

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Vice-Chairman Jeff Whitham at 3:30 p.m. on March 11, 2010, in Room 346-S of the Capitol and conducted the meeting until Chairman Lance Kinzer arrived fifteen minutes later due to testifying at another committee.

All members were present except:

Representative Kevin Yoder- excused

Committee staff present:

Jason Long, Office of the Revisor of Statutes
Matt Sterling, Office of the Revisor of Statutes
Jill Wolters, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Lauren Douglass, Kansas Legislative Research Department
Sue VonFeldt, Committee Assistant

Conferees appearing before the Committee:

K.T. Shively, Kansas Legal Services,
John Hooge, Attorney-Lawrence, Kansas,
Jill A. Michaux, Neis & Michaux, P.A., Topeka, Kansas
Paul Post, Attorney - Topeka, Kansas,
Senator John Vratil,
Representative Larry Powell,
Andrew Larson, Garden City, Landowner
Ty Brookover, Garden City, Landowner
Tim Miller, Garden City, Landowner
John Hamilton, Attorney, Topeka, Kansas,
Jerry Younger, , Deputy Secretary for Engineering and State Transportation (KDOT)
Jayme Morris-Hardman, Kansas Judicial Council

Others attending:

See attached list.

The hearing on SB 363 - Allowing debtors to exempt earned income tax credits during bankruptcy proceedings was opened.

Jill Wolters, Office of the Revisor of Statutes, provided the committee with an overview of the bill that allows an individual debtor in a bankruptcy proceeding to exempt the debtor's right to receive earned income tax credits (EITC). The earned income tax credit is a refundable federal income tax credit for low to moderate income working individuals and families. (Attachment 1)

K.T. Shively appeared before the committee on behalf of Marilyn Harp, Executive Director of Kansas Legal Services, a statewide program providing legal services to low and moderate income persons, asking for the committee's support of this bill. Currently EITC income is directed towards low income persons, however, if that person has filed for bankruptcy, the EITC income becomes the property of the bankruptcy trustee and the money is distributed to the creditors by the trustee. This bill would exclude the EITC income, therefore allowing the debtor to retain the money. (Attachment 2)

John Hooge, Attorney-Lawrence, Kansas, appeared as a proponent for this bill and stated the purpose of exemptions in bankruptcy is to allow people to have a fresh start and not have everything taken away from them. He further explained a person only gets an earned income credit if he or she is a wage earner with minor children, and if the wages are under a certain amount. The current lack of an exemption in Kansas means some people lose their earned income tax credit in bankruptcy and this defeats the very purposes of the earned income tax credit-to encourage work and keep people out of poverty. (Attachment 3)

Jill A. Michaux, of Neis & Michaux, P.A., Topeka, Kansas, testified in support of this bill. She advised she has represented individuals and small business proprietors in bankruptcy since 1982 and was the attorney in the 10th Circuit case called Montgomery. (IN Re Montgomery, 224 F.3d 1193, 1194 (10th Cir. 2000).

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Debtors' attempt to exempt EITC in their bankruptcy was rejected. She stated the circuit court said a specific exemption for EITC is required and the general exemption for social welfare in K.S.A. 39-717 is not sufficient. She also advised many states have specific EITC exemptions or an exemption for any property up to a certain limit that can be used for EITC. She also provided additional information showing status of EITC exemption by state. (Attachment 4)

Paul Post, a lawyer in Topeka, Kansas, in private practice, stated a significant percentage of his practice is representing persons and families filing for bankruptcy and he supports this bill. He explained how unsecured creditors receive money from the bankruptcy estate and that it is not uncommon for them to receive small distributions amounting to only a few dollars while exempting the earned income credit would allow those low income families to keep this source of funds for essential survival items. (Attachment 5)

Senator John Vratil provided written testimony in support of the bill. (Attachment 6)

There were no opponents.

The hearing on **SB 363** was closed.

The hearing on **HB 2714 - Restricting KDOT'S authority to appeal from awards under eminent domain procedure** was opened.

Matt Sterling, Office of the Revisor of Statutes, presented an overview of the bill to the committee that would amend K.S.A. Supp. 26-507 and 26-508, concerning eminent domain. He explained under current law, the state cannot take private property without just compensation to the land owner. After the taking of the private property, appraisers are appointed to appraise the value of the land taken, the appraisers then survey the land and then testify to the valuation of the land at a public hearing and set the reward of compensation for the land. The plaintiff and the defendant would both then have an opportunity to appeal the appraisers award.

This bill would prohibit the Kansas Department of Transportation (KDOT) from appealing the appraisers' award but would not prevent any other party from appealing the appraisers' award and this bill would be applied retroactively to all proceedings pending on or commenced after January 1, 2009, and the bill would take effect upon its publication in the Kansas Register. (Attachment 7)

Representative Powell addressed the committee stating he introduced this bill and asked the committee to support the bill after he learned the details about the eminent domain settlement and did not think it was appropriate for a government agency to go after landowners after distributing the award of the court appointed appraisers. He provided an attached spreadsheet that shows the original offer of purchase, condemnation award, settlement amount, expert fees, attorney fees and costs and net return. (Attachment 8)

Andrew Larson, Garden City, Landowner, appeared before the committee and asked for their support of the bill to give protection to the individual citizen. He explained the family history of the land and how the land taken by KDOT would devalue the land and limit access to farm ground on each side to the highway. (Attachment 9)

Ty Brookover, Garden City, representing Brookover Land Enterprises and Brookover Feedyards, Inc. spoke before the committee in support of the bill. He stated he is a third generation cattle feeder and talked about the KDOT acquisition process and the lack of any attempt by KDOT to work out a fair settlement. He also stated the system today costs the landowner a great deal of time and money of the condemnation process goes to trial and stated KDOT has an advantage over the landowner as they have a vast amount of resources which include time, money and staff as compared to a landowner. (Attachment 10)

John Hamilton, Attorney, with Hamilton, Laughlin, Barker, Johnson & Watson, Topeka, Kansas, stated he represents property owners in eminent domain cases, and supports this bill. He also stated he represents Andrew Larson, landowner at Garden City who just testified. He told the committee that KDOT appealed almost every award on Highway 50 and many landowners have settled by giving back substantial sums of money rather than facing the uncertainty and expense of a jury trial, as a landowner can easily spend \$15,000

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to \$20,000 for expert witnesses, depositions and substantial attorney fees. (Attachment 11)

Tim Miller, Garden City, Landowner also spoke before the committee asking for support of this bill and stated fair treatment was not given to farmers land acquisition. He stated he has over \$50,000 invested in legal costs so far and will likely end up with over \$100,000, in defense of the unfair value of the condemnation awarded by the state. He also stated that all too often the amount of resources thrown at a lawsuit directly impacts the results and the state has unlimited resources in comparisons to an individual farmer. (Attachment 12)

Brian Shaw, Garden City, owner of the Crazy House and C bar H Stores at Garden City, provided written testimony in support of the bill. (Attachment 13)

Jerry Younger, Deputy Secretary for Engineering and State Transportation Engineer at KDOT addressed the committee in opposition of the bill. He thoroughly explained the procedures KDOT is required to follow regarding eminent domain procedures. He also stated many governmental entities and utilities have the power of eminent domain under Kansas law including state agencies, cities, airport authorities, etc, and all condemning authorities follow the procedures set out in K.S.A. 26-501 et. seq. This process is used when governmental agencies are unable to reach an acquisition agreement with the owner of the property needed for public purposes.

He stated this bill would continue to allow all condemning authorities except KDOT, and all landowners to appeal appraisers' awards and his biggest concern would be the long term effects of KDOT not being able to appeal. He tells people they are using taxpayers money to pay these awards and if this bill were enacted, it would leave KDOT with no tools necessary to be a good steward of public funds with respect to right of way acquisition. Finally, the language of this bill makes it retroactive to cases that were pending or commenced after January 1, 2009, and of the 19 cases appealed by KDOT during 2008 and 2009, all were pending as of that date or filed after that date.

He further stated the current system has a good set of checks and balances in it already which protect the land owners from overreaching by governmental entities in the eminent domain process. It has been in place for a long time and has served both sides well. If landowners are aggrieved in the process and their position turns out to be correct on the value of their property, the process makes them whole by affirming or increasing the award of damages as well as requiring the condemning authority to pay their costs. (Attachment 14)

Many questions and much discussion followed the testimony.

The hearing on HB 2714 was closed.

The hearing on SB 460 - Children; permanency and priority of orders was opened.

Jayne Morris-Hardman, testified in support of the bill, and as a member of the Juvenile Offender and Child in Need of Care Committee, Kansas Judicial Council, (JO/CINC) she provided the history of how this bill came about. As that committee was reviewing aspects of the Revised Kansas Juvenile Justice Code and 2008 HB 2820, they determined certain child in need of care orders, or juvenile offender orders, should take priority over similar orders in other domestic cases such as divorce, paternity, protection from abuse, and guardianship and conservatorship. In addition the Kansas Supreme Court issued an opinion that held that juveniles 14 years of age or older who are charged with a felony have a right to a jury trial under the Kansas Constitution. To address these issues, the proposed legislation became 2009 SB 88. The department of Social and Rehabilitation Services (SRS) and the Kansas Coalition against Sexual and Domestic Violence (KCSDV) provided issues not covered with the bill, and the bill was set aside for interim study, but unfortunately, was not approved for study after the 2009 session. This bill is in essence a redraft of the CINC portions of 2009 SB 88 and includes all the balloon amendments proposed in 2009 and those that were going to be proposed in 2010 as a result of the JO/CINC committee's review. In February, 2010, just prior to the Senate Judiciary hearing of the bill, the committee was informed that KCSDV, the Juvenile Justice Authority and the SRS intended to propose balloon amendments to SB 460. The various parties got together and agreed on language and the Senate Committee subsequently approved the bill including the balloon amendment proposed by KCSDV; however, it did not include the amendment proposed by JJA and SRS, so the Senate Judiciary

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Committee amended the bill to address those issues. She stated the Judicial Council supports **SB 460** in its current form, along with the attached balloon to correct a typographical error with regard to a statutory reference on page 44, line 33, striking the reference from K.S.A. 38-226, to the correct statute of K.S.A, 38-2264. (Attachment 15)

The next meeting is scheduled for March 15, 2010.

The meeting was adjourned at 5:35 p.m.

JUDICIARY COMMITTEE GUEST LIST

DATE: 3-11-10

NAME	REPRESENTING
John Hooge	
Jill A. Michaux	
Paul Post	
Natalie Grubson	Kansas Judicial Council
Jayne Morris Hardeman	Kansas Judicial Council JD/CINC
Myrna Powell	
TK Shively	KCS
Mack Gleason	Judicial Branch
Dale L. Jones	Self
RS. McKenna	SPS
John Donley	KS Livestock Assn.
Arthur Breyants	KLRD
Patrick Vegeberg	Kerney and Assoc.
Tim Miller	Self
Andrew Lanson	Self
J. R. Hamilton	Andrew Lanson
Ty Brookover	Self
Juni Roe	KCSL
Bill Vizary	KDOT

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MEMORANDUM

To: Chairman Kinzer and members of the House Committee on Judiciary
From: Jill Ann Wolters, Senior Assistant Revisor
Date: 11 March, 2010
Subject: SB 363

Senate Bill No. 363 allows an individual debtor in a bankruptcy proceeding to exempt the debtor's right to receive earned income tax credits. The earned income tax credit is a refundable federal income tax credit for low to moderate income working individuals and families.

The bill would take effect upon publication in the Kansas register.

For reference purposes, KSA 79-32,205 reads as follows:

79-32,205. Earned income tax credit. (a) There shall be allowed as a credit against the tax liability of a resident individual imposed under the Kansas income tax act an amount equal to 17% for tax year 2007, and all tax years thereafter, of the amount of the earned income credit allowed against such taxpayer's federal income tax liability pursuant to section 32 of the federal internal revenue code for the taxable year in which such credit was claimed against the taxpayer's federal income tax liability.

(b) If the amount of the credit allowed by subsection (a) exceeds the taxpayer's income tax liability imposed under the Kansas income tax act, such excess amount shall be refunded to the taxpayer.

History: L. 1998, ch. 130, § 22; L. 2002, ch. 185, § 38; L. 2007, ch. 154, § 4; July 1.

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Attachment # 1

Testimony in support of

Senate Bill 363

I am TK Shively, Director of Research and Program Development, Kansas Legal Services. I am appearing before you today on behalf of Marilyn Harp, Executive Director of Kansas Legal Services, a statewide program providing legal services to low and moderate income persons. Senate Bill 363 deserves your support.

In 2009, we provided advice and legal representation to over 20,000 low income Kansans. In that regard, we have contact daily with low income Kansans who qualify for and may receive Federal Earned Income Tax credits (EITC). This program was designed to replace the Federal support for low income families, which was delivered through direct monthly payments in the Aid to Families with Dependent Children (AFDC) program. Unlike the AFDC program, which was administered in Kansas by the Kansas Department of Social and Rehabilitation Services, the EITC program is administered through the Federal Income Tax program. Families file a federal income tax return. If they qualify for EITC, they receive a payment larger than the amount of their earnings withheld for Federal Income tax payments. Eligible families (parent and one minor child) have annual incomes of \$35,063. Those with the least amount of earnings would receive a credit of \$3,043. This is applied to taxes due from the worker and can be received as a "refund".

Since 1975, the Earned Income has become the largest income transfer from the Federal government to low income Americans. In 2007, 24 million Americans received \$48 billion through the EITC program. The state of Kansas provides a credit figured at 17% of the Federal EITC for Kansas low income workers.

One concern about the EITC program is that about 20% of the eligible participants do not file a Federal income tax return, and, therefore, don't qualify for the payment through this program. The requirement of paying a tax preparer to complete a return in order to participate has been an obstacle for low income workers. As one response to this, legal services programs nationwide have worked together to create and distribute a easy to use program designed to maximize the EITC benefit available. There is no

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charge for accessing this program, called I CAN e-file. A link to this program can be found on the Kansas Legal Services website, www.kansaslegalservices.org.

Kansas Legal Services advises and represents clients who are contemplating filing for bankruptcy. Because of an unpaid debt, perhaps a child's hospital bill, they have been sued and their wages have been garnished. They are regularly losing 25% of their very limited income to garnishment. The only solution that will end the garnishment is filing for bankruptcy. However, under the law today, they face the loss of perhaps \$3,000 in a EITC enhanced income tax return.

The purpose of the EITC is not to transfer Federal income support to the creditors of low income persons. Yet, without the law change, this is exactly what happens. Federal income support directed toward low income persons goes to their creditors. When a low income person files for bankruptcy, the income tax return due them at that point (or a pro rata portion of their annual return, based on when they file) becomes the property of the bankruptcy trustee. This money is distributed to the creditors by the trustee, in partial payment of the creditor's debts.

Marilyn Harp, Executive Director
Kansas Legal Services, Inc.
712 S. Kansas Avenue, Suite 200
Topeka, KS 66603
785-233-2068
harpm@klsinc.org

Testimony in Support of S.B. 363

My name is John Hooge. I am a fourth generation native Kansan. I attended Ottawa University, Kansas Univ. Law School and Indiana Univ. School of Law-Indianapolis. After graduating from IU in 1977 I returned to Lawrence where I have been an attorney for over 30 years.

Although I have handled many types of civil and criminal cases, I have always handled bankruptcy cases. Debtor bankruptcy has been practically the only thing I have handled for a # of years and I have filed thousands of bankruptcies.

I do not believe bankruptcy should be filed when unnecessary. To my knowledge, I am the only bankruptcy lawyer in Kansas who has a credit counselor who helps people avoid filing bankruptcy. The bankruptcy law now also requires people to get credit counseling from designated non-profit credit counseling agencies before they can file bankruptcy. To see if they have another viable option. But, sometimes people have no other reasonable choice in dealing with their debts. Especially in these hard times.

The purpose of exemptions in bankruptcy is to allow people to have a fresh start and not have everything taken from them. In Kansas a person can have an unlimited amount of equity in their homestead and retain that in a bankruptcy case. A person can have an unlimited amount in an IRA, a 401K, other tax qualified pensions and whole life insurance policies. They can keep a vehicle up to \$20,000, their household goods and furnishings. Up to \$7,500 value of trade-tools. But, folks with these type of assets don't generally have earned income credits.

A person only gets an earned income credit (EIC) if he or she is a wageearner with minor children—and if the wages are under a certain amount. It is often a working mother—who may or may not be receiving child support but is supporting her children by herself. It can be a soldier and his family—some of our soldiers at Ft. Riley receive earned income tax credits due to their limited income.

Every person filing bankruptcy must file a budget showing how much income they have from all sources and how their income is spent. It is always eye-opening to help a person with children put that budget together. A person with children making \$10 an hour has difficult choices to make. \$1,600 a month or less does not go very far. Often the choice is doing without necessities. Not getting dental work, not fixing the car, reducing food or medicine, choosing between basic necessities. Their annually received EIC helps this budget immeasurably.

I speak with my clients—often single mothers—on how they intend to use their EIC. It is always for necessities. Getting caught up on utilities and rent. Buying shoes and clothes once a year for growing children. Stocking up on groceries. Buying a car for \$3,000—you can't get much of a vehicle for that--or paying for the needed repairs to the car they have. Paying for needed dental work for themselves or their children that they can't otherwise afford. This is part of their annual budget. A necessity for them. And they spend it locally—in our state, in their community.

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Attachment # 3

The current recession has made the EIC even more important. The working poor have felt this recession more than any others. They pay a higher percentage of their income for rent, medical costs, food costs, necessities. They often cannot find employment with medical insurance provided. Many employers hire temporary workers for this reason. Income as well as benefits has been reduced. Overtime is harder to come by. People have been laid off and are trying to make it on unemployment benefits or on part-time income. The working poor right now need the EIC more than ever. They need this to survive.

Sometimes a person must file a bankruptcy even though they know they will lose their refund or EIC. To stop a house from being foreclosed or prevent a needed car from being repossessed.

But, all too often a person who loses his or her EIC is someone who didn't understand they would lose the tax credit. A mother who felt she couldn't afford a lawyer and filed bankruptcy on her own. Or who got advice from an attorney who doesn't handle enough bankruptcy to give appropriate advice.

As Paul Post will testify, the creditors in a bankruptcy often get as their share only small amounts from an EIC taken from a Debtor. This has minimal benefit for them. But, the impact on the person or family with children and limited income can be devastating.

The lack of an exemption in Kansas means some people lose their earned income tax credit in bankruptcy. The lack of an exemption defeats the very purposes of the earned income tax credit—to encourage work and keep people out of poverty.

Respectfully submitted,

John R. Hooge

Testimony in favor of Senate Bill 363
Before the Kansas House of Representatives Judiciary Committee March 11, 2010
by Jill A. Michaux, Neis & Michaux, P.A., Topeka

Thank you members of the Judiciary Committee. I come before you in support of Senate Bill 363 to create a Kansas state law exemption for EIC for use in bankruptcy.

I have represented Kansas individuals and small business proprietors in bankruptcy since 1982. I was the attorney in the 10th Circuit case called Montgomery. (In Re Montgomery, 224 F.3d 1193, 1194 (10th Cir. 2000). Debtors' attempt to exempt EIC in their bankruptcy was rejected.

The circuit court said an specific exemption for EIC is required. The general exemption for social welfare in K.S.A. 39-717 is not sufficient.

38-717(c) None of the money paid, payable, or to be paid, or any tangible assistance received under this act shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Many states have specific EIC exemptions or an exemption for any property up to a certain limit that can be used for EIC. The status of other state laws is listed on page 38-41 of "When Welfare Becomes Work Support: Exempting Earned Income Tax Credit Payments in Consumer Bankruptcy", American Bankruptcy Law Journal, Summer, 2004. A summary is attached to this testimony.

I urge you to adopt Senate Bill 363. Thank you.

Earned Income Tax Credit

Earned Income Tax Credit (EITC or EIC) is a **refundable tax credit** designed to encourage low-income workers and offset the burden of U.S. payroll taxes. Both the United States and the State of Kansas have the EITC.

EIC recipients must have a minimum amount of earned income and at least one qualifying child sharing their residence. The credit phases out for earned income over \$43,352. Maximum credit is \$4050 to \$5666 depending on income and number of children.

There is a much more modest EIC for persons and couples without children with earned income of \$5980 to \$13,460. The maximum EIC is \$457.

Enacted in 1975, the EIC has been expanded many times, including the more widely-publicized Reagan EIC expansion of 1986. Today, the EITC is one of the largest anti-poverty tools in the United States, and enjoys broad bipartisan support.

Kansas is one of at least 20 states with their own EIC. Kansas residents claiming an EIC on their Federal return, may claim an EIC on their Kansas income tax return. Nonresidents cannot claim the Kansas EIC. **The Kansas EIC is 17% of the federal EIC.**

<http://www.ksrevenue.org/faqs-taxii.htm>

The EIC has significant impact on the lives and the communities of the nation's lowest paid workers. The EIC encourages more work during the phase in period to qualify for a larger EIC. It lifts the lowest paid working people above the federal poverty line. Dollars are spent in local communities on commodities and services.

Economists suggest that every increased dollar received by low and moderate-income families has a multiplier effect of between 1.5 to 2 times the original amount, in terms of its impact on the local economy and how much money is spent in and around the communities where these families live.

Source: **http://en.wikipedia.org/wiki/Earned_Income_Tax_Credit**

EIC Table, 2009

The credit is characterized by a three-stage structure that consists of phase-in, plateau, and phase-out.

Size of credit (tax year 2009)^[1]

Earned income (x)	Stage	Credit (3+ children)
\$0-\$12,570	phase in	45% * x
\$12,570-\$16,420	plateau	\$5,657
\$16,420-\$43,279	phase out	\$5,657 - 21.06% * (x - \$16,420)
>= \$43,279	no credit	\$0
Earned income (x)	Stage	Credit (2 children)
\$0-\$12,570	phase in	40% * x
\$12,570-\$16,420	plateau	\$5,028
\$16,420-\$40,295	phase out	\$5,028 - 21.06% * (x - \$16,420)
>= \$40,295	no credit	\$0
Earned income (x)	Stage	Credit (1 child)
\$0-\$8,950	phase in	34% * x
\$8,950-\$16,420	plateau	\$3,043
\$16,420-\$35,463	phase out	\$3,043 - 15.98% * (x - \$16,420)
>= \$35,463	no credit	\$0
Earned income (x)	Stage	Credit (no children)
\$0-\$5,970	phase in	7.65% * x
\$5,970-\$7,470	plateau	\$457
\$7,470-\$13,440	phase out	\$457 - 7.65% * (x - \$7,470)
>= \$13,440	no credit	\$0

The same data, in words: for a person with two qualifying children, the credit is equal to 40% of the first \$12,570 of earned income, thus reaching a plateau of \$5,028 and staying there until earnings increase beyond \$16,420, at which point the credit begins to phase out at 21.06%, reaching zero as earnings pass \$40,295. The dollar amounts are indexed annually for inflation.

For married filing jointly, the plateaus travel \$5,000 further.

This table, and the graph below, might make it appear as though EITC moves smoothly. In actuality, the amount of the credit is given by an IRS table that divides earned income into fifty dollar increments from \$1 to \$43,279.
<http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?DocID=36&Topic2id=40&Topic3id=42>

I. Exemption of the Federal Earned Income Tax Credit in states that do not allow people who file for bankruptcy to choose the federal exemptions under § 522(b) and (d) (“Opt-out states”).

1. Alabama “Public assistance to needy persons” is exempt. Case law says EITC is covered by this exemption.
2. Arizona Statutory chapter on state welfare assistance programs is not subject to operation of any bankruptcy law. Case law says EITC is not exempt under state law.
3. California Aid under state Welfare and Institutions Code is exempt. EITC is either not exempt or whether it is exempt is unclear.
4. Colorado Express exemption for EITC. Colo. Rev. Stat. § 13-54-102(1)(o) (West 2009).
5. Delaware Statutory chapter on public assistance says assistance under it is not subject to operation of bankruptcy law. EITC is either not exempt under this provision or whether it is exempt is unclear. Separate exemption provided for property with aggregate fair market value of not more than \$5,000 (excluding retirement plans).
6. Florida Express exemption for EITC (by reference to § 32 of the Internal Revenue Code). Fla. Stat. § 225.25(3) (West 2009).
7. Georgia Exemption provided for a local public assistance benefit. EITC is not exempt under this provision.
8. Idaho Exempts benefits under “federal, state, or local public assistance legislation.” Case law says this covers EITC.
9. Illinois Exempts public assistance benefit, which case law says covers EITC.
10. Indiana No exemption available that even arguably covers EITC.
11. Iowa Exempts “public assistance benefit,” which case law says covers EITC. Iowa Code § 627.6(8)(a) used to cover a “local public assistance benefit” but was amended to say “any public assistance benefit.”

12. Kansas The Social Welfare chapter of Kan. Stat. Ann. (K.S.A. 2008 Supp. 39-717(c)) says benefits under that act are not subject to legal process, or to the operation of any bankruptcy law; K.S.A. 60-2313(a)(2) exempts public assistance benefits covered by K.S.A. 39-717.
13. Kentucky Non-commingled public assistance is not assignable and is exempt from levy or execution, which case law says sometimes makes EITC exempt. Kentucky also has a \$1,000 wildcard exemption for people who file for bankruptcy.
14. Louisiana Express exemption for EITC, except for seizure by the state department of revenue or arrears in child support payments. La. Rev. Stat. Ann. § 12:3881 (2009) (Added in 2004.)
15. Maine Exempts a local public assistance benefit. EITC is not exempt under this provision.
16. Maryland Assistance under specified subtitle of state statutes is not subject to bankruptcy law. EITC is either not exempt or whether it is exempt is unclear. Md. Code Ann., Cts. & Jud. Proc. § 11-504(b)(5) provides exemption for up to \$6,000 worth of cash or other property.
17. Mississippi Exempts public benefits for disabled, blind, and the elderly. EITC is either not exempt or whether it is exempt is unclear.
18. Missouri Exempts local public assistance benefit. Case law says EITC not covered because it is not a "local" benefit. Head of household may claim exemption for up to \$1,250 plus \$350 per minor child or disabled dependent. EITC that qualifies as a married couple's entireties property would be exempt from creditors with claims against only one spouse.
19. Montana Assistance under chapter about administration of public assistance is not subject to any bankruptcy law. EITC is either not exempt or whether it is exempt is unclear.
20. Nebraska Exempts county and state assistance. State supreme court said EITC is a "means-tested public assistance benefit"

excluded from child support income calculations. EITC is either not exempt or whether it is exempt is unclear.

21. Nevada Statutory chapter about public welfare says assistance under it is not subject to the operation of any bankruptcy law. Case law says EITC is not exempt under this provision.
22. New York Exempts a local public assistance benefit. EITC is either not exempt or whether it is exempt is unclear. A debtor who claims no homestead exemption can claim up to \$2,500 in cash or yet-to-be-received tax refund (including federal refund).
23. North Carolina Allows wildcard exemption up to \$3,500 under certain circumstances that could be used to exempt EITC.
24. North Dakota Exempts aid to families with dependent children under statutory chapter; allows wildcard exemption of \$7,500 (in addition to other specific exemptions) to resident who claims no homestead exemption; allows head of family a wildcard exemption of \$5,000 (in addition to other specific exemptions); allows a single person a wildcard exemption of \$2,500.
25. Ohio Express exemption for EITC. Ohio Rev. Code Ann. § 2329.66 (2009).
26. Oklahoma Provides undue hardship exemption for part of earnings from personal services necessary for maintenance of family or other dependents. Case law says this covers EITC. Other exemptions held not to cover EITC.
27. Oregon Express exemption for EITC. Or. Rev. Stat. Ann. § 18.345(1)(n) (West 2009).
28. South Carolina Exempts a local public assistance benefit. EITC is either not exempt or whether it is exempt is unclear.
29. South Dakota Statutory chapter about temporary assistance for needy families exempts assistance provided under it. EITC is either not exempt or whether it is exempt is unclear. Provides

wildcard exemption for personal property, but might be needed for vehicles, furnishings, and other personal property, as well as EITC.

30. Tennessee Exempts a local public assistance benefit. EITC is either not exempt or whether it is exempt is unclear. Statutory chapter on programs and services for children says assistance under it is not subject to any bankruptcy law. Tennessee has a wildcard exemption for up to \$4,000 that can be used to exempt EITC. Tenn. Code Ann. § 26-2-103 (West 2009).
31. Utah Statutory chapter on workforce services says public assistance provided under it is not subject to any bankruptcy law.
32. Virginia Provides wildcard exemption that might protect large EITC payment, depending on value of homestead exemption debtor claims.
33. West Virginia Exempts a local public assistance benefit. EITC is either not exempt or whether it is exempt is unclear.
34. Wyoming Statutory chapter exempts public assistance and social services provided under it. Case law says EITC is not exempt under that chapter.

II. Exemption of the Federal Earned Income Tax Credit in states that allow people who file for bankruptcy to choose under § 522(b) either the exemptions provided in § 522(d) (“the federal exemptions”) or the exemptions provided by state law (and other federal law).

A debtor who chooses the federal exemptions, as allowed by these 16 states, can claim a wildcard exemption for property worth up to \$1,075, plus up to \$10,125 of unused part of the exemption amount allowed for a residence. § 522(d)(1) & (5). (These dollar amounts may be adjusted on April 1, 2010).

There have apparently been almost no reported decisions in these states about exempting the EITC under § 522(d) or under state exemption laws.

States that have not opted out of the federal exemptions

1. Alaska
2. Arkansas
3. Connecticut
4. Hawaii
5. Massachusetts
6. Michigan
7. Minnesota
8. New Hampshire
9. New Jersey
10. New Mexico
11. Pennsylvania
12. Rhode Island
13. Texas
14. Vermont
15. Washington
16. Wisconsin

Case law says a debtor who chose the federal exemptions could not exempt the EITC under § 522(d)(10) as a “local public assistance benefit,” but a debtor who chose the state exemptions could exempt the EITC under a Minnesota statute as “relief based on need.”

SUMMARY OF TESTIMONY IN SUPPORT OF KANSAS SENATE BILL 363

House Judiciary Committee: March 11, 2010

My name is Paul Post. I have been a lawyer for over 35 years, and in private practice in Topeka since 1978. A significant percentage of my private practice involves representing persons and families filing for bankruptcy. I generally represent debtors rather than creditors. My bankruptcy practice for debtors is about evenly divided between filing Chapter 7 bankruptcies and Chapter 13 repayment plans.

As part of the bankruptcy process, debtors are required to list all of their assets, which includes income tax refunds which they expect to receive. The refunds also include the earned income credit. If a tax refund is received after the case is filed, the debtor is usually required to turn the tax refund over to the bankruptcy trustee, for distribution by the trustee to unsecured creditors. It is also possible for me to accept an income tax assignment to pay all or a portion of my attorney fees in connection with the case.

The amount of the income tax refund and earned income credit required to be turned over to the trustee varies depending on when the case is filed. If a bankruptcy is filed early in the year, but after the previous year's tax refund or earned income credit is received, then the trustee will only require turnover of that portion of the refund or EIC that was "earned" prior to the time that the case was filed. In other words, if a case is filed on April 1, which is one fourth of the way through the year, then one fourth of the tax refund or EIC must be turned over. As the year progresses, more or the refund or EIC must be turned over. If a bankruptcy is filed after the new year begins, but before the tax return is filed and the refund received, then all of the tax refund and EIC from the previous year is subject to turnover to the trustee.

A trustee has discretion to decline to accept a refund or the EIC. If the refund is small, then

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a trustee may allow the debtor to keep the refund, since there would not be a meaningful payment to unsecured creditors arising out of the refund. In my experience, if the refund is less than \$1,000.00, then the trustee may decline to administer the refund for the benefit of creditors. However, this is not always true, especially if there are other potential non-exempt assets which the debtor owns that may be required to be turned over.

Court decisions in the 1990's determined that the earned income credit was subject to turnover to the trustee. These court rulings which allow bankruptcy trustees to require turnover of the earned income credit are at cross-purposes with the national welfare assistance program, which has been described by Marilyn Harp in her testimony. The effect of these decisions is to remove the money from families who need the funds essentially to survive, and allow the money to be distributed to creditors. The question becomes whether it is fair result to redirect money away from low incomes families who need the funds for essential survival, and pay it to creditors.

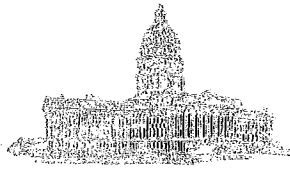
This question can be answered by looking how unsecured creditors receive money from the bankruptcy estate. The trustee is allowed to base a fee on 25% of the first \$5,000.00 of recovered assets in a Chapter 7 case, with a 10% fee charged for sums received thereafter on amounts up to \$50,000.00. A \$5,000.00 earned income credit refund would result in a fee of \$1,250.00 to the trustee. A Chapter 7 trustee may also charge additional expenses against the recovered asset. Most trustee's charge separately, and usually at an hourly rate, for actual legal work that benefits the estate, and this on top of the trustee fee previously discussed. The attorney fee charges usually add an additional \$500.00 to \$1,000.00 to the total bankruptcy estate expenses, which are deducted from the recovered asset. Again, using the hypothetical \$5,000.00 earned income credit, fees could easily exceed \$2,000.00, leaving the balance for unsecured creditors, who share *pro rata* in the net recovered assets based upon the amount of each claim compared to the entire recovery.

It is not uncommon for unsecured creditors to receive small distributions amounting to only a few dollars. Oftentimes, the original creditor has sold its claim to a collection agency or a company that buys claims in bankruptcy for cents on the dollar. Thus, the small amount of money paid to creditors in Chapter 7 may end up in the coffer of a speculator who has purchased another company's bankruptcy claim. This comes at the expenses of working parents who would otherwise use the earned income tax exemption to purchase needed goods and services in the local economy. Exempting the earned income credit would allow those low income families to keep this source of funds for the benefit of their children.



JOHN VRATIL
 SENATOR, ELEVENTH DISTRICT
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State of Kansas



Vice President
 Kansas Senate

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 CODE RECODIFICATION
 COMMISSION

Testimony Presented to
 House Judiciary Committee
 By Senator John Vratil
 March 11, 2010
 Concerning Senate Bill 363

Good afternoon! Thank you for the opportunity to appear before the House Judiciary Committee in support of Senate Bill (SB) 363. The language in SB 363 would protect the Earned Income Tax Credit by exempting it from a bankruptcy proceeding.

The Earned Income Tax Credit (EITC) is a critical tool for low income Kansans as they struggle to maintain and improve their lives. Under current law, the debtor can be forced to forfeit the EITC. Such forfeiture is counterproductive and further inhibits the debtor's ability to recover, making it more likely that the debtor will come to require state services.

I ask that you support SB 363.

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 jvratil@lathroppage.com

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 10851 MASTIN BLVD.
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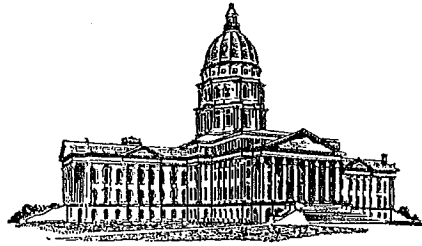
House Judiciary
 Date 3-11-10
 Attachment # 6



MARY ANN TORRENCE, ATTORNEY
REVISOR OF STATUTES

JAMES A. WILSON III, ATTORNEY
FIRST ASSISTANT REVISOR

GORDON L. SELF, ATTORNEY
FIRST ASSISTANT REVISOR



OFFICE OF REVISOR OF STATUTES
KANSAS LEGISLATURE

Legal Consultation—
Legislative Committees and Legislators
Legislative Bill Drafting
Legislative Committee Staff
Secretary—
Legislative Coordinating Council
Kansas Commission on
Interstate Cooperation
Kansas Statutes Annotated
Editing and Publication
Legislative Information System

MEMORANDUM

To: Chairman Kinzer and members of the House Committee on Judiciary
From: Matt Sterling, Assistant Revisor of Statutes
Date: March 11, 2010
Subject: House Bill No. 2714

HB 2714 would amend K.S.A. 2009 Supp. 26-507 and 26-508, concerning eminent domain. Under current law, the state cannot take private property without just compensation to the land owner. After the taking of the private property, appraisers are appointed to appraise the value of the land taken, the appraisers then survey the land and then testify to the valuation of the land at a public hearing and set the reward of compensation for the land. The plaintiff and the defendant would both then have an opportunity to appeal the appraisers award.

HB 2714 would prohibit the Department of Transportation from appealing the appraisers' award, but would not prevent any other party from appealing the appraisers' award. The prohibition on the Department of Transportation from appealing an appraisers' award would be applied retroactively to all proceedings pending on or commenced after January 1, 2009. The bill would take effect upon its publication in the Kansas Register.

STATE OF KANSAS

LARRY POWELL
REPRESENTATIVE, 117TH DISTRICT
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TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
CHAIRMAN: AGRICULTURE AND NATURAL
RESOURCES
VICE CHAIRMAN: AGRICULTURE AND NATURAL
RESOURCES BUDGET
MEMBER: TAXATION

March 11, 2010

Proponent testimony on behalf of **HB 2714**.

Chairman Kinzer and members of the Judiciary Committee, thank you for having a hearing on **HB 2714**.

For full disclosure, I was not asked by any of the parties involved regarding these issues to introduce this Bill. I learned about the details after the eminent domain settlement and did not think it was appropriate for a government agency to go after landowners after distributing the award of the court appointed appraisers.

KDOT reports it is appealing amounts awarded under eminent domain procedures on a total of 14 tracts.

- KDOT negotiated with landowners for land needed for the US-50 project, but was unable to reach a settlement on these 14 tracts;
- KDOT then filed eminent domain action under KSA 26-501, et. seq.;
- The court appointed three disinterested residents of the county to value the property (KSA 26-504); and
- KDOT paid the amounts awarded into the district court (required under KSA 26-507) to be distributed to the landowners so KDOT could take possession of the property and begin construction.

I have with my testimony a chart indicating:

- Tract numbers;
- The amount originally offered;
- The condemnation award;
- In cases that have been settled since the original appeals, the settlement amount;
- Fees paid to experts and outside counsel through December 2009; and

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- The net return to the agency. The amount is calculated by subtracting the settlement amount, expert fees, and fees for outside counsel from the condemnation award. The agency reports a total net return of \$674,197.

I believe this is reprehensible for a state agency to sue landowners after a settlement. They had the choice of not settling and appealing the award. This is a tremendous burden on landowners to not have this settled and KDOT goes on with the project.

I have also included a memo from KDOT that shows their in-house attorney fee at \$1,160 which I thought was rather minimal.

In addition, I have included a time line on the actions by KDOT.

Thank you for your attention and I would be glad to stand for questions at the appropriate time.

Representative Larry Powell
District 117

KANSAS LEGISLATIVE RESEARCH DEPARTMENT

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February 16, 2010

To: Representative Larry Powell

Office No.: 149-S

From: Jill Shelley, Principal Analyst

Re: Estimate of In-House Attorney Costs

This memorandum follows up on information provided to you on February 3 regarding appeals of certain appraiser awards for land KDOT purchased for a project on US-50 near Garden City. You requested additional information regarding KDOT's in-house costs for attorneys.

KDOT has provided a copy of the spreadsheet sent with the original memorandum that includes an additional column showing amounts spent on in-house attorneys, a total of \$1,160. A copy of that spreadsheet is enclosed.

JS/mkl

Enclosure

Tract #	Name	Original Offer to Purchase	Condemnation Award	Settlement Amount	Expert Fees	Atty Fees and Costs	Net Return
3	[REDACTED]	\$54,375.00	\$181,333.21	\$100,000.00	\$ 9,800.00		\$ 71,533.21
5	[REDACTED]	\$173,155.00	\$560,491.00	\$300,000.00	\$ 7,500.00	\$ 17,202.73	\$ 235,788.27
7	[REDACTED]	\$22,000.00	\$223,920.00		\$ 10,300.00	\$ 31,127.95	
11	[REDACTED]	\$26,080.00	\$114,929.00	\$109,929.00			\$ 5,000.00
15	[REDACTED]	\$50,810.00	\$244,213.00	\$130,000.00	\$ 10,500.00	\$ 14,862.73	\$ 88,850.27
20	[REDACTED]	\$199,145.00	\$615,960.00		\$ 10,971.79	\$ 26,363.95	
22	[REDACTED]	\$188,540.00	\$402,706.00		\$ 13,240.88	\$ 17,321.13	
24	[REDACTED] ①	\$463,335.00	\$4,402,910.00		\$ 17,099.71	\$ 34,266.81	
29	[REDACTED]	\$89,415.00	\$331,825.32	\$190,000.00	\$ 16,500.00	\$ 15,002.73	\$ 110,322.59
34	[REDACTED]	\$631,725.00	\$1,363,000.00	\$1,200,000.00		\$ 297.00	\$ 162,703.00
44	[REDACTED] ①	\$19,200.00	\$645,875.00				
45	[REDACTED] ②	\$38,585.00	\$39,500.00				
47	[REDACTED] ②	\$3,060.00	\$71,775.00			\$ 22,653.73	
50	[REDACTED]	\$301,190.00	\$1,609,535.00				\$ 674,197.34

- ① consolidated - owned by related parties
- ② consolidated - owned by related parties

Time Line of Actions:

- August 23, 2007 - Presented offer letter from KDOT.
- August 6, 2008 - Filed eminent domain petition to take the land.
- December 11, 2008 - Received report from court appointed appraisers.
- January 6, 2009 - Motion was filed to distribute the award of the court appointed appraisers.
- Sometime prior to January 14, 2009, KDOT filed Notice to Sue.

March 11, 2010

This is a statement by Andrew Larson, Jr. in support of The House of Representatives Bill #2714.

My name is Andrew Larson, Jr. and I reside at 3510 N Little Lowe Rd, Garden City, Ks. I am appearing on behalf of our family's farming interests which adjoin US Highway 50 on both sides, West of Garden City. The property was purchased in 1949 and has been farmed by us since that time until the present.

Construction commenced approximately 1 year ago to expand Highway 50 to a 4 Lane Road for a 7 mile segment West of Garden City. We, along with many others, through the procedure of condemnation, lost a portion of our property. At the time that the District Court Judge appointed 3 appraisers, the Ks Dept of Transportation and we agreed to abide by the values assigned to the property taken and the cost to cure damages incurred. Even before we received the award from the court, KDOT filed an appeal to take back an unknown portion of the award.

The main reason that the award of the court is considerably greater than KDOT's offer is that they showed a complete disregard for the Ks Statute that provides compensation for land owners when their direct access to a road is taken. In our case they are taking 5 points of direct access. Compounding the problem is the closing of a main county road intersection which will completely deny us the ability to access a 150 acre tract of irrigated land with the majority of our modern farm implements. The court appointed appraisers recognized these problems.

KDOT also failed to acknowledge that after the project is completed, our farming operations cost will greatly increase due to accessibility issues. For example, currently to go from 1 field to another is a 300ft and 2 minute trip. After completion, it will be 6 miles and 30 minutes just for small equipment and no access for large equipment. This greatly devalues the land.

Twenty-five years ago we declined an offer that was double the latest KDOT offer and now with a 1.5 mile frontage with no access, development potential is gone forever.

Some property was taken and settlements were made with landowners prior to condemnation procedures being set in motion. Other property was acquired at the value set by the court appointed appraisers. In some cases it appears that the settlement figures are much greater than market price or the cost to cure damages. The logic applied in those cases seems to be illogical.

Our time and expense to defend against KDOT's court action to set aside the court appointed appraiser's award is a great burden for us. KDOT's propensity to spend taxpayer dollars in matters such as this is overwhelming. Passage of Bill 2714 would certainly give protection to the individual citizen from the insensitive orange giant.

House Judiciary

Date 3-11-10

Attachment # 9

Bill #2714

Dear Chairman Kinzer and House Judiciary Committee,

Thank you for allowing me to speak with you today. My name is Ty Brookover and I represent Brookover Land Enterprises and Brookover Feedyards, Inc. in Garden City. I am a 3rd generation cattle feeder and our company has been feeding cattle commercially since 1951.

I am a proponent of House Bill #2714

We have been working through the KDOT right of way acquisition process for two and one half years, while doing our best to continue our daily business. During this process, we have spent a great deal of time and money working with attorneys and experts in response to this on going process. We would have appreciated the opportunity to sit down with KDOT to attempt to work out a fair settlement. We have yet to be given that opportunity.

The system today costs the landowner a great deal of time and money if the condemnation process goes to trial

- KDOT has an advantage over the landowner as they have a vast amount of resources which include time, money and staff as compared to a landowner. They are professionals at condemnation proceedings.

- KDOT hired attorneys and appraisers before condemnation and also after taking. Landowners have to spend a great deal of time and money on legal representation to simply keep up with the amount of paperwork, meetings, etc. that are involved in this process.

The system today does not motivate KDOT to work with the landowner

- During our process with KDOT, we were never given the opportunity to work towards a settlement amount. KDOT has never sat down with us prior to condemnation or after the appeals process to listen to our concerns nor have they given us an opportunity to negotiate.

- Upon completion of the 3 court appointed appraisers, that KDOT approved, we were forced to expend money to prepare for a trial, with no assurance on the amount of money we would ultimately be awarded. In addition, if the amount awarded by a jury is less than awarded by the appraisers, we will be forced to pay that difference back to the State with interest. The jury will consist of people with much less experience in determining the fair value of real estate as compared to the KDOT approved and court appointed appraisers.

- This Bill would help level the playing field as well as relieve an enormous burden on the State court system.

House Judiciary

Date 3-11-10

Attachment # 10

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*LICENSED IN KS & MO

OF COUNSEL
BOB W. STOREY
JEFFREY W. JONES
LARRY E. GREGG
(1948-1999)

TESTIMONY ON HB 2714

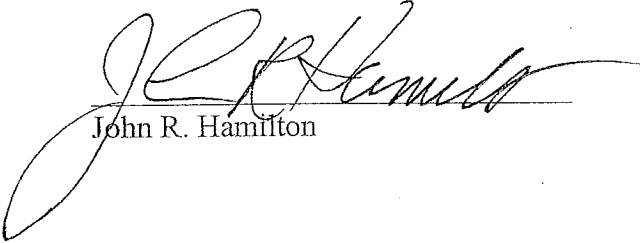
Chairman Kinzer and Members of the House Judiciary Committee:

My name is John Hamilton. I represent property owners in eminent domain cases.

I support House Bill 2714, which amends K.S.A. 26-508 to prohibit KDOT from appealing the awards of appraisers who live and reside in the community. This amendment will prevent abusive tactics by KDOT appealing almost every appraisers' award that is significantly increased above KDOT's estimate of value. KDOT tends to obtain low-ball appraisers lower than the approved appraisals upon which the original offers are made before condemnation.

In Finney County, KDOT appealed almost every award on Highway 50 and many landowners have settled by giving back substantial sums of money rather than facing the uncertainty and expense of a jury trial. A landowner can easily spend \$15,000 to \$20,000 for expert witnesses, depositions and exhibits in defending an appeal from the appraisers' award. This expense is in addition to substantial attorney fees.

I respectfully suggest that House Bill 2714 will level the playing field and prevent abusive tactics by the Kansas Department of Transportation.


John R. Hamilton

House Judiciary

Date 3-11-10

Attachment # 11

Chairman and Members of the House Judiciary Committee

My name is Tim Miller; I represent Six-M Farms Inc.

I come before you this afternoon in support of House Bill 2714.

As a land owner along Highway 50 project in Finney County as well as a board member of a Finney Co. Drainage district, I am familiar with condemnation uses and procedures.

In hopes of not wasting your time I will not rehash the validity or design of the Highway 50 project in Finney Co.

I first want to address the acquisition process on the Hwy. 50 project. With the exception of a few businesses and a residence in which the State was Very generous in their offers almost all the owners along the project couldn't even come close to a settlement and it didn't seem to matter how much documentation was offered. Even though most of the State employees were very cordial they were obviously ignorant of the local economy and factors affecting use and value. My brother Tom who is the tenant on our property along the project as well as a land owner next to us asked the State employee who came to talk to him about settlement, why they were giving the businesses along the project such large settlements and it seemed they were trying to walk on him and to quote Tom."She said off the record, you are just a farmer". That apparently engrained attitude set up the conflict that lead most of the owners to reject the offers the State made and move the process to the next stage. The court appointed appraisers who are bright, honorable and very knowledgeable men did their jobs to the best of their abilities and came up with their findings. Most of the owners I know had resigned themselves to accept whatever the appraiser's findings were and even though there were rumors all over the place we really didn't know how the cards would fall. After the findings were in, most of the owners were content that they had been treated fairly, only to find out on the last day possible that the State appealed virtually all the findings.

Many of the owners, realizing it would take tens of thousands of dollars to defend themselves against a government which in relative terms has unlimited resources added insult to injury by further disrupting their lives, consequently they succumbed to what is perceived as "blackmail" and gave back a large part of the award demanded by the State, all in an effort to just stop the pain and get back to their normal lives. As most of you know, all too often the amount of resources thrown at a lawsuit directly impacts the results.

This bill will help to stop some of the abuses of power by the State to at will pick winners and losers in the condemnation procedure. It is currently not applied fairly or uniformly rather at the whim of some bureaucrat or their attorney.

This problem was even more evident after the State announced its appeals. There were few awards not appealed. One of these was my brother's. There were no special circumstances, and if the same values were applied to ours we wouldn't be here, the total would have been in the ball park of our award.

The court appointed appraisers said they used the same criteria for all the properties, apparently the State thinks differently, as they have shown, they will treat some property owners well and some badly.

I could go on about the State taking 90% of our access to one property and offering no compensation whatsoever or that after much questioning the State admitted that the reason they were taking most of the access along the project wasn't for current safety needs. Rather they projected that in 20 years or so the area would be developed (completely contrary to their valuations) and in 20 years or so it may be necessary to start closing access points. They didn't want to expend the political capital at that time it would be necessary to close them for safety reasons. After all, it is so easy to walk over us right now (those are my words). In short, the current law allows the State to take your property, tell you what they think is fair and if you don't like it, drag you through the legal system costing many tens of thousands of dollars. If you don't have that kind of money to defend yourself, then you must live with whatever some bureaucrat hundreds of miles away says.

Thank you for your time.

House Judiciary

Date 3-11-10

Attachment # 12

March 11, 2010

This is a statement by Brian Shaw in support of **HB 2714**.

I am the owner of the Crazy House and C bar H Stores which are located southwest of the Anderson Road and Highway 50 intersection near Garden City.

The Crazy House is a clothing store specializing in western wear and horsemanship gear. C bar H is a home, auto and farm supply store and adjoins the Crazy House.

Prior to constructing our building, a written agreement with Kansas Department of Transportation (KDOT) was drawn up to insure direct access to our business from Highway 50. We had to pay for the construction of that access with our own money. Now, KDOT is taking away all of our access and did not want to compensate us for having to move our business. The Court appointed appraisers recognized that we would have to move and determined our condemnation award on that basis. In order to avoid closing the two stores for six months to a year, we began construction on a new facility approximately seven months ago. KDOT has appealed the court's condemnation award and has not revealed to us the amount they are seeking to be returned.

So, in closing, our opinion is that we were faced with two choices; close our businesses and wait for the outcome of a trial, which probably would result in a permanent closing of the businesses, or proceed with the relocation process.

The continuation of our 50 year old, three generation business depends heavily on the condemnation award to relocate our building.

The passage of **HB 2714** would certainly level the playing field for my home team.

Written Testimony

Brian Shaw, Owner

Crazy House and C bar H Stores

House Judiciary

Date 3-11-10

Attachment # 13

**TESTIMONY BEFORE
HOUSE JUDICIARY COMMITTEE**

**REGARDING HOUSE BILL 2714
RELATING TO EMINENT DOMAIN PROCEDURE**

March 11, 2010

Mr. Chairman and Committee Members:

I am Jerry Younger, Deputy Secretary for Engineering and State Transportation Engineer at the Kansas Department of Transportation. HB 2714 would amend current eminent domain law to prohibit the Department of Transportation through the Secretary of Transportation, hereinafter referred to as KDOT, from appealing appraisers' awards to the district court. The exclusion would be applied retroactively and apply to all eminent domain proceedings pending on or commenced after January 1, 2009.

Many governmental entities and utilities have the power of eminent domain under Kansas law including state agencies, cities, airport authorities, etc. All condemning authorities follow the procedures set out in K.S.A. 26-501 et seq. This process is used when governmental agencies are unable to reach an acquisition agreement with the owner of property needed for public purposes.

Prior to engaging in the eminent domain procedures KDOT is required to first have the property to be acquired appraised and entertain good faith negotiations with property owners to attempt to reach a negotiated purchase. It is only when that process fails that eminent domain actions are commenced. The focus of that process is to determine the difference between the fair market value of the landowner's property before the taking by the governmental entity, and the fair market value of the portion of the property remaining, if any, in the hands of the landowner after the taking. This difference is the just compensation to be paid by the governmental entity to the landowner.

During the first hearing in the statutory process, the court appoints three disinterested residents of the county in which the eminent domain proceeding is pending to serve as court appointed appraisers. Only two of the three appointed "appraisers" must have "experience in the valuation of real estate" and that experience does not have to be appraisal experience. It can be experience as a real estate agent, banker, insurance agent, auctioneer, or just experience privately buying and selling real estate, etc. The court provides the appraisers with a set of instructions and the appraisers hold a hearing which is informal and not subject to the rules of evidence. Property owners are allowed at that hearing to give whatever assessment of value they desire.

No judge or jury reviews or consents to the award given by the appraisers. The only check on the work of these appraisers is that any landowner or condemning authority may appeal the award and have just compensation for the taking determined by a jury. At the conclusion of this administrative process, and before any appeal is decided, the condemning authority must pay the awards to the Clerk of the District Court for distribution to the landowners in order to take possession of the property and begin construction.

Under existing law, if a governmental entity files an appeal of the appraisers' award and the jury finds the amount owed to the landowner to be greater than or equal to the amount determined by the court appointed appraisers, then the governmental entity is required to pay all of the landowner's costs of the appeal including their attorney's fees. This provision increases the risk to governmental entities of taking an appeal and, as a result significantly limits the appeals taken by governmental entities.

KDOT very carefully analyzes the cases where court appointed appraisers' awards exceed the KDOT appraisal amount on the tract of land before making the decision to appeal those awards. In addition to the potential exposure to an attorney's fees and costs award, KDOT looks at the dollar difference between the award and the agency's appraisal; the percentage of the increase; legal issues presented by the situation including whether adverse travel, severance, or police power issues are raised by the situation; whether there are related issues outstanding with the landowner such as relocation assistance payments; the jury appeal of KDOT's position; and the potential for bad case law to be created if the legal issues on appeal are decided adversely to KDOT.

HB 2714 would continue to allow all condemning authorities, except KDOT, and all landowners to appeal appraisers' awards. If enacted the result would be a situation where whether a landowner may be subjected to an appeal by the condemning authority is dependent on the identity of the condemning authority. Landowner "X" who is condemned by KDOT will not be subject to an appeal and landowner "Y" who is condemned by any other condemnor is subject to a possibility of having the appraisers' award for their property be appealed by the condemnor. KDOT administers many local projects and often handles the property acquisition for those projects. If enacted, this bill will result in local units of government having to do that work, in order to enjoy the benefit of having appeal rights. Many local units of government are ill equipped to handle these property acquisition matters.

If enacted, this bill would leave KDOT with no tools necessary to be a good steward of public funds with respect to right of way acquisition. KDOT would have no recourse but to pay the award or abandon the project in cases where the court appointed appraisers award landowners more than the property is worth or where the appraisers misinterpret or disregard the instructions of the court. Further, the bill will effectively remove KDOT's ability to challenge the instructions given by the Court to the appointed appraisers as well since the only avenue for doing so under existing law is through the appeal of the court appointed appraisers' award. This leaves trial judges free to instruct in ways not in conformity with statutory requirements or case law applicable to governmental takings in general when KDOT is the condemnor and there will be no recourse to appeal within the context of the condemnation action.

The dollar effect of this legislation on KDOT is difficult to determine due to the many variables that would have an impact on that calculation. The variables that would impact the figure would include, among others:

- How much land is needed in any given year to construct projects;
- How many of the needed tracts can be acquired through negotiation;
- The extent to which the awards given by the court appointed appraisers follow the instructions given to them by the court;
- The extent to which the trial court judge instructs the appraisers according to established law; and
- The extent to which the appraisers appointed by the court understand and apply the instructions given by the court.

During calendar years 2008 and 2009, KDOT filed appeals on only 19 tracts of land out of the hundreds of tracts which were acquired during that time period for KDOT projects. The amounts awarded by the court appointed appraisers on those 19 tracts were 436% of, or over 4 times the amounts supported by the KDOT appraisals on the tracts. The difference in dollars between the court awards and the KDOT appraisals was just under \$10,000,000. This increase in compensation on those tracts would have increased the project costs by the nearly \$10,000,000 difference, reducing the funds available for other projects.

The impact would not end there, however. There are a number of other likely impacts if this legislation were passed. First, KDOT, recognizing that it will have no recourse from excessive appraisers awards, will be placed in a position where it will have to hedge its bets and be willing to negotiate higher settlements overall to avoid having to go through a process where the values are taken completely out of its control without recourse. Landowner lawyers will understand immediately that they can hold out for more in negotiations knowing KDOT will not want to roll the dice with the court appointed appraisers. This will increase all negotiated settlements (on all tracts, not just the ones that would have gone to appeal under the current system) by some unknown amount. Alternatively, if the demands are just too high, this will make reaching negotiated settlements more difficult and more tracts will go to condemnation, increasing the cost of those proceedings.

A second, and perhaps more concerning impact resulting from passage of this legislation will be that in KDOT condemnations, the court appointed appraisers will be operating completely unchecked by any review on the awards they give to landowners. There is no review of these awards by the court so the three court appointed appraisers will be the final determiner of value to be paid.

Finally, the language of this bill makes it retroactive to cases that were pending or commenced after January 1, 2009. Of the 19 cases appealed by KDOT during 2008 and 2009, all were pending as of that date or filed after that date. Of those cases one has been tried to a jury and eight have been settled. The combined return to KDOT on these nine cases is around \$800,000. It appears that KDOT would have to return those sums to the landowners from whom they were collected after trials or negotiated settlements. One of those settlements also resolved a

companion relocation assistance appeal which would be reinstated if the settlement is voided and additional relocation benefits could be paid to that owner as well.

Over time as the chilling effect of this legislation on right of way negotiations plays out, and depending on the amount of right of way acquisition needed for projects, there may be the need for additional right of way staff to deal with the more protracted negotiations that are an inevitable result of removing one of the checks and balances in the system to the benefit of one side of the negotiations and not the other. The cost of this additional staff will be above and beyond the increased payments to landowners.

KDOT strongly opposes this legislation. The current system has a good set of checks and balances in it already which protect the landowners from overreaching by governmental entities in the eminent domain process. It has been in place for a very long time and has served both sides in the process very well. If landowners are aggrieved in the process and their position turns out to be correct on the value of their property, the process makes them whole by affirming or increasing the award of damages as well as requiring the condemning authority to pay their costs.

Thank you for allowing me to testify on HB 2714. I will gladly stand for questions at the appropriate time.



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TO: Representative Lance Kinzer,
Chair, House Judiciary Committee

From: Jayme Morris-Hardeman, Juvenile Offender and Child in Need of Care
Committee, Kansas Judicial Council

Re: Testimony in support of 2010 Senate Bill 460

Date: Thursday, March 11, 2010

TESTIMONY OF THE JUDICIAL COUNCIL JUVENILE OFFENDER/CHILD IN NEED OF CARE ADVISORY COMMITTEE ON 2010 SENATE BILL 460

In 2009, while reviewing aspects of the Revised Kansas Code for Care of Children (CINC code), the Revised Kansas Juvenile Justice Code (JO code) and 2008 HB 2820, the Juvenile Offender / Child in Need of Care Advisory Committee (JO/CINC committee) determined that certain child in need of care orders or juvenile offender orders should take priority over similar orders in other domestic cases such as divorce, paternity, protection from abuse, and guardianship or conservatorship. This has been the practice generally, but it has not been clarified by statute. The JO/CINC committee had also been asked to review provisions of 2007 HB 2527 relating to confidentiality of reports and records of a child in need of care. In

addition, in June, 2008, the Kansas Supreme Court issued its opinion in *In re L.M.*, 186 P.3d 164 (Kan 2008) and held that juveniles 14 years of age or older who are charged with a felony have the right to a jury trial under the Kansas Constitution. Therefore, the JO/CINC committee submitted legislation to the 2009 Legislature to address these issues. That proposed legislation became 2009 Senate Bill 88.

SB 88 received a hearing on two separate dates in the Senate Judiciary Committee. In the first hearing, the Department of Social and Rehabilitation Services (S.R.S.) indicated that there were some child support enforcement issues that had apparently been overlooked during drafting of the bill. The hearing on the bill was subsequently continued to a later date so that the JO/CINC committee and S.R.S. could get together and work out the issues. By the second hearing on the bill, the child support enforcement issues had been addressed and the necessary balloon amendments had been introduced. However, the Kansas Coalition against Sexual and Domestic Violence (KCS DV) testified in opposition to section 26 of the bill which dealt with the authority of the court to remove a child from the home in a protection from abuse case. Although the JO/CINC committee eventually agreed that section 26 could be stricken from the bill if it would allow the bill to move forward, the Senate Judiciary Committee set the bill aside for interim study. Unfortunately, the bill was not approved for study after the 2009 session.

Thereafter, the JO/CINC committee continued work on the proposed legislation to address issues that were raised by S.R.S. and the KCS DV during the 2009 legislative session and introduced 2010 SB 460 this session. SB 460 was in essence a redraft of the CINC portions of 2009 SB 88 and included all of the balloon amendments proposed in 2009 and those that were going to be proposed in 2010 as a result of the JO/CINC committee's review.

Just prior to the Senate Judiciary hearing on the bill in February, 2010, the JO/CINC committee was informed that the KCSDV and the Juvenile Justice Authority (J.J.A) in conjunction with S.R.S. intended to propose balloon amendments to SB 460. Judge Shepherd, the JO/CINC committee and Judicial Council representative testifying on the bill, reviewed and agreed with the J.J.A./S.R.S. proposal and worked with Joyce Grover of KCSDV to come up with agreed upon language for KCSDV's proposal. The Senate Committee subsequently approved the bill including the balloon amendment proposed by the KCSDV; however, it did not include the amendment proposed by J.J.A./S.R.S.. The result is the bill you have before you now.

The Judicial Council supports SB 460 in its current form but it would like to propose the attached balloon amendment to correct a typographical error with regard to a statutory reference on page 44, line 33.

COMMITTEE'S COMMENTS TO PROPOSED CINC LEGISLATION – as amended by Senate Committee

- New Section 1: Pertains to priority of custody and parenting time orders issued in a CINC or JO proceeding over those issued in Adoption and Relinquishment proceedings and Guardians and Conservators proceedings while the CINC or JO case is pending.
- Section 2: Amends K.S.A. 38-1116 of the Kansas parentage act to include similar priority language as that in new section 1. Subsection (d) pertains to priority of custody and parenting time orders issued in a CINC or JO proceeding over those issued in parentage proceedings while the CINC or JO case is pending. Subsection (e) allows the transfer of CINC orders back into a parentage case as appropriate at the close of the CINC case.
- Section 3: Amends K.S.A. 38-1121 to give the court in parentage actions the option of placing a child or children in nonparental residency if the court finds that there is probable cause to believe the child is a child in need of care or that neither parent is fit to have residency. The proposed language is almost identical to the nonparental custody provisions in the divorce code. The only difference is in the sentence beginning in line 37, page 4 of this report where the word "disposition" has been

replaced with “custody, residency or parenting time order” and the words “shall be binding and shall supersede” have been replaced with “take precedence over any custody, residency or parenting time”.

- Section 4: Amends K.S.A. 38-2201 to clarify that orders issued pursuant to the CINC code shall take precedence over any order under the parentage, adoption and relinquishment, guardians and conservators, divorce, protection from abuse, and protection from stalking act until jurisdiction under the CINC code is terminated.
- Section 5: Amends K.S.A. 2008 Supp. 38-2202 to include a definition of “civil custody case”.
- Section 6: Amends K.S.A. 2008 Supp. 38-2203 to include a section clarifying that a court’s order affecting a child’s custody, residency, parenting time and visitation that is issued in a proceeding under the CINC code shall take precedence over such orders in a civil custody case (as defined by the amendment in Section 5), a proceeding under the protection from abuse act or a comparable case in another jurisdiction, except as provided by the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA).
- Section 7: Amends K.S.A. 38-2208 to correct an error and thereby clarify that in any case referred to a citizen review board, the court shall conduct a hearing at least annually.
- Section 8: Amends K.S.A. 38-2212 to include the Committee’s revised amendments to 2007 HB 2527 relating to confidentiality of reports and records of a child in need of care. The proposed amendments would restrict disclosure of information from confidential reports or records relating to a child in need of care to instances where the individual or their representative has given written explicit consent unless the investigation or the filing of a petition has become public knowledge. In such instance, the authorized disclosure would be restricted to confirmation of procedural details relating to the handling of the case by professionals. Other technical amendments are suggested in subsection (f) and pertain to removing reference to “department of social and rehabilitation services” and replacing it with “secretary” to maintain consistency, and reorganizing the content of the section for clarity.
- Sections 9 and 10: Amend K.S.A. 38-2242 and 38-2243 to address the federal requirement that the judicial determination of contrary to the welfare of the child be made in the first court order authorizing out of home placement. The federal law also requires a finding that reasonable efforts were made or were unnecessary due to an emergency which threatens the safety of the child shortly after loss of parental custody. The proposed amendments are intended to reflect that orders subsequent to the initial removal order need not continue to make the findings. The reasonable efforts requirement subsequent to the initial order is addressed in K.S.A. 38-2264 and requires that, if the child continues in foster care for 12 months, the court must

determine whether reasonable efforts are being made to provide a permanent family for the child.

- Section 11: Amends K.S.A. 2008 Supp. 38-2251 to clarify the time frame within which a final adjudication or dismissal of a CINC proceeding must be completed.
- Section 12: Amends K.S.A. 38-2255 to make a few technical changes for clarity and consistency, to remove subparagraph (d)(1)(B) as the Committee determined that the provision only served to cause confusion and it was not necessary, and to address the same issue as sections 9 and 10 above.
- Section 13: Amends K.S.A. 2008 Supp 38-2258 to specify that written notice of any change in placement of a child shall also be given to the petitioner, the attorney for the parents, if any, the child's court appointed special advocate and any other party or interested party in addition to the court, each parent, foster parent or custodian, and the child as currently listed in the statute. Subsections (b) and (c) are also amended to maintain consistency with the changes in subsection (a). In addition, the additional sentence is proposed to allow the court to expedite a change in placement if there isn't any request for a hearing within the 10 days after notice is received.
- Section 14: Amends K.S.A. 2008 Supp. 38-2264 to clarify issues surrounding permanency as was intended with 2008 HB 2820 and to make the language in subsection (c) consistent with that in K.S.A. 38-2269(b)(7).
- Section 15: Amends K.S.A. 38-2272 to make a correction pertaining to acknowledgment of consents to appointment of a permanent custodian which was apparently overlooked in the clean-up legislation of 2008 SB 435. This amendment makes the process consistent with consents to adoption.
- Section 16: Amends K.S.A. 38-2273 to address confusion about permanency hearing time frames when a CINC case is on appeal.
- Section 17: Amends K.S.A. 38-2279 to address issues surrounding the modification of child support orders prior to the closing of a CINC case.
- Section 18: Amends K.S.A. 2008 Supp. 38-2304 to indicate that a court's order affecting a child's custody, residency, parenting time and visitation issued in a proceeding under the JO code shall take precedence over such orders in a proceeding under the parentage, divorce, protection from abuse, adoption and relinquishment, guardians or conservators acts, or comparable cases in another jurisdiction, except as provided by the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA).
- Section 19: Amends K.S.A. 38-2305 to clarify appropriate venue in cases involving a juvenile.

- Section 20: Amends K.S.A. 38-2361 to ensure that a permanency hearing is completed when a juvenile offender is released from a juvenile correctional facility.
- Section 21: Amends K.S.A. 2008 Supp. 60-1610 in subparagraph (a)(1) to make the statute consistent with UIFSA (IV-D interstate mandate). Subsection (a)(6) is amended to clarify that custody and parenting time orders issued in a CINC proceeding or a JO proceeding take precedence over those issued in a divorce proceeding. Subparagraph (3)(E) is added to allow the transfer of CINC orders back into a divorce case as appropriate at the close of the CINC case.
- Section 22: Amends K.S.A. 60-3107 to add language to subsection (c) to clarify that custody and parenting time orders issued in a CINC proceeding or a JO proceeding take precedence over similar orders involving the same child issued in a protection from abuse proceeding.

1 ciate the bond between the child and the other parent and to allow for a
2 continuing relationship between the child and the other parent;

3 (vii) evidence of spousal abuse;

4 (viii) whether a parent is subject to the registration requirements of
5 the Kansas offender registration act, K.S.A. 22-4901, et seq., and amend-
6 ments thereto, or any similar act in any other state, or under military or
7 federal law;

8 (ix) whether a parent has been convicted of abuse of a child, K.S.A.
9 21-3609, and amendments thereto;

10 (x) whether a parent is residing with an individual who is subject to
11 registration requirements of the Kansas offender registration act, K.S.A.
12 22-4901, et seq., and amendments thereto, or any similar act in any other
13 state, or under military or federal law; and

14 (xi) whether a parent is residing with an individual who has been
15 convicted of abuse of a child, K.S.A. 21-3609, and amendments thereto.

16 (C) Neither parent shall be considered to have a vested interest in
17 the custody or residency of any child as against the other parent, regard-
18 less of the age of the child, and there shall be no presumption that it is
19 in the best interests of any infant or young child to give custody or resi-
20 dency to the mother.

21 (D) There shall be a rebuttable presumption that it is not in the best
22 interest of the child to have custody or residency granted to a parent who:

23 (i) Is residing with an individual who is subject to registration require-
24 ments of the Kansas offender registration act, K.S.A. 22-4901, et seq.,
25 and amendments thereto, or any similar act in any other state, or under
26 military or federal law; or

27 (ii) is residing with an individual who has been convicted of abuse of
28 a child, K.S.A. 21-3609, and amendments thereto.

29 (E) *If a court of competent jurisdiction within this state has entered
30 an order pursuant to the revised Kansas code for care of children regard-
31 ing custody of a child or children who are involved in a proceeding filed
32 pursuant to this section, and such court has determined pursuant to sub-
33 section (i)(2) of K.S.A. 38-226, and amendments thereto, that the orders
34 in that case shall become the custody orders in the divorce case, such
35 court shall file a certified copy of the orders with the civil case number
36 in the caption and then close the case under the revised Kansas code for
37 care of children. Such orders shall be binding on the parties, unless mod-
38 ified based on a material change in circumstances, even if such courts
39 have different venues.*

40 (4) *Types of legal custodial arrangements.* Subject to the provisions
41 of this article, the court may make any order relating to custodial arrange-
42 ments which is in the best interests of the child. The order shall provide
43 one of the following legal custody arrangements, in the order of

Reference should be to K.S.A. 38-2264.
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