 1999 the Colorado Legislature made \$100,000 available - by way of tax exemptions - for Conservation Easement Programs, a sum that was *immediately* overwhelmed by participation in the program;
- Over the next few years, near annual, stopgap legislation was passed in Colorado that expanded credits, raised caps, and increased refunds for Conservation Easement Programs all in an effort to stem the tide of revenue losses that were occurring as a result of program that was not well thought out and that lacked standards, oversight and minimum controls;

- By 2005, the Colorado Department of Revenue was systematically disallowing Conservation Easement filings, and by 2007 CDOR and the State of Colorado - facing a \$1B budget deficit - was questioning legitimate Conservation Easement appraisals, placing well-meaning landholders between the disallowed tax credits on one side and angry investors who purchased those credits on the other.
- It was not until 2008 - in the wake of 800 disallowed Conservation Easements covering 1M acres at a value of over \$265M - that the Colorado Legislature created the *Conservation Easement Oversight Commission* and approved Minimum Standards.

With respect to Land Trusts, there exists a gaping hole in the tax law that is being exploited by unscrupulous people, and it goes something like this:

- Bad person "A" holds a nice parcel of land - say for purposes of discussion along the Kansas River - through which she desires to derive a tax exemption benefit but still own the land.
- So, she sets up dummy Land Trust, which is simple to do, and donates the Land - through the mechanism of a Conservation Easement - to the Trust; she is now eligible, as also the owner, to take a tax exemption under IRS Rules.
- Now the way the IRS Conservation Easement tax laws are set up, if the Land Trust at any point also becomes the *owner* of the land, the Conservation Easement can be extinguished and the value of the land rebounds > and wooola the Land Trust now owns a piece of property from which a ghost tax exemption has been derived, the value has returned, and from which ownership has never really been relinquished.
- So, in effect, Bad Person "A" has never lost control of the land and gained - through a federal tax exemption - a significant deduction.

In closing, I would offer to this Committee that while today there may appear to be only minimal connection between the State holding Conservation Easements - as proposed by SB 118 - and the need to establish a *Conservation Easement Oversight Commission*, in coming days and months the need to develop *Minimum Standards* and establish an Oversight Commission will readily be revealed, as colossal sums of money have been allocated - by the Federal Government and others - to Conservation Easement programs.

Exhibit A

History of Colorado Conservation Easement Legislative Action

1999 HB1155 -- Established conservation easements with State Tax credits @ 100% of first \$100,000, identifies IRS 170(h) as the only standard
 2000 HB1348 -- Made \$100,000 Colorado tax credits transferable; refundable up to \$20,000 if there was a TABOR surplus
 2001 HB1090 -- Expanded credits to \$100K + 40% of of remaining value, capped at \$260K, and increased TABOR refunds to \$50,000
 2005 HB1244 -- Authorized CDOR to review & evaluate appraisal values & validity of credit
 2006 HB1354 -- Changed calculation of tax credit to equal 50% of donation capped at 375,000, for donation values of \$750,000
 2007 HB1361 -- Specifies Land Trust must provide CDOR with various data on C/Es (# of C/Es, # of acres, ...water, gravel, etc).
 2008 HB1353 -- Created CEOC (Conservation Easement Oversight Commission) -- additional oversight & appraisal standards
 2011 ~~HB1208 -- (failed) CDOR must produce prima facie evidence of fraud, within one year, else accept the C/Es in dispute~~
 2011 HB1300 -- Option to elect District Court &/or Administrative Hearings -- re: CDOR Disallowances / CEOC Recommendations
 2013 SB221 -- DOR/DRE Pre-Authorization / Pre-Approval of Appraisals