Approved: 4-7-93
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

The meeting was called to order by Chairman, Representative Michael R. O' Neal at 3:30 p.m. on March 22, 1993 in room 313-S of the Statehouse.

All members were present except:

Representative Rand Rock - Excused

Committee staff present:

Jerry Donaldson, Legislative Research
Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the Committee:

Janet Stubbs, on behalf of M.S. Mitchell, Kansas Property Rights Coalition
Paul Fleener, Kansas Farm Bureau
Mike Beam, Kansas Livestock Association
Karen France, Kansas Association of Realtors
Art Brown, Kansas Lumbermen's Association
Bill Craven, Kansas Sierra Club
Darrell Montei, Kansas Wildlife & Parks

Committee minutes for March 15, 16 & 17 were distributed.

SB 339 - Court-appointed special advocates for children in divorce cases.

Representative Garner made a motion to table SB 339. Representative Carmody seconded the motion. The motion carried.

SB 338 - Court-appointed special advocates for juvenile offenders.

Representative Carmody made a motion to table SB 338. Representative Garner seconded the motion. The motion carried.

SB 365 - Amendment to the revised Uniform Reciprocal Enforcement of Support Act.

Representative Carmody made a motion to report SB 365 favorably for passage. Representative Macy seconded the motion. The motion carried.

HB 2527 - Child support enforcement, medical support orders, coverage under health benefit plans.

Representative Carmody explained the balloon handed out to the committee. He stated that the balloon takes into consideration several comments that conferees made. New section 1 is an attempt to say the court may issue a medical support order for a child against either obligor or obligee. He suggested that the committee might want to use the word "party" instead of "obligor or obligee". The balloon deletes new section 3. (Attachment #1)

Representative Pauls made the comment that the committee might want to use the word "parent" instead of "obligor or obligee".

Representative Wagnon asked to have subsection (b) left in the bill.

Representative Everhart questioned if it was appropriate language to leave in when all the references to illegitimate have been removed.

Minutes of the House Committee on Judiciary, Room 313-S, Statehouse, at 3:30 p.m. on March 22, 1993.

Representative Carmody made a motion to adopt the balloon with the following additions: to use the word "parent" instead of the words "obligor or obligee" and retain subsection (b) and renumber. Representative Wagnon seconded the motion. The motion carried.

Representative Garner made a substitute motion to amend the appropriate statutes to say that if a child is born out of a Chapter 35 crime then the victim is not liable to pay child support. Representative Macy seconded the motion.

Representative Carmody stated that this is a major policy decision and there need to be hearings on this before the committee addresses the issue.

The motion failed 7-13.

Representative Macy made a motion to amend in a portion of HB 2184 which deals with the contempt stage of a hearing. It would be discretionary for the judge to place restrictions on driving privileges for a non-paying obligor. Representative Garner seconded the motion. The motion carried.

Representative Carmody made a motion to report HB 2527 favorably for passage as amended. Representative Macy seconded the motion. The motion carried.

SB 121 - Standards for trust investments by fiduciaries.

Representative Pauls made a motion to report SB 121 favorably for passage. Representative Carmody seconded the motion.

Representative Pauls handed out an balloon amendment which would strike subsection (3) and renumber. This language would encourage the court to put a stamp of approval on certain actions. (Attachment #2)

Representative Pauls made a substitute motion to amend the balloon into the bill. Representative Carmody seconded the motion. The motion carried.

Representative Pauls renewed her motion to report SB 121 favorably for passage as amended. Representative Carmody seconded the motion. The motion carried.

SB 125 - Liability of officers and directors of certain financial institutions.

Representative Adkins made a motion to report SB 125 favorably for passage. Representative Mays seconded the motion.

Chairman O'Neal asked the committee if there was any interest in deleting the Senate amendments. No interest was shown. Interest was expressed in making the act retroactive. Proposed language was handed out at the hearing regarding Texas and Oklahoma's retroactive language. These provisions provide for procedural retroactivity.

Representative Heinemann made a substitute motion to add the Texas retroactive clause and include a severability clause. Representative Carmody seconded the motion. The motion carried 11-9.

Representative Adkins made a motion to strike the language for an exception of executive officers and return to the original language of the bill. Representative Robinett seconded the motion. The motion failed.

Representative Carmody made a motion to report SB 125 favorably for passage as amended. Representative Heinemann seconded the motion. The motion carried.

SB 355 - Professional responsibility of CPA's in providing professional services to financial institutions.

Representative Robinett made a motion to report SB 355 favorably for passage. Representative Adkins seconded the motion.

Chairman O'Neal asked if there was any interest in the CPA's proposal of adding a new section 2 that would add that this act is declaratory of and codifies existing Kansas law and policy and a new section 3 that would say that this act shall apply to all past, present and future claims or causes of action based on Kansas state law seeking to recover money damages from any person or entity covered within the scope of section 1 which are filed in any court of competent jurisdiction.

Representative Heinemann made a substitute motion to adopt the proposed amendment. Representative Bradley seconded the motion. The motion carried.

Representative Heinemann made a motion to have this effective upon publication of the Kansas Register. Representative Adkins seconded the motion. The motion carried.

Representative Macy made a motion to add a severability clause. Representative Heinemann seconded the motion. The motion carried.

Representative Heinemann made a motion to report SB 355 favorably for passage as amended. Representative Adkins seconded the motion. The motion carried.

Hearings on SB 293 were opened regarding private property rights protection.

Janet Stubbs, on behalf of M.S. Mitchell, Kansas Property Rights Coalition, appeared before the committee in support of the bill. She summarized Mitchell's testimony which stated that SB 293 was patterned after Arizona law. (Attachment #3)

Paul Fleener, Kansas Farm Bureau, appeared before the committee in support of the bill and briefed the committee on the bill. He stated that the proposed bill defines a "constitutional taking" or "taking"; defines a "governmental action" or "action"; requires the Attorney General to adopt guidelines (section 2) to assist state agencies in identifying governmental actions that have constitutional taking implications; and requires state agencies to prepare an assessment (section 3) of agency actions which may have "taking" implications. (Attachment #4)

Chairman O'Neal questioned what they will have that they don't have now with the passage of this bill.

Fleener stated that they will have the utilization of the guidelines and the assessment of what the "taking" implication will mean.

The Chairman asked if they knew what the Attorney General would draw-up in the way of guidelines, because he is not appearing nor was anyone from his office appearing in support or opposition to this legislation.

Fleener stated that they do not know.

Chairman O'Neal questioned if they have received information from other states as to their guidelines so they would have something to look at when they draw theirs up.

Fleener stated that they have not gotten any information on other states guidelines.

Chairman O'Neal stated that the committee received the this bill at a late date in the session and has no examples of what the proposed guidelines will be and with the Senate deciding that this shouldn't take effect until July 1, 1994, shouldn't there be an interim study on this.

Fleener stated that he would prefer it not be an interim study.

Mike Beam, Kansas Livestock Association, appeared before the committee in support of the bill. He stated that it is not the intent of this bill to be interpreted as an assault on state agencies. (Attachment #5)

Chairman O'Neal questioned what has happened in Kansas that would cause the need for this legislation.

Beam stated that most fears and concerns regarding property rights are driven from the federal agencies and enforced by state agencies. There was a case where a person was not allowed to take gravel from around a river because it dealt with the Endangered Species Act.

Karen France, Kansas Association of Realtors, appeared before the committee in support of the bill. She commented that this bill establishes a system for state agencies to review their actions prior to finalizing them, in order to ensure that their actions do not constitute an unlawful "taking of property without just compensation". (Attachment #6)

Art Brown, Retail Lumber and Building Material Dealers in Kansas, appeared before the committee as a proponent of the bill. He distributed a handout from the Reader's Digest. (Attachment #7)

The Chairman questioned if a state agency decides there are taking implementations, aren't there taking implementations with or without this legislation. The only thing that this proposed bill does is to have the agency try and identify that. Since it doesn't create any greater rights, it seems that all this legislation would do is heighten the awareness. It's not going to give more compensation for a taking.

Brown gave an example of a pecan grove situation where a grower couldn't harvest pecans because of an easement. He could not undercut under the trees to pick up the pecans because of the restrictive easement. This bill isn't going to help him, but it might prevent it from happening it in the future. The Chairman determined, however, that the easement was in effect at the time he purchased the property.

Paul Hettenbach, Kansas Land Improvement Contractors Association, appeared before the committee as a proponent of the bill. The court ruled in Lucas v. South Carolina Costal Council that the landowner was denied the "economically viable use of his land" and agency action constitutes a taking and should be compensated. (Attachment #8)

Bill Craven, Sierra Club, appeared before the committee in opposition to the bill. He briefed the committee on his handout that listed several items where he believed that the intent is not clear. He believes that this bill is unnecessary and would require a staggering amount of red tape, and will cost taxpayers millions of dollars. (Attachment #9)

Darrell Montei, Kansas Wildlife & Parks, appeared before the committee as an opponent to the bill. He commented that if this proposed legislation would become law it would dramatically increase the role of the Attorney General in order to monitor potential regulatory "takings" ; increase costs to the state and to the taxpayer to pay for the litigation, staff, assessment, and compensation costs, and cause serious delays in promulgating needed regulations and permits which benefit the general public. He requested an amendment to section 3, line 24, which would strike everything in section 3 after the word "implications" (Attachment #10)

The Committee adjourned at 6:00 p.m. The next Committee meeting is March 23, 1993 at 3:30 p.m. in room 313-S.

GUEST LIST

HOUSE JUDICIARY COMMITTEE

DATE MARCH 22, 1993

NAME	ADDRESS	ORGANIZATION
Jean Taylor	Topeka	Advocate WU Intern
DARRELL MONTEI	PRATT	KDWP
JEFF SONNICH	TOPEKA	HNLSI
Jerel Wright	Topeka	Ks CLU Assn
Charles Henson	Topeka	KBA
Kathy Taylor	"	"
Nancy Woodall	"	"
Sloan Stephens	"	KDWP
Laura Palmer	"	KDWP
Stan Adams		DWP
Lanny Jones	"	KDWP
DON SINOSEK	OSAWATOMIE	UTY
HARRY SPRING	KANSAS CITY	HUMANA
Blake Henning	Topeka	KS Water Office
Mike Reels	Topeka	KDOT
JAMES CLARK	"	KCDAA
BRIAN MOLINE	"	KCC
Steven Passer	Overland Park	Attorney at Law
Bob Storey	Topeka	Crescent Trans. Inc.
Bruce W Kent	Topeka	KDHR
Steve WAGLE	Law.	Kansas Gov Consulting
Mark Stafford	Topeka	AG

Session of 1993

HOUSE BILL No. 2527

By Committee on Appropriations

3-9

AN ACT concerning the income withholding act; relating to enforcement of support; medical support orders for children; health benefit plans; amending K.S.A. 23-4,105 and K.S.A. 1992 Supp. 23-4,106, 23-4,108, 23-4,109 and 23-4,111 and repealing the existing sections.

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

New Section. 1. (a) Except as provided in subsection (c), when a medical support order for a child has been issued, the court, upon request, shall include in any income withholding order an order requiring the payor to enroll the child in a health benefit plan which is available to the obligor, if there is one.

(b) Except as provided in subsection (c), when a medical support order has been issued and the income withholding order does not include an order requiring the payor to enroll the child in a health benefit plan, upon motion the court shall modify the income withholding order to include an order requiring the payor to enroll the child in a health benefit plan which is available to the obligor, if there is one.

(c) If the obligor subject to a medical support order demonstrates, before issuance of a new or modified income withholding order, that the child is enrolled in an adequate health benefit plan or that the steps necessary to enroll the child have been completed, the court shall not include in the income withholding order an order requiring the payor to enroll the child in a health benefit plan. Nothing in this subsection shall delay issuance of the income withholding order.

(d) An order requiring a payor to enroll a child in a health benefit plan shall provide the child's full name, date of birth, social security number, if available, and the address where the payor may send forms or may obtain additional information needed to enroll the child. The order shall provide the name and mailing address of the person who, as of the date of the income withholding order, holds the limited power of attorney pursuant to section 2 and amendments thereto.

(e) If the person holding the limited power of attorney changes, written notice of the new holder's name and mailing address shall

pursuant to section 1.

New Section 1. The court may issue a medical support order for a child, against either the obligor or obligee after consideration of the following factors:

(a) Reasonable cost; and

(b) if more than one health benefit plan is available, the child shall be enrolled in the plan (1) designated by court order or agreement of the parties, or, if none, then (2) in which the child already has benefits, or, if none, then (3) with terms closest to those designated by court order or agreement of the parties, or, if none, then (4) in which the parent or members of the parent's household have benefits, or, if none, then (5) in which the child will receive the greatest benefits.

Renumber remaining sections

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be provided to the payor.

New Sec. 2. (a) When a medical support order for a child has been issued, the obligor shall be deemed to have granted by operation of law a limited power of attorney to submit claims to a health benefit plan on the child's behalf and to endorse and negotiate any check or other negotiable instrument issued in full or partial payment of the child's claim.

(b) Except as otherwise provided in this subsection, the limited power of attorney provided by this section shall be held by the obligee. If the child is receiving medical assistance from the secretary of social and rehabilitation services, the secretary of social and rehabilitation services shall be deemed the sole holder of the limited power of attorney. Upon termination of medical assistance for the child, the secretary of social and rehabilitation services shall retain the limited power of attorney with respect to medical assistance already provided until the claim of the secretary for reimbursement is satisfied.

~~New Sec. 3. (a) A health benefit plan shall not discriminate~~ against a child with a medical support order on the basis of the child's residence in a particular household. If benefits under a health benefit plan are restricted to members of the households of policyholders or other parties, then, for the purposes of the health benefit plan, the child shall be deemed to be a member of the household of such a party so as to be eligible for benefits under the health benefit plan. If ordinary or nonemergency benefits under a health benefit plan are limited to locations not reasonably accessible to the child, then claims submitted on the child's behalf shall be deemed to have been incurred on an emergency basis or in other special circumstances so as to allow payment of the claims by the health benefit plan.

(b) A health benefit plan shall not discriminate against a child with a medical support order on the basis of the marital status of the child's parents at the time of the child's conception or birth or otherwise. If benefits under a health benefit plan are restricted to the legitimate children of policy- holders or other parties, then, for purposes of the health benefit plan, the child shall be deemed to be a legitimate child of such party so as to be eligible for benefits ~~under the health benefit plan.~~

New Sec. 4. (a) Except for good cause shown, the obligee shall be granted judgment against the obligor if: (1) The obligor was subject to a medical support order for a child, (2) under the Kansas child support guidelines the obligor received credit toward a cash child support obligation based upon health benefit premiums to be paid

pursuant to section 1

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by the obligor, and (3) the anticipated premiums were not paid in full by the obligor because of the obligor's delay or failure in obtaining health benefit coverage for the child or the obligor's failure to maintain health benefit coverage for the child.

(b) The amount of the judgment shall be the lesser of: (1) Actual costs incurred by the obligee for substantially similar health benefits, or (2) the difference between the actual amount of the cash child support order and the amount the cash child support order would have been without the credit for unpaid premiums but with any premiums paid by the obligee for substantially similar health benefit coverage.

(c) Failure to obtain or maintain health benefit coverage as ordered, for whatever reason, shall be a material change of circumstances justifying modification of the order for support if credit has been given for health benefit premiums which are not being paid.

Sec. 5. K.S.A. 23-4,105 is hereby amended to read as follows: 23-4,105. (a) The title of K.S.A. ~~1985 Supp.~~ 23-4,105 through 23-4,118, *and sections 1 through 4,* and amendments thereto, shall be *and may be cited as* the income withholding act.

(b) The purpose of ~~K.S.A. 1985 Supp. 23-4,105 through 23-4,118, and amendments thereto,~~ *the income withholding act* is to enhance the enforcement of all support obligations by providing a quick and effective procedure for withholding income to enforce orders of support.

Sec. 6. K.S.A. 1992 Supp. 23-4,106 is hereby amended to read as follows: 23-4,106. As used in ~~K.S.A. 23-4,105 through 23-4,118~~ *the income withholding act*:

(a) "Arrearage" means the total amount of unpaid support which is due and unpaid under an order for support, based upon the due date specified in the order for support or, if no specific date is stated in the order, the last day of the month in which the payment is to be made. If the order for support includes a judgment for reimbursement, an arrearage equal to or greater than the amount of support payable for one month exists on the date the order for support is entered.

(b) "Health benefit plan" means any benefit plan, other than public assistance, providing medical or dental care or benefits for a child, whether through insurance or otherwise, which is available through the obligor's employment or is available through any other group plan at a reasonable cost.

~~(b)~~ *(c)* "Income" means any form of periodic payment to an individual, regardless of source, including, but not limited to, wages, salary, trust, royalty, commission, bonus, compensation as an in-

dependent contractor, annuity and retirement benefits and any other periodic payments made by any person, private entity or federal, state or local government or any agency or instrumentality thereof. "Income" does not include: (1) Any amounts required by law to be withheld, other than creditor claims, including but not limited to federal and state taxes, social security tax and other retirement and disability contributions; (2) any amounts exempted by federal law; (3) public assistance payments; and (4) unemployment insurance benefits except to the extent otherwise provided by law. Any other state or local laws which limit or exempt income or the amount or percentage of income that can be withheld shall not apply.

~~(e)~~ *(d)* "Income withholding order" means an order issued under this act which requires a payor to withhold income to satisfy an order for support or to defray an arrearage.

(e) "Medical support order" means an order requiring a parent to provide coverage for a child under a health benefit plan.

~~(d)~~ *(f)* "Obligee" means the person or entity to whom a duty of support is owed.

~~(e)~~ *(g)* "Obligor" means any person who owes a duty to make payments *or provide health benefit coverage* under an order for support.

~~(f)~~ *(h)* "Order for support" means any order of a court, or of an administrative agency ~~of another jurisdiction,~~ authorized by law to issue such an order, which provides for payment of funds for the support of a child, or for maintenance of a spouse or ex-spouse ~~living with a child for whom an order of support is also being enforced~~, and includes ~~such~~ an order which provides for modification or resumption of a previously existing order; *payment of uninsured medical expenses;* payment of an arrearage accrued under a previously existing order; a reimbursement order, including but not limited to an order established pursuant to K.S.A. 39-718a or K.S.A. 1992 Supp. 39-718b, and amendments thereto; ~~or~~ an order established pursuant to K.S.A. 23-451 *et seq.* and amendments thereto; *or a medical support order.*

~~(g)~~ *(i)* "Payor" means any person or entity owing income to an obligor or any self-employed obligor *and includes, with respect to a medical support order, the administrator of a health benefit plan.*

~~(h)~~ *(j)* "Public office" means any elected or appointed official of the state or any political subdivision or agency of the state, or any subcontractor thereof, who is or may become responsible by law for enforcement of, or who is or may become authorized to enforce, an order for support, including but not limited to the department of social and rehabilitation services, court trustees, county or district

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attorneys and other subcontractors.

~~(i)~~ *(k)* "Title IV-D cases" means those cases required by part D of title IV of the federal social security act (42 U.S.C. §651 et seq.), as amended, to be processed by the department of social and rehabilitation services under the state's plan for support enforcement.

Sec. 7. K.S.A. 1992 Supp. 23-4,108 is hereby amended to read as follows: 23-4,108. (a) It shall be the affirmative duty of any payor to respond within 10 days to written requests for information presented by the public office concerning: (1) The full name of the obligor; (2) the current address of the obligor; (3) the obligor's social security number; (4) the obligor's work location; (5) the number of the obligor's claimed dependents; (6) the obligor's gross income; (7) the obligor's net income; (8) an itemized statement of deductions from the obligor's income; (9) the obligor's pay schedule; (10) the obligor's health insurance coverage; and (11) whether or not income owed the obligor is being withheld pursuant to this act. This is an exclusive list of the information that the payor is required to provide under this section.

(b) It shall be the duty of any payor who has been served an income withholding order under this act to deduct and pay over income as provided in this section. The payor shall begin the required deductions no later than the next payment of income due the obligor after 14 days following service of the order on the payor.

(c) It shall be the duty of any payor who has been served an income withholding order which requires the payor to enroll the child in a health benefit plan to promptly enroll the child in a health benefit plan available to the obligor, deducting and remitting any premium due from the obligor as required by the health benefit plan. The signature of the person holding the limited power of attorney pursuant to section 2 *and amendments thereto, or that person's designee, shall be valid authorization to the health benefit plan for the exercise of any available option for the extension or continuation of benefits for the child.*

~~(c)~~ *(d)* Within 10 days of the time the obligor is normally paid, the payor shall pay the amount withheld as directed by the income withholding agency pursuant to K.S.A. 23-4,109 and amendments thereto, otherwise to the clerk of court or court trustee as directed by the income withholding order. The payor shall identify each payment with the name of the obligor, the county and case number of the income withholding order, and the date the income was withheld from the obligor. A payor subject to more than one income withholding order from a single county may combine the amounts withheld into a single payment, but only if the amount attributable

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to each income withholding order is clearly identified.

~~(d)~~ *(e)* The payor shall continue to withhold income as required by the income withholding order until further order of the court.

~~(e)~~ *(f)* From income due the obligor, the payor may withhold and retain to defray the payor's costs a cost recovery fee of $5 for each pay period for which income is withheld or $10 for each month for which income is withheld, whichever is less. Such cost recovery fee shall be in addition to the amount withheld as support.

~~(f)~~ *(g)* The entire sum withheld by the payor, including the cost recovery fee *and premiums due from the obligor which are incurred solely because of an order requiring a child's enrollment in a health benefit plan*, shall not exceed the limits provided for under section 303(b) of the consumer credit protection act (15 U.S.C. 1673(b)). *If amounts of earnings required to be withheld exceed the maximum amount of earnings which may be withheld according to the consumer credit protection act, priority shall be given to payment of current and past due support, and the payor shall promptly notify the holder of the limited power of attorney of any nonpayment of premium for a health benefit plan on the child's behalf.* An income withholding order issued pursuant to this act shall not be considered a wage garnishment as defined in subsection (b) of K.S.A. 60-2310 and amendments thereto. If amounts of earnings required to be withheld in accordance with this act are less than the maximum amount of earnings which could be withheld according to the consumer credit protection act, the payor shall honor garnishments filed by other creditors to the extent that the total amount taken from earnings does not exceed consumer credit protection act limitations.

~~(g)~~ *(h)* The payor shall promptly notify the clerk of the district court or the court trustee of the termination of the obligor's employment or other source of income, or the layoff of the obligor from employment, and provide the obligor's last known address and the name and address of the individual's current employer, if known.

~~(h)~~ *(i)* Payment as required by an income withholding order issued under this act shall be a complete defense by the payor against any claims of the obligor or the obligor's creditors as to the sums paid.

~~(i)~~ *(j)* If any payor violates the provisions of this act, the court shall enter a judgment against the payor for the total amount which should have been withheld and paid over and may enter judgment against the payor to the extent of the total arrearage owed.

~~(j)~~ *(k)* Any payor who intentionally discharges, refuses to employ or takes disciplinary action against an obligor solely because of an income withholding order issued under this act shall be subject to

a civil penalty not exceeding $500 and such other equitable relief as the court considers proper.

Sec. 8. K.S.A. 1992 Supp. 23-4,109 is hereby amended to read as follows: 23-4,109. (a) An income withholding order issued under this act shall have priority over any other legal process under state law against the same income. Withholding of income under this section shall be made without regard to any prior or subsequent garnishments, attachments, wage assignments or other claims of creditors.

(b) Except as provided by this act, any state law which limits or exempts income from legal process or the amount or percentage of income that can be withheld shall not apply to withholding income under this act.

(c) If more than one income withholding order requires withholding from the same source of income of a single obligor, the payor shall withhold and disburse as ordered the total amount required by all income withholding orders if such amount does not exceed the limits of subsection ~~(f)~~ *(g)* of K.S.A. 23-4,108 and amendments thereto, as shown in the withholding order which specifies the highest percentage of income allowed to be withheld. If the total amount required by all income withholding orders, *including premiums due from the obligor which are incurred solely because of an order requiring a child's enrollment in a health benefit plan,* exceeds such limits, the payor shall withhold the amount permitted to be withheld under such limits and from the amount withheld the payor shall retain any cost recovery fee charged by the payor. The remaining funds shall first be prorated by the payor among all income withholding orders for the obligor that require payment of current support. When all current support for the month has been satisfied, any remaining funds shall be prorated among all income withholding orders for the obligor that require payment of an amount for arrearages. *If funds remain after payment of all current and past due support for the month, the payor shall attempt to satisfy premium requirements for children enrolled in a health benefit plan, giving priority to children in the order they were enrolled. The payor shall promptly notify the affected holder of the limited power of attorney of any nonpayment of premium.* The payor may request assistance from the income withholding agency in determining the amount to be disbursed for each income withholding order, but such assistance shall not relieve the payor from any responsibility under this act. Upon request of a public office or of any obligee whose income withholding order is affected by this subsection, the payor shall provide the county, case number and terms of all the obligor's income

withholding orders.

(d) The provisions of this section as amended by this act shall apply to all income withheld on or after July 1, 1992, regardless of when the applicable income withholding order was entered or modified.

Sec. 9. K.S.A. 23-4,111 is hereby amended to read as follows: 23-4,111. (a) At any time, an obligor may petition the court to: (1) Modify or terminate the income withholding order because of a modification or termination of the underlying order for support; or (2) modify the amount of income withheld to reflect payment in full of the arrearage by income withholding or otherwise.

(b) On request of the obligee or public office, the court shall issue an order which modifies the amount of income withheld, subject to the limitations of subsection ~~(f)~~ *(g)* of K.S.A. 23-4,108 and amendments thereto.

(c) The obligor may file a motion to terminate the income order because payments pursuant to the income withholding order have been made for at least 12 months and all arrearages have been paid. Upon receipt of a motion under this subsection, the court may terminate the income withholding order unless it finds good cause for denying the motion because of the obligor's payment history or otherwise. If an income withholding order is terminated for any reason and the obligor subsequently becomes delinquent in the payment of the order for support, the obligee or public office may obtain another income withholding order by complying with all requirements for notice and service pursuant to this act.

(d) If support payments are undeliverable to the obligee, any such payments shall be held in trust by the court until the payments can be delivered.

(e) The clerk of court shall cause to be served on the payor a copy of any order entered pursuant to this section that affects the duties of the payor.

Sec. 10. K.S.A. 23-4,105 and K.S.A. 1992 Supp. 23-4,106, 23-4,108, 23-4,109 and 23-4,111 are hereby repealed.

Sec. 11. This act shall take effect and be in force from and after its publication in the statute book.

As Amended by Senate Committee

Session of 1993

SENATE BILL No. 121

3/16/93

By Committee on Judiciary

1-28

AN ACT concerning trusts; relating to standards for investments by fiduciaries; amending K.S.A. 17-5004, *58-1202 and 72-17,125* and repealing the existing ~~section~~ *sections*.

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

Section 1. K.S.A. 17-5004 is hereby amended to read as follows: 17-5004. ~~(a) (1) In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for the benefit of another, a fiduciary shall exercise the judgment and care under the circumstances then prevailing, which persons of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.~~

~~(2) Within the limitations of the foregoing standard, a fiduciary: (A) Is authorized to acquire and retain every kind of property, real, personal or mixed, and every kind of investment including, but not limited to, bonds, debentures and other corporate obligations, and stocks, preferred or common, and securities of any open-end or closed-end management type investment company or investment trust registered under the federal investment company act of 1940 and amendments thereto which persons of prudence, discretion and intelligence acquire or retain for their own account; and~~

~~(B) may retain property properly acquired, without limitation as to time and without regard to its suitability for original purchase.~~

(a) Prudent Investor Rule. (1) A fiduciary has a duty to invest and manage the trust assets as follows: (A) The fiduciary has a duty to invest and manage assets as a prudent investor would considering the purposes, terms, distribution requirements and other circumstances of the trust or conservatorship. This standard requires the exercise of reasonable care, skill and caution and is to be applied to investments not in isolation, but in the context of the portfolio under the fiduciary's control as a whole and as a part of an overall

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the fiduciary's reasonable and good faith reliance on those express provisions.

~~(3) Nothing in this section abrogates or restricts the power of~~ an appropriate court in proper cases to: (A) Direct ~~or permit~~ the fiduciary to deviate from the terms of a ~~trust or~~ similar instrument; or

(B) direct or ~~permit~~ the fiduciary to take, or to restrain the fiduciary ~~from~~ taking, any action regarding the making or retention ~~of investments.~~

(4) The following terms or comparable language in the investment powers and related provisions of a trust instrument, unless otherwise limited or modified by that instrument, shall be construed as authorizing any investment or strategy permitted under this section: "Investments permissible by law for investment of trust funds;" "legal investments;" "authorized investments;" "using the judgment and care under the circumstances then prevailing that men of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to the speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital;" "prudent man rule;" and "prudent person rule."

(3)

(5) On and after the effective date of this act, the provisions of this section shall apply to all existing and future trusts or conservatorships, but only as to actions or inactions occurring after the effective date of this act.

(4)

(b) Duty Not to Delegate. (1) The fiduciary has a duty not to delegate to others the performance of any acts involving the exercise of judgment and discretion, except acts constituting investment functions that a prudent investor of comparable skills might delegate under the circumstances. The fiduciary may delegate those investment functions to an investment agent as provided in subsection (b)(2).

(2) For a fiduciary to properly delegate investment functions under subsection (b)(1), all of the following requirements shall apply: (A) The fiduciary must exercise reasonable care, skill and caution in selection of the investment agent, in establishing the scope and specific terms of any delegation and in periodically reviewing the agent's actions in order to monitor overall performance and compliance with the scope and specific terms of the delegation.

(B) The fiduciary must conduct an inquiry into the experience, performance history, professional licensing or registration, if any, and financial stability of the investment agent.

(C) The investment agent shall be subject to the jurisdiction of

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TESTIMONY OF M.S. MITCHELL

CHAIRMAN, KANSAS PROPERTY RIGHTS COALITION

BEFORE HOUSE JUDICIARY COMMITTEE

SUPPORTING SENATE BILL 293

CHAIRMAN O'NEAL, MEMBERS OF THE COMMITTEE. IT IS WITH EXTREME PLEASURE THAT I SPEAK TO YOU TODAY ON A SUBJECT WHICH HAS OCCUPIED MUCH TIME AND EFFORT FROM A WIDE RANGE OF PERSONS AND ORGANIZATIONS, SOME OF WHICH ARE ACTIVELY REPRESENTED HERE TODAY.

TO US, THE RIGHT TO ACQUIRE, TO HOLD, TO OPERATE, TO IMPROVE, TO EXPAND, TO CHERISH AND TO PASS TO FUTURE GENERATIONS PROPERTY IS AS FUNDAMENTAL AS IS THE RIGHT TO LIFE AND LIBERTY. IN FACT, AS THE PART OF THE WORLD IN THE OLD COMMUNIST COUNTRIES RECENTLY ACKNOWLEDGED, WITHOUT THE RIGHT TO OWN PROPERTY, THE RIGHTS TO LIFE AND LIBERTY ARE A HOLLOW PROMISE.

SENATE BILL 293, PATTERNED AFTER ARIZONA LAW, IS THE FIRST STEP IN ASSURING THAT THE CONSTITUTIONAL GUARANTEE THAT "...no person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation." IS GIVEN CONSCIENTIOUS CONSIDERATION BEFORE EVERY ACTION TAKEN BY EVERY STATE AGENCY TO ASSURE THAT PRIVATE PROPERTY RIGHTS ARE NOT TAKEN OR DIMINISHED WITHOUT THE CLEAR UNDERSTANDING THAT SUCH ACTION DEMANDS COMPENSATION. ONCE ENACTED, THE COALITION MUST BE DILIGENT IN ASSISTING THOSE PRIVATE PROPERTY OWNERS WHO BELIEVE THAT THEIR RIGHTS HAVE BEEN TAKEN, AND IN MONITORING FUTURE ACTIONS OF THOSE STATE AGENCIES WHICH HAVE IN THE PAST BEEN BENT ON SUCH TAKINGS ON THE CLAIM THAT CERTAIN PARTS OF PRIVATE PROPERTY ARE TOO VALUABLE TO ENTRUST TO THE PRIVATE SECTOR

AND MUST BE CONTROLLED, REGULATED, RESTRICTED, PROTECTED OR PRESERVED IN THE PUBLIC TRUST. AS EACH OF YOU MAY SEE FROM THE ABOVE DISCUSSION, MOST OF THE CONFLICTS ABOUT WHICH COALITION MEMBERS ARE CONCERNED STEM FROM THE CONTROL OF LAND USE, WHICH IS, IN OUR OPINION THE MOST INSIDIOUS AND PERVASIVE THREAT FROM STATE GOVERNMENTAL AGENCIES. SOME OF THE THREATS WHICH HAVE BEEN BROUGHT TO LIGHT AT OUR ORGANIZATIONAL MEETINGS ARE:

1. EXPANSION OF THREATENED OR ENDANGERED SPECIES LEGISLATION AND REGULATIONS TO INCLUDE PLANTS AND MICRO ORGANISMS WHICH CAN BE USED TO STOP AGRICULTURAL USE IN THE SAME MANNER IT HAS BEEN USED TO STOP COMMERCE AND INDUSTRY.
2. STATE LAND USE LEGISLATION AND REGULATIONS DIRECTED AT CONTROLLING SURFACE AND BELOW GROUND ACTIVITIES NEEDED TO CONDUCT ALL TYPES OF AGRICULTURE, BUSINESS AND INDUSTRY. ONE SUCH PROGRAM WOULD REQUIRE OPERATORS OF PUBLIC WATER SUPPLY SYSTEMS (10 SERVICE CONNECTIONS OR REGULAR SERVICE TO 25 PEOPLE FOR 60 DAYS PER YEAR) TO CONTROL LAND USE WITHIN A MINIMUM RADIUS OF 2 MILES OR 10-YEARS TIME OF TRAVEL (FOR A CONTAMINANT TO REACH A WELL) FROM ANY PUBLIC WATER SUPPLY WELL. IN KANSAS THERE ARE ABOUT 2300 PUBLIC WATER SUPPLY WELLS FOR WHICH THE 2-MILE RADIUS MINIMUM PROTECTION AREA CALCULATES TO BE 28,903 SQUARE MILES WHICH IS 35 PERCENT OF ALL LAND IN THE STATE OF KANSAS.

3. CONSERVATION EASEMENT LEGISLATION AND REGULATIONS WHICH PERMIT ANYONE ACTING AS AN INTERVENER TO HARASS AN OPERATOR OF THE LAND BY CLAIMING VIOLATIONS OF SPECIFIC CONDITIONS OF THE CONSERVATION EASEMENT.
4. WETLANDS AND RIPARIAN LEGISLATION AND REGULATIONS WHICH ARE BASED ON THE CONCEPT THAT SUCH AREAS MUST BE PLACED IN THE PUBLIC TRUST BECAUSE PRIVATE USE WILL RESULT IN DESTRUCTION OR IRREPLACEABLE NATURAL RESOURCES.
5. PUBLIC RECREATIONAL LEGISLATION AND REGULATIONS WHICH WILL GIVE THE PUBLIC ACCESS TO AND PASSAGE OVER PRIVATE RIVER, CREEK AND STREAM CORRIDORS WITHOUT REGARD TO THE LIABILITY OF THE PROPERTY OWNER IN CASE OF ACCIDENT.
6. STATE CONTROL OF WATER RIGHTS AND THE USE OF KANSAS WATER PLAN LEGISLATION AND REGULATIONS WHICH HAVE THE EFFECT OF REDUCING OR RESCINDING EXISTING WATER RIGHTS.
7. USE OF CLEAN WATER ACT LEGISLATION AND REGULATIONS TO THREATEN AGRICULTURAL OPERATORS WITH ISSUES SUCH AS FENCING RIVERS, CREEKS, DRAWS AND ANY POTENTIAL WATERWAY TO ELIMINATE POLLUTION BY STOCK AND REQUIRING EROSION CONTROL BEST MANAGEMENT PRACTICES.
8. HALTING OR DELAYING RURAL WATERSHED DAM CONSTRUCTION WHICH IS THE ONLY RURAL FLOOD CONTROL PROGRAM BY APPLICATION OF THREATENED OR ENDANGERED SPECIES, WETLANDS AND RIPARIAN AREA RESTRICTIONS TO SITES, AND INSISTING ON MITIGATION OF AREAS FAR UPSTREAM AND DOWNSTREAM FROM THOSE SITES.

BEFORE SOME OF YOU GET THE IMPRESSION THAT THIS IS ANTI ENVIRONMENTAL LEGISLATION AND YOU MIGHT BE TEMPTED TO SUCCUMB TO THE ARGUMENT THAT THE GOVERNMENT HAS COMPELLING REASONS TO PROTECT THE ENVIRONMENT, EVEN IF SOME INDIVIDUALS HAVE TO LOSE SOME OF THEIR RIGHTS, LET ME READ WHAT THE GOVERNOR OF ARIZONA, WHO IS MUCH MORE ARTICULATE THAT I CAN BE SAID IN HIS REBUTTAL TO THOSE WHO CLAIMED HIS SUPPORT OF THE ARIZONA BILL TO BE INCONSISTENT WITH HIS PREVIOUS RECORD OF COMMITMENT TO ENVIRONMENTAL ISSUES. HE SAID: "IS THEIR POSITION THAT ENVIRONMENTALISM REQUIRES ITS ADHERENTS TO DENIGRATE THE PRINCIPLE OF PRIVATE PROPERTY AS IT HAS BEEN KNOWN IN AMERICA FROM THE VERY DAWN OF OUR NATIONAL EXISTENCE? IF SO, THEY THEY HAVE EMBRACED AN ENVIRONMENTALISM WHICH IS FOREIGN TO ME, AND I WOULD GLADLY PLACE MY ENVIRONMENTAL RECORD AGAINST THAT OF ANY HOLDER OF HIGH OFFICE ANYWHERE IN THE COUNTRY." HE WENT ON TO SAY "I WILL NOT PRESIDE OVER A STATE GOVERNMENT THAT IS AFRAID TO REQUIRE OF ITSELF DUE REGARD FOR THE PRIVATE PROPERTY OF THE CITIZENS."

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE, I ASK YOU THEN, HOW CAN KANSAS, FOUNDED AS IT WAS ON THE LABORS OF THOSE WHO LOVED THE LAND AND WHO CAME HERE TO FIND A NEW LIFE AND FREEDOM IN WHICH THE INDIVIDUAL'S EFFORT COULD BE REWARDED BY MAKING THE LAND PRODUCE DO ANY LESS? PLEASE PASS SENATE BILL 293 OUT OF COMMITTEE AND WORK FOR ITS PASSAGE BY THE HOUSE.

Sunphoto/Ray Brechalsen

McCune businessman Chauncey Shepard used to remove gravel from this Neosho River gravel bar and others before the Madtom Catfish, a three-inch fish on the endangered species list, put a halt to his business in 1991. Federal and state agencies have refused to issue permits which would allow Shepard to continue removing gravel from bars along the river.

Endangered catfish halts gravel business

Small Madtom catfish keeps McCune man from removing gravel

By NEAL McCHRISTY
Morning Sun Staff Writer

STRAUSS — A three-inch catfish on the endangered species list forced an area man to close his gravel-removal business almost two years ago.

Now, Chauncey Shepard, McCune, has a ringed notebook stuffed with correspondence to and from various agencies about the demise of his business of taking gravel from river sandbars and selling it for use on roads.

The existence of the Madtom catfish, a species that grows to three inches and inhabits the gravel riffles near sandbars in the Neosho River, halted Shepard's business in early 1991.

The U.S. Fish and Wildlife Service, together with the Kansas Department of Wildlife and Parks, haven't given Shepard a permit to remove gravel from the sandbars, although he is able to get permits from other agencies for his work.

Shepard maintains that he did not disturb the fish's habitat. He didn't dredge the gravel out from the underwater. He says he could never remove all the gravel available "because it's under the banks, and when they remove it, it's replaced by other gravel." Gravel is plentiful under farmland within about a mile of the river, he says.

Shepard's family had been taking gravel from the sandbars to sell for fill and road material since the '50s. Shepard removed the gravel with a loader, always working above the water line.

Shepard's grew up on a farm near the river, and he says he remembers when the river was half as wide and there were deep holes in the river for fish.

"We don't have any deep holes for fish even to stay in anymore," he said, and catfish are wormy now.

Shepard blames release of water from John Redmond Reservoir into the Neosho as one reason for riverbank erosion, saying it washes gravel that acts as a stabilizer from under the banks. The consequence is that the riverbank falls in the water. The U.S. Army Corps of Engineers controls the release of water at the reservoir.

And the Madtom catfish? "I've never seen one. I saw one in an aquarium up there in Emporia."

But the fish are there, according to Eric Schenck, chief of environmental services for the Kansas Department of Wildlife and Parks, Pratt. In fact, Schenck said, the Neosho River is one of the few habitats left for the fish.

"This is a federally-protected species...," Schenck said, "so it's protected under federal law — not only state law."

Before a permit can be issued, Schenck says there has to be a plan for special consideration of the endangered species. There is a plan by the state agency to place large rocks on the bottom of the river that will trap the gravel and recharge the gravel riffles where the fish live.

While Schenck agrees that "Mr. Shepard's operation probably does not harm the Madtom at that level, the big concern that exists — and the one the service is hanging tough on — is the concern about removal of the gravel when there is high flow (in the river), and whether that will have an effect."

Shepard says that by removing the gravel, he helps change the river flow on steep turns, lowering the erosion of the gravel beneath river banks.

"What he's doing has an effect locally," Schenck said. "In terms of helping the Madtom, I wouldn't go so far as to say that."

But Schenck doesn't disagree that the gravel has been building on the area where Shepard used to remove it and "that makes that turn tighter and tighter." Schenck also said that because of the steepness of that sandbar's edge, it was doubtful that the Madtom catfish would inhabit the riffles there.

Schenck also agreed that with the method Shepard uses, "he takes gravel that is replaced fairly rapidly."

. Something the department hasn't done,

(See MADTOM, Page 10)

Madtom

(Continued from Page 1)

Schenck said, is study the affect of the gravel-removal operation that Shepard does, " which is different than the gravel-dredging operation at other places that go below the water and dredge gravel up."

Are there fewer fish overall in the river? Schenck said the last all-species count was in the early '80s.

There is no question the Madtom catfish is decreasing, however. While the small fish used to inhabit the Neosho, Cottonwood and Spring Rivers in Kansas and rivers in Missouri and Oklahoma, now they inhabit only the Neosho. Schenck says about one-third of the endangered species in Kansas are in the Neosho River basin. One now listed as threatened by the state is the Neosho Muckett Mussel.

The department has been studying the method of recharging gravel, and Schenck said the data may be complete enough by next spring to recommend a permit.

But even if the gravel trap structure works, Schenck said the department would have a problem with the permit, as the species is listed as endangered by the U.S. Fish and Wildlife Service.

Schenck said the gravel removal below the high-water mark is regulated by permit, and the high-water mark is determined by the U.S. Army Corps of Engineers.

Shepard was able to convince the Kansas Legislature's Committee For Special Claims Against the State to grant a $2,500 settlement by the committee in the 1992 Legislature, but the appropriation wasn't approved. He states his claim is now $38,000.

Rep. Ed McKechnie, D-Pittsburg, who chaired the committee in the 1992 Legislature, said the claim will be heard again. Rep. Bob Grant, D-Cherokee, a committee member, said, "he needs to be compensated, because this (gravel removal) has been done for years, and I don't see where it hurts at all."

One of the permits that Shepard needs is from the Kansas Board of Agriculture Division of Water Resources. Fred Foshag, an engineer for the division in Chanute, said the applicant has to send in a set of plans, and because the Madtom catfish is endangered, other agencies, such as the Kansas Department of Wildlife and Parks, must deem the plans acceptable for them to issue a permit.

But speaking personally about the gravel-removal operation Shepard does, Foshag says, "They've been doing that in the river for 75 years or more, and the species is still there."

If parts of your backyard are a bit soggy after a heavy rain watch out! According to current EPA regulations, it's wetland and you better not disturb it.

The strange case of the glancing geese

By Warren Brookes

Wetlands

But tell that to William Ellen, a successful and respected Virginia marine engineer who is now appealing a prison term and a large fine for having "filled" more than 15 acres of Eastern Shore "nontidal wetlands" when he bulldozed these seemingly dry and forested acres to create large nesting ponds for ducks and geese as well as a management complex.

Ellen was working on a project for Paul Tudor Jones II, the high-flying futures trader *(see p. 184)* who in August 1987 had bought 3,200 acres in Dorchester County, very close to the Blackwater Wildlife Refuge. Jones' idea was to create a combination hunting and conservation preserve as well as a showplace estate. The centerpiece of the project is a 103-acre wildlife sanctuary developed with the assistance of the Maryland Department of Natural Resources. This sanctuary includes ponds, shrub swamps, food plants and grassland plots all designed to attract geese, ducks and other migrating waterfowl.

In May 1990 Jones suddenly pleaded guilty to one misdemeanor related to negligent filling of wetlands, agreeing to pay $1 million to the National Fish & Wildlife Foundation to help the Blackwater Refuge, plus a $1 million fine. The plea allowed Jones to avoid a costly and debilitating trial, and possibly even a jail term and the loss of his trading license. However, no such deal was afforded Bill Ellen, himself a well-known conservationist who, with his wife, runs a rescue/rehab mission for injured wildlife and waterfowl.

How could Ellen be prosecuted for converting land that was so dry water-spraying had to be used as a dust suppressant during bulldozing into large nesting ponds for waterfowl? That question disturbed trial judge Frederic Smalkin at the U.S. District Court in Baltimore, and the answer he got was bizarre.

Prosecution witness Charles Rhodes, one of the EPA's top scientists on wetlands, said that even though the forested "wetlands" had been replaced by new ponds, the ecology was supposedly worse off.

Why? The problem was bird shit. "The sanctuary pond is designed to have a large concentration of waterfowl, and before the restoration plan was implemented, all that fecal material [from the ducks and geese] was geared to be discharged right into the wetlands, whereas now it is actually designed to go through like a treatment system through the wetlands. So that would have been a negative impact, a water quality impact." In other words, the bird droppings, instead of staying in one place, would be spread over a wider area.

To which Judge Smalkin responded incredulously: "Are you saying that there is pollution from ducks, from having waterfowl on a pond, that that pollutes the water?" Incredibly, a jury convicted Ellen on five counts of filling wetlands. But U.S. Attorney Breckinridge Willcox said Ellen's conviction sends "a clear message that environmental criminals will, in fact, go to jail." The prosecution asked the court for a prison term of 27 to 33 months, but Judge Smalkin sentenced Bill Ellen to six months in jail and four months of home detention.

PUBLIC POLICY STATEMENT

HOUSE COMMITTEE ON THE JUDICIARY

RE: S.B. 293 - Private Property Protection Act

March 22, 1993
Topeka, Kansas

Presented by:
Paul E. Fleener, Director
Public Affairs Division
Kansas Farm Bureau

Chairman O'Neal and Members of the Committee:

We certainly appreciate the opportunity to make comments concerning S.B. 293, the Private Property Rights Protection Act. For property owners in Kansas - including farmers and ranchers - there may well be no more important piece of legislation, no higher priority than favorable action on and enactment of S.B. 293.

For the record, my name is Paul E. Fleener. I am the Director of Public Affairs for Kansas Farm Bureau. We are a general farm organization. We represent farmers and ranchers in the 105 counties of Kansas. We have numerous policy positions which speak to the protection of property rights ... the protection of landowner rights ... the protection of the rights of homeowners, builders, developers, farmers, ranchers, to utilize prudently, wisely, and for profit the property they own.

Mr. Chairman ... Members of the Committee: preparation of testimony on this important legislation has been both interesting and instructive. It has been my pleasure to review thoroughly the Kansas

Constitution. It has likewise been my privilege to review the United States Constitution. I would like to quote briefly from both. I do so for my own edification, as well as to share with those who have not recently reviewed these two documents.

First we quote from two sections of the Bill of Rights of the Kansas Constitution:

> **Sec. 17. Property rights of citizens and aliens.**
>
> No distinction shall ever be made between citizens of the State of Kansas and the citizens of others states and territories of the United States in reference to the purchase, enjoyment or descent of property.
>
> **Sec. 18. Justice without delay.**
>
> All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay. (Underlining added).

Just briefly, then, two short references from the United States Constitution:

> **Amendment 5. Criminal prosecutions; due process of law; eminent domain.**
>
> No person shall be held ... ... nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation. (Underlining added).

Amendment 14. Rights and immunities of citizens.

Section 1. Citizenship; privileges or immunities; due process clause. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

S.B. 293 embodies the spirit and intent of the United States Constitution and Kansas Constitutional provisions. We urge this Committee and the full House of Representatives to act favorably on this vital legislation. We will, of course, be asking the Governor of Kansas to sign into law S.B. 293. The Senate has already given its strong support to this legislation, passing S.B. 293 on March 17 with a vote of 38-2.

At this point in our testimony, Mr. Chairman, we want to give you a **brief review** of the Senate Judiciary Committee action on this bill, introduced by the Committee on February 11. There were two days of hearings on S.B. 293. The original hearing was on Feb. 23. There were 11 proponents who either spoke or handed-in written testimony in support of the bill. There was one opponent. A second hearing was held on March 12. There was one additional proponent, there was one who characterized himself as neither proponent nor opponent. He simply raised questions. There were six state agencies and one other organization speaking in opposition. Senate Committee Chairman Moran asked committee members what action they wanted to take. The suggestion was made to name a subcommittee. That suggestion was followed. Senator Bob Vancrum chaired a subcommittee which included Sen. Mark Parkinson, Sen. Jerry Moran and Sen.

Bill Brady. That subcommittee met one week ago today, made all but one of the changes you see in S.B. 293 at this time, and recommended the bill favorably to the full Judiciary Committee of the Senate on Tuesday, March 16. The Committee adopted the subcommittee recommendations and reported the bill favorably on a voice vote.

On Wednesday, March 17, Sen. Moran carried the bill on the floor of the Senate. He offered a "clarifying" amendment, the language of which you will find on page 3, lines 21 through 23. On final action that same day, S.B. 293 passed by a vote of 38-2.

Background on Private Property Protection

Attached to our statement is Executive Order 12630 dated March 15, 1988. It was advanced by then-President Ronald Reagan. President Reagan issued the Executive Order to provide that private property shall not be taken for public use without just compensation. He was simply saying to federal agencies that the Fifth Amendment to the Constitution had not been repealed. In his Executive Order President Reagan indicated: "Private Property refers to all property protected by the Just Compensation Clause of the Fifth Amendment."

Later in the Executive Order ... Sec. 3(e), President Reagan said: "The Just Compensation Clause is self-actuating, requiring that compensation be paid whenever governmental action results in a taking of private property regardless of whether the underlying authority for the action contemplated a taking or authorized the payment of compensation."

The protection of private property, and the **just compensation** for the "taking" of private property is significant in the U.S. Constitution and the Kansas Constitution. Private property is a cornerstone of our

competitive enterprise system, important to our lives and livelihoods. Any erosion of that right weakens all other rights.

S.B. 293 puts into Kansas statutory language what President Reagan put in Executive Order 12630. This legislation before you today is both constitutionally sound and statutorily appropriate. Both the United States and Kansas Constitutions express clearly that private property shall not be taken, damaged, diminished in value for public use without just compensation being made to the rightful owner. S.B. 293 will require state agencies ... with the assistance of the Attorney General, who shall develop guidelines ... to determine whether or not a "governmental action" or an "action" has a "taking" implication. Agencies will know **before** they adopt new rules and regulations what the effect will be on their activities and how the rules and regulations will affect private property owners. The guidelines and the legislation will alert you, the Legislators, will alert the Governor, to all serious implications of "takings" and budgeting to meet required compensation for property owners in this state.

S.B. 293 does these things:

*Defines a "constitutional taking" or "taking;"

*Defines a "governmental action" or an "action;"

*Requires the Attorney General to adopt guidelines (Sec. 2) to assist state agencies in identifying governmental actions that have constitutional taking implications; and

*Requires state agencies to prepare an assessment (Sec. 3) of agency actions which may have "taking" implications.

This legislation, if read along side Executive Order 12630 would clearly indicate the goals and objectives are the same as those President

Reagan had when he issued that Executive Order in March, 1988. The goals are the same as the goals of Senator Bob Dole who introduced **S. 177** into the United States Congress on January 21, 1993. Senator Dole introduced the bill for himself and 10 co-sponsors. He has subsequently picked up additional co-sponsors. And his legislation is the same as that introduced **and passed** by the Senate in 1991 and 1992 (S.50 by Senators Symms - R.,Idaho and Boren, D.,Oklahoma).

The companion to S. 50 last year was co-sponsored by three of our present House members ... Representative Pat Roberts, 1st District, ... Representative Jim Slattery, 2nd District ... Representative Dan Glickman, 4th District. We have written to all four House members asking them to once again co-sponsor the House version of Private Property Rights Protection legislation in 1993, which has been introduced by Representative Condit (D.,California).

The farmers and ranchers in this state who are members of the 105 County Farm Bureaus are pleased and proud to be a part of a coalition ... the Kansas Property Rights Coalition ... supporting and asking for your support of S.B. 293.

We would be pleased to respond to any questions you may have. Thank you again for this time to testify.

Executive Order 12630 of March 15, 1988

Governmental Actions and Interference With Constitutionally Protected Property Rights

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to ensure that government actions are undertaken on a well-reasoned basis with due regard for fiscal accountability, for the financial impact of the obligations imposed on the Federal government by the Just Compensation Clause of the Fifth Amendment, and for the Constitution, it is hereby ordered as follows:

Section 1. *Purpose.* (a) The Fifth Amendment of the United States Constitution provides that private property shall not be taken for public use without just compensation. Government historically has used the formal exercise of the power of eminent domain, which provides orderly processes for paying just compensation, to acquire private property for public use. Recent Supreme Court decisions, however, in reaffirming the fundamental protection of private property rights provided by the Fifth Amendment and in assessing the nature of governmental actions that have an impact on constitutionally protected property rights, have also reaffirmed that governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required.

(b) Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. Executive departments and agencies should review their actions carefully to prevent unnecessary takings and should account in decision-making for those takings that are necessitated by statutory mandate.

(c) The purpose of this Order is to assist Federal departments and agencies in undertaking such reviews and in proposing, planning, and implementing actions with due regard for the constitutional protections provided by the Fifth Amendment and to reduce the risk of undue or inadvertent burdens on the public fisc resulting from lawful governmental action. In furtherance of the purpose of this Order, the Attorney General shall, consistent with the principles stated herein and in consultation with the Executive departments and agencies, promulgate Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings to which each Executive department or agency shall refer in making the evaluations required by this Order or in otherwise taking any action that is the subject of this Order. The Guidelines shall be promulgated no later than May 1, 1988, and shall be disseminated to all units of each Executive department and agency no later than July 1, 1988. The Attorney General shall, as necessary, update these guidelines to reflect fundamental changes in takings law occurring as a result of Supreme Court decisions.

Sec. 2. *Definitions.* For the purpose of this Order: (a) "Policies that have takings implications" refers to Federal regulations, proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, or other Federal policy statements that, if implemented or enacted, could effect a taking, such as rules and regulations that propose or implement licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property. "Policies that have takings implications" does not include:

(1) Actions abol ng regulations, discontinuing gov mental programs, or modifying regulations in a manner that lessens interference with the use of private property;

(2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;

(3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;

(4) Studies or similar efforts or planning activities;

(5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority;

(6) The placement of military facilities or military activities involving the use of Federal property alone; or

(7) Any military or foreign affairs functions (including procurement functions thereunder) but not including the U.S. Army Corps of Engineers civil works program.

(b) Private property refers to all property protected by the Just Compensation Clause of the Fifth Amendment.

(c) "Actions" refers to proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, applications of Federal regulations to specific property, or Federal governmental actions physically invading or occupying private property, or other policy statements or actions related to Federal regulation or direct physical invasion or occupancy, but does not include:

(1) Actions in which the power of eminent domain is formally exercised;

(2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;

(3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;

(4) Studies or similar efforts or planning activities;

(5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority;

(6) The placement of military facilities or military activities involving the use of Federal property alone; or

(7) Any military or foreign affairs functions (including procurement functions thereunder), but not including the U.S. Army Corps of Engineers civil works program.

Sec. 3. *General Principles.* In formulating or implementing policies that have takings implications, each Executive department and agency shall be guided by the following general principles:

(a) Governmental officials should be sensitive to, anticipate, and account for, the obligations imposed by the Just Compensation Clause of the Fifth Amendment in planning and carrying out governmental actions so that they do not result in the imposition of unanticipated or undue additional burdens on the public fisc.

(b) Actions undertaken by governmental officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking of property. Further, governmental action may amount to a taking even though the action results in less than a complete deprivation of all use or value, or of all separate and distinct interests in the same private property and even if the action constituting a taking is temporary in nature.

(c) Government officials whose actions are taken specifically for purposes of protecting public health and safety are ordinarily given broader latitude by courts before their actions are considered to be takings. However, the mere assertion of a public health and safety purpose is insufficient to avoid a taking. Actions to which this Order applies asserted to be for the protection of public health and safety, therefore, should be undertaken only in response to real and substantial threats to public health and safety, be designed to advance significantly the health and safety purpose, and be no greater than is necessary to achieve the health and safety purpose.

(d) While normal governmental processes do not ordinarily effect takings, undue delays in decision-making during which private property use if interfered with carry a risk of being held to be takings. Additionally, a delay in processing may increase significantly the size of compensation due if a taking is later found to have occurred.

(e) The Just Compensation Clause is self-actuating, requiring that compensation be paid whenever governmental action results in a taking of private property regardless of whether the underlying authority for the action contemplated a taking or authorized the payment of compensation. Accordingly, governmental actions that may have a significant impact on the use or value of private property should be scrutinized to avoid undue or unplanned burdens on the public fisc.

Sec. 4. *Department and Agency Action.* In addition to the fundamental principles set forth in Section 3, Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when implementing policies that have takings implications:

(a) When an Executive department or agency requires a private party to obtain a permit in order to undertake a specific use of, or action with respect to, private property, any conditions imposed on the granting of a permit shall:

(1) Serve the same purpose that would have been served by a prohibition of the use or action; and

(2) Substantially advance that purpose.

(b) When a proposed action would place a restriction on a use of private property, the restriction imposed on the use shall not be disproportionate to the extent to which the use contributes to the overall problem that the restriction is imposed to redress.

(c) When a proposed action involves a permitting process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process shall be kept to the minimum necessary.

(d) Before undertaking any proposed action regulating private property use for the protection of public health or safety, the Executive department or agency involved shall, in internal deliberative documents and any submissions to the Director of the Office of Management and Budget that are required:

(1) Identify clearly, with as much specificity as possible, the public health or safety risk created by the private property use that is the subject of the proposed action;

(2) Establish that such proposed action substantially advances the purpose of protecting public health and safety against the specifically identified risk;

(3) Establish to the extent possible that the restrictions imposed on the private property are not disproportionate to the extent to which the use contributes to the overall risk; and

(4) Estimate, to the extent possible, the potential cost to the government in the event that a court later determines that the action constituted a taking.

In instances in which there is an immediate threat to health and safety that constitutes an emergency requiring immediate response, this analysis may be done upon completion of the emergency action.

Sec. 5. *Executive Department and Agency Implementation.* (a) The head of each Executive department and agency shall designate an official to be responsible for ensuring compliance with this Order with respect to the actions of that department or agency.

(b) Executive departments and agencies shall, to the extent permitted by law, identify the takings implications of proposed regulatory actions and address the merits of those actions in light of the identified takings implications, if any, in all required submissions made to the Office of Management and Budget. Significant takings implications should also be identified and discussed in notices of proposed rule-making and messages transmitting legislative proposals to the Congress, stating the departments' and agencies' conclusions on the takings issues.

(c) Executive departments and agencies shall identify each existing Federal rule and regulation against which a takings award has been made or against which a takings claim is pending including the amount of each claim or award. A "takings" award has been made or a "takings" claim pending if the award was made, or the pending claim brought, pursuant to the Just Compensation Clause of the Fifth Amendment. An itemized compilation of all such awards made in Fiscal Years 1985, 1986, and 1987 and all such pending claims shall be submitted to the Director, Office of Management and Budget, on or before May 16, 1988.

(d) Each Executive department and agency shall submit annually to the Director, Office of Management and Budget, and to the Attorney General an itemized compilation of all awards of just compensation entered against the United States for takings, including awards of interest as well as monies paid pursuant to the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601.

(e)(1) The Director, Office of Management and Budget, and the Attorney General shall each, to the extent permitted by law, take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in Sections 1 through 5 of this Order, and the Office of Management and Budget shall take action to ensure that all takings awards levied against agencies are properly accounted for in agency budget submissions.

(2) In addition to the guidelines required by Section 1 of this Order, the Attorney General shall, in consultation with each Executive department and agency to which this Order applies, promulgate such supplemental guidelines as may be appropriate to the specific obligations of that department or agency.

Sec. 6. *Judicial Review.* This Order is intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

RONALD REAGAN

THE WHITE HOUSE,
March 15, 1988.

Kansas Livestock Association

6031 S.W. 37th Street • Topeka, Kansas 66614-5128 • Telephone: (913) 273-5115
FAX: (913) 273-3399
Owns and Publishes The Kansas STOCKMAN magazine and KLA News & Market Report newsletter.

March 22, 1993

To: House Judiciary Committee

Rep. Michael O'Neal, Chairman

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

Re: Support of SB 293, Procedures for State Agencies in Assessing Constitutional Taking Implications of Private Property Rights.

Mr. Chairman and committee members, I'm Mike Beam with the Kansas Livestock Association (KLA). KLA is proud to be one of the 37 members of the Kansas Property Rights Coalition which advocates the passage of SB 293.

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

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

KLA believes landowners must be sensitive to responsible use of private land because our actions may, in fact, jeopardize the state's resources and/or impact the property rights of others. We also believe, however, the state must always balance the degree of influence over private property against the rights of private property owners. SB 293 speaks to this balancing act and we believe it deserves your favorable consideration.

This legislation instructs the attorney general to adopt guidelines to assist state agencies in identifying actions that may have constitutional taking implications. Furthermore, the attorney general shall "formulate principles that ensure state agencies are sensitive to, anticipate and account for the obligations imposed by the fifth and fourteenth amendments of the Constitution of the United States and section 18 of the Bill of

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Rights of the Constitution of the State of Kansas in planning and carrying out governmental actions."

If a state agency determines its actions creates a constitutional taking implication, it must prepare an assessment of the taking implications by including an analysis of the elements listed in Section 3. Before the agency could proceed, it would be required to report to the governor, attorney general, and legislative budget committee.

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

It's our contention the state of Kansas should follow the lead of other states by formalizing the process of reviewing agency actions which may cause constitutional taking implications. SB 293 outlines such a process and KLA supports the passage of the bill. Thank you.

KANSAS ASSOCIATION OF REALTOR

REALTOR®

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

TO: THE HOUSE JUDICIARY COMMITTEE

FROM: KAREN FRANCE, DIRECTOR, GOVERNMENTAL AFFAIRS

DATE: MARCH 22, 1993

SUBJECT: SB 293, PRIVATE PROPERTY RIGHTS BILL

Thank you for the opportunity to testify. On behalf of the Kansas Association of REALTORS®, I appear today to support SB 293.

The Kansas Association of REALTORS hold private property rights as a basic freedom of this country. As American citizens, we have the constitutional right to own and use our property however we see fit, as long as our use is not dangerous or harmful to others. We support government's use of police power when regulating property use to protect the rights of others. We, however, cannot suport the use of government authority that constitutes a "regulatory taking" of property.

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

What does this bill do? This bill establishes a system for state agencies to review their actions prior to finalizing them, in order to ensure that their actions do not constitute an unlawful "taking of property without just compensation", an action which is prohibited by the Just Compensation Clause of the Fifth Amendment of the United States Government.

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

A June 29, 1992 United States Supreme Court decision unequivocally reaffirmed the principle, that government regulation which denies a property owner all economically viable use of property constitutes a taking for which the owner must receive compensation. That court case arose out of a situation where an individual paid $975,000 for two oceanfront lots on South

Carolina's Isle of Palms with plans to build a house on each lot, one for himself and one to sell. However, enactment in 1988 of the South Carolina Beachfront Management Act prevented him from building any permanent habitable structures on the lots. The Act, and its implementing regulations were passed in order to prevent beach erosion.

The owner filed suit in state court, claiming that the application of the Act to his properties rendered them valueless, thus constituting a "taking" for which he was entitled to just compensation under the Takings Clause of the Fifth Amendment of the U.S. Constitution. It took four years of court battles, and untold attorney fees in order to get the United States Supreme Court to rule in favor of the landowner. Even then, the decision of the United States Supreme Court only remanded the case back to state court for retrial. Thus the legal nightmare for this property owner is still not over.

What we are trying to accomplish by this legislation is a system which will help to avoid such legal entanglements for property owners, and the state. Keep in mind that the State of South Carolina had to expend untold amounts of money, time, and energy in order to defend the action, only to have go back and retry the case after the Supreme Court ruled.

It is important to note what we are not proposing what to do in this bill. We are not impacting the decisions of local units of government or of the state legislature. The Private Property Protection Act is specifically limited to "state agencies". "Governmental Action", and "action" are clearly defined at line 28, page one of the bill.

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

The Private Property Protection Act does not expand existing "takings" law. A "taking" is specifically defined by the Act as an action such that compensation is required by either the fifth or fourteenth amendment of the United States Constitution or by the Kansas Constitution. All principles stated in the Act are consistent with court rulings on what constitutes a "taking" under the Constitution. The bill provides a process to insure that state agencies recognize when their actions have "taking" implications under existing law.

We believe that this country was built on Private Property Rights. We believe this bill will help to insure that those rights are protected by a system which will guarantee that just compensation is given when government agencies deem it is necessary to regulate those rights in such a way as to essentially "take" it from the owner. We ask for your assistance in this endeavor by recommeding SB 293 favorable for passage.

800 WESTPORT ROAD • KANSAS CITY, MISSOURI 64111-3[illegible]
816/931-2102 FAX 816/931-4617

MID-AMERICA LUMBERMENS ASSOCIATION

ARKANSAS KANSAS
MISSOURI NEBRASKA
OKLAHOMA

TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE

March 22, 1993

Senate Bill 293

Mister Chairman, members of the House Judiciary Committee, my name is Art Brown and I represent the Retail Lumber and Building Material Dealers in Kansas. I appear before you today in support of Senate Bill 293.

Attached to my testimony is a reprint from a *Reader's Digest* article about a family who is being severely threatened by lawsuits of the cutting of timber. While this does not sound like a major issue into itself, the crux of the matter is this family owns this land, has for three generations and are not being offered any compensation for it. It is not their fault a spotted owl cannot tell the difference between forest service land and theirs, yet they stand to lose their 200 acres, because they cannot afford the legal fees to protect themselves in this matter. They just don't have that kind of money.

To put this in perspective here in Kansas, if property was to be purchased adjacent to an existing business with hopes of developing this land as the business grows, and taxes are paid on this land over a period of time, it would be devastating to the owner if he were told that this land had been declared a wetlands, or it became a habitat of an endangered species. The owner could not collect any monies for the land, and would not be able to develop it. It just sits there. This type of scenario was pointed out graphically in a *Forbes* magazine article, "The Strange Case of the Glancing Geese," which will probably be, or already has been, referred to you by other conferees.

I will tell the committee, I am not an attorney, and have no desire to get involved in a protracted discussion about Constitutional law. The changes that the Senate made from the original bill was to put language into the bill and delete other language which the end result is closer to Constitutional law. We have no quarrel with these changes.

What we see as a very unique quality with this bill is that this is one of those rare situations where the Legislature has a solution to a problem or concern, before one exists. Arizona, along with several other states have adopted such a provision, and this bill reflects much of that law. The changes made, keep it in step with the United States and Kansas Constitution, as mentioned before.

If you would take just a minute to read the parts of the *Reader's Digest* article I have highlighted for you, you will realize that passage of this measure can go a long way in preventing such a situation developing in Kansas.

It has been my pleasure to visit with you about this issue today. I would stand for any questions or comments about my testimony. Thank you.

LUMBER GROWS ON TREES

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Reader's Digest

Thousands are losing their jobs, and all of us are paying a price

The Great Spotted Owl War

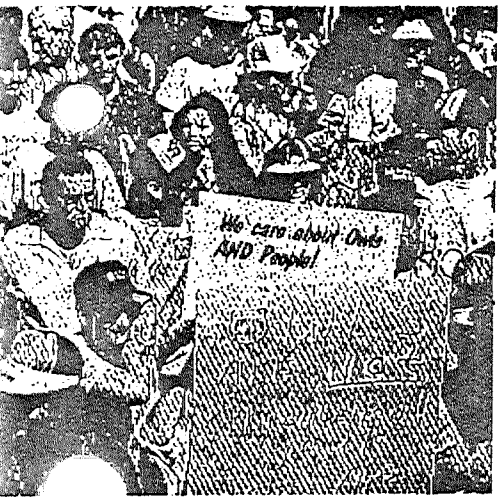
BY RANDY FITZGERALD

ONE AFTERNOON last November, Donald Walker, Jr., got a four-page letter from an attorney for an environmental group calling itself the Forest Conservation Council. The organization threatened to sue, seeking heavy fines and imprisonment, if Walker cut down a single tree on his 200 acres of Oregon timberland.

Walker, his wife Kay and two daughters live in central Oregon on land that has been in the family for three generations. Since being laid off from his lumber-mill job in 1989, Walker had cut a few trees each year for income to help support the family.

Barely able to control his mounting anger, Walker called his 77-year-old father, who lives nearby. He had received a similar letter. Then Walker talked to a neighbor, a retired log-truck driver, who cut timber on his land just to pay his property taxes every year. The same threat had been mailed to him.

West Coast timber workers and their families demonstrate



ABOVE: © JOSEPH GIBSON/BLACK STAR; © JOHN COONEY/NATURAL SELECTION

Kay Walker was in disbelief. "Here we are caught up in this owl mess again," she fumed.

The "mess" had begun when environmentalists challenged the Interior Department's decision not to list the northern spotted owl as a threatened or endangered species under the Endangered Species Act. The act permits anyone to sue to enforce provisions protecting a species in peril and its suspected habitat.

As a result of this and related court action, most timber sales on federal forest land in the Pacific Northwest have been halted, throwing thousands of loggers and mill employees out of work.

Now the act is being used against private landowners. Besides the Walkers, about 190 other landowners in Oregon have received legal threats from the same environmental group. Most are small private landowners or modest local logging companies. "We can't afford to fight this in court," Walker says. "I'm out of work, and last year our property taxes nearly doubled. Our tree farm is the last hope we have to survive."

The hardships visited on logging families by the spotted-owl controversy will eventually touch all Americans through higher prices for wood products. But these problems could have been avoided—and still can be—if environmentalists, timber owners and federal officials would compromise.

The Real Agenda. In 1987, a Massachusetts group called Greenworld petitioned the U.S. Fish and Wildlife Service to list the northern spotted owl as an endangered species. After a review, the FWS ruled that the owl was not in danger of extinction. In retaliation, 22 environmental groups—ranging from the Seattle Audubon Society to the Sierra Club—sued to reverse the decision.

A number of these groups had another agenda—to outlaw logging in old-growth forests throughout much of the Northwest—and were using the owl as a tool. "The northern spotted owl is the wildlife species of choice to act as a surrogate for old-growth forest protection," explained Andy Stahl, staff forester for the Sierra Club Legal Defense Fund, at a 1988 law clinic for other environmentalists. "Thank goodness the spotted owl evolved in the Pacific Northwest," he joked, "for if it hadn't, we'd have to genetically engineer it."

Old-growth forests are often defined as stands of trees at least 200 years of age that have never been exposed to cutting. There are nine million acres of old-growth forest on federal lands in Oregon, California and Washington. Of this, some six million acres—enough to form a three-mile-wide band of trees from New York to Seattle—are already off-limits to logging, preserved mostly in national parks and federal wilderness areas.

So the fight came down to the remaining three million acres, which were being cut at the rate of some 60,000 acres a year. By the time this

Testimony of Paul Hettenbach
Representing Kansas Land Improvement Contractors Association
Before House Judiciary Committee supporting Senate Bill 293

Chairman O'Neal, members of the committee:

As a representative of the Kansas Land Improvement Contractors Association, I am pleased to stand in support of Senate Bill 293. As an excavating contractor working primarily in rural areas, I have witnessed restrictions placed on landowners use of their own property. Extremely heavy rains caused runoff to overtop a dike or levy. The levy was protecting tilled farm ground and a township road. In the course of repairing the levy, four trees blocking the flow of water were removed from the channel. A state agency employee was in the area on other business and saw the completed work and informed the farmer that he would need to plant a fifty foot strip of grass outside of the channel and levy. The water in a stream crossing private property does belong to the State of Kansas. The state regulates the uses and flow of the water. How far from the stream banks on private property can regulations be imposed before a "takings" has occurred?

A recent court case has ruled in favor of the landowner where regulations deny the "economically viable use of his land." This constitutes a taking and should be compensated. (Lucas v. South Carolina Costal Council)

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Procedures to determine the value to the public must be established and compared to the cost of the possible taking. Senate Bill 293 calls for the responsible use of regulations and accountability, as well as, the evaluation procedure of the cost versus benefits. These procedures are necessary to analyze agency regulations so that unappropriated state funds are not encumbered. This legislation will avoid imposing unanticipated or undue additional burdens on the state treasury.

Mr. Chairman, members of the committee, for accountability and responsible use of regulations, I ask for your support of Senate Bill 293. Thank you.

SIERRA CLUB

Kansas Chapter

Testimony of William Craven
Legislative Coordinator, Kansas Sierra Club
House Judiciary Committee
March 22, 1993
S.B. 293

Thank you, Mr. Chairman, and members of the committee. I am pleased to be here today to express my very strong opposition to this bill on behalf of the 3,000 members of the Kansas Sierra Club. Kansas, along with several other states, has been targeted by several groups who advance a truly radical and extreme view of property rights. This bill is not an isolated Kansas event. Similar measures are being considered in several state legislatures.

Even after the Senate amendments, this bill is only slightly less objectionable. I ask you to consider the following provisions, and tell me if you think the intent is clear, or if this bill is nothing more than an invitation to endless litigation.

—Line 40 on page 1: Whose private property? There are situations in which an agency could lessen its actions affect on one person's private property only to further burden someone else's. The bill is not clear on this point.

—Paragraph (2) (c), the law enforcement exemption, is understandable, but there is legislation pending in Congress on this very issue. I agree with the intent, but it should be crafted so as to track federal law.

—Paragraph (D) (d) on page 2. This is an important provision that exempts the legislature from the act. But if an agency follows the legislative mandate, how can the agency be found guilty of a takings? This exposes one of the several inherent logical inconsistencies in this bill.

—Section 3(b) has several problems. One is that it requires state agencies, to follow the AG's guidelines "to the extent permitted by law." Does that mean there is a body of law which exempts certain agencies from the AG's guidelines? Or does it mean that the legislature can exempt certain regulations from this act? Frankly, I have no idea what that language means.

Next, this section requires that all agency actions be expressly authorized by law. Unless the proponents have evidence to the contrary, it seems to me that this legislation is totally unneeded. Where are the examples of state agencies acting in violation of law?

These are just some examples. There is language throughout this bill that is not clearly defined, that has no real purpose, that doesn't address real problems, and that therefore makes this entire bill unnecessary.

This bill is the centerpiece of the legislative agenda of what has been called by some the "wise use" movement. The "wise use" movement says that its aim is to protect property rights. However, its real agenda is to weaken and prevent laws that protect human health and safety, and the environment. It is an extremely self-centered movement which has only one goal: exploiting natural resources with and minimizing regulations of businesses or agribusiness regardless of the effect on the public or future generations. They care little about the consequences of their actions on neighboring landowners, and they care even less

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about the consequences of their actions as they relate to the public welfare or the environment.

I want to make one thing quite clear.This bill is not about private property rights. Instead, this bill is is a frontal attack on the right of the government to protect the public interest. I also want to make it clear that I take second to no one in protecting private property. I consider it one of the linchpins of both the federal and state constitutional bill of rights. This bill, however, advocates an extreme position that has no support in our constitutional tradition.

When takings occur—the remedy is through the court system. I have not found a single Kansas case in which compensation was paid to a landowner for anything other than a complete taking. This bill, which says that compensation can be paid for a partial taking, addresses a problem that doesn't exist, and creates an extreme adminstrative burden to implement new regulations. If the proponents claim that such litigation is expensive, and it sometimes is, then the remedy is enact a bill providing that the state shall pay the attorneys fees of a party who brings a successful takings action. There is no sense in turning over the takings issue to the Attorney General. Takings are a highly specialized field of jurisprudence, and executive branch officials are the last place to vest this extensive authority.

Many of the proponents, I expect, will lambast various federal regulations like the wetlands rules. They can lambast all they want, but this bill, since it is limited to state regulations, doesn't help them at all. I challenge you to challenge the proponents to come up with enough "takings" accomplished through state law that warrant the magnitude of change represented by this bill.

The gist of this bill is that future state laws or regulations which target such issues as toxic waste dumping, water rights appropriations, landfill regulations, food handling, highway safety, or day care centers or other matters of compelling importance would have to be jump through a bunch of hoops to see if these regulations are "takings." The test is whether the new regulations would affect the value or use of property, or the operating costs or profits of a business. If so, regulators would have to determine if that would constitute a "taking," all of which would have to be paid for by the state. Such a bill could end up forcing the public to pay businesses not to endanger the public and to pay polluters not to pollute.

A new, very restrictive, and highly objectionable test under Section 3(b) (page 3, line 41) of this bill, states that public health and environmental officials would have to prove that a business' action would pose a real and substantial threat to human health, a radical departure from the current standards that protect against potential and probable threats.

The strongest argument against this bill is that taxpayers should not have to pay property owners to prevent them from harming their neighbors. Citizens, working through the legislature, should have the right to protect a state's natural resource base, whether that be water, threatened and endangered species, soil, or whatever. But this bill, though aimed partly at environmental regulations, is much broader than that. Had this bill been effective during the civil rights movement, lunch counters, motels, and other places of public accomodation in the South would not have had to desegregate. This bill is far more than an anti-environmental bill. It has immense adverse implications for zoning, historic preservation, for sanitation in restaurants, for regulating staff-to-client ratios in daycare centers and retirement homes, workplace safety standards, and for many racial, sexual, and religious anti-discrimination laws, as well as for employment laws and a host of similar measures. As another example, regulations which keep insurance companies out of

banking, and which keep banks out of selling insurance would be suspect under this law. Regulations which require financial institutions to be solvent may constitute a taking. Regulations which require shopping malls to have fire sprinkler systems may require the state to compensate the mall owners. There is no end to the mischief this bill would work.

The proponents argue that they do not object to regulation for the public benefit as long as they receive compensation from the public. That is not, and never has been the test for a taking. There is a deliberate tension within the Fifth Amendment which requires compensation for complete takings on the one hand, while permitting government to exercise rights pursuant to its police power, on the other hand. Takings cases must be analyzed very carefully and deliberately, with special attention on the facts of each case. Takings law, as it applies to statutes, is not something which can be defined by rule and regulation by the Attorney General.

There is a flip side to the takings issue. The long-term value of land is diminished by mining, over-grazing, clear-cut timbering and pollution from industry. When a private landowner builds roads, or clearcuts timber, or pollutes, those actions can sometimes decrease water quality, lead to soil erosion, or cause other consequences. If we are to have legislation requiring compensation to landowners for the impact of environmental regulations, then the same legislation should require private landowners to compensate the public when their actions harm the state's water, threatened and endangered species, or other aspects of the state's natural resource base.

The proponents statements make a mockery of that obligation. I haven't heard agribusiness offer to pay to clean up the drinking water of cities which is polluted by atrazine or other pesticides. What do the proponents say to future generations of Kansans who no longer will have an Ogallala aquifer? What do they say to our future generations who will rely on groundwater sources which are contaminated with nitrates from fertilizers and feedlot runoff? What do they say to children who want to know what the Arkansas River once looked like before groundwater pumping in Kansas and Colorado essentially emptied the river? What do they say to those who want to know why taxpayers should pay for the damages caused by soil and wind erosion, by the failure to rotate crops, or by the failure to practice sustainable agriculture? Why do we taxpayers need to pay to protect ourselves from these dangers?

The so-called wise use movement, which should more accurately be called the resource abuse movement, rests on three negative appeals: the fear of unknown regulations, the fear of the government, and the fear of limitations on private property rights. If that is not enough to stir up trouble and public alarm, then they go beyond scare tactics and start telling untruths. That is not just my phrase.

Here is just one example. In a Wichita Eagle editorial of early last year, it was said that, "Disinformation is often used by extremists to defend landowner "rights." It described the wise use movement as "a loose cover for industries and landowners who want to destroy environmental laws, as well as rural interests who see government land grabs lurking everywhere. In Kansas, this kind of thinking is exemplified by the tactics of the American Farm Bureau Federation, which is busy trying to spread panic in central Kansas over federal wetlands laws. The federation charges that the McPherson Valley Wetland Restoration Project could grab more than 20,000 acres, drive scores of farm families off their land, and close vital roadways and bridges. The reality is that it targets but 5,000 acres, and only land held by willing sellers. No roads and bridges would be closed; no farmers driven from the home place."

The editorial concluded that "envrionmental, zoning, and other land-use laws are vital to the functioning of society. They put in proper perspective the balance betwen individual rights, and the rights of the community at large."

Kansas' sorry record in environmental protection needs strengthening, not rolling back.Last year, when the Green Index from the Institute for Southern Studies was released, Kansas ranked in the low 40's out of 50 states in several environmental categories. This is the basest and most cynical attempt to protect purely private interests I have seen so far in the legislature this year.

It is important to recognize that the bill is totally unnecessary. The whole process will require a staggering amount of red tape, and will end up costing taxpayers millions of dollars. Even worse, it will delay important actions designed to protect the public. I haven't seen the fiscal note for this bill, but if it doesn't have nine zero's after it, then something is out of whack.

The federal and state constitutions already protect private property rights. This bill is an attempt to do what a very conservative U.S. Supreme Court refused to do last year, and what other very conservative Supreme Courts have refused to do in times past. If the proponents of this wacky bill tell you that their intent is to codify the Lucas decision, then let's write the entire decision into state law. They aren't codifying Lucas. They are re-writing more than 200 years of constitutional law to suit their own selfish interests.

The basic principle of "takings" law was articulated in a famous U.S. Supreme Court of 1887, which incidentally, came from Kansas. The case is known as Mugler v. Kansas, 123 U.S. 623, 625. There, the principle was stated that:

> "All property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."

That case, the recent Lucas case, and all cases involved in the takings issue depend on a very careful consideration of the facts presented by a particular claim of takings. This bill abandons this property-specific approach by requiring the Attorney General to determine in the abstract "the governmental actions that have constitutional takings implications." (Page 2, line 5). As the Maryland Attorney General's office said, "this proposed assessment is difficult, if not largely impossible, to do."

The bill would impose a burdensome review process on all kinds of government regulatory programs that are in no sense a "taking." Written impact assessments of all current or proposed policies that have constitutional implications" would be required and I am astonished that these groups seek such a costly new governmental program only results in more paper shuffling and more state workers. Regardless of whether the policy under review actually is a taking, the assessment must consider alternatives to the program, an estimate of the financial cost to the government for compensation, and identification of a source of payment within the agency's budget. The net effect of these requirements is that regulatory programs would be impeded, despite the fact that these regulations could not be validly challenged as taking, under any constitutional analysis whatsoever.

New regulations typically arise because of scientific progress and increases in knowledge. For example, it is only through scientific advances that we learned of the values of wetlands, which we once thought were useless swamps. Scientific advances have taught us the importance of species preservation and of biodiversity, of the importance of not having oil and gas seep into groundwater, of the effects of lead paint and solder from plumbing on children, and a host of other issues which are now regulated.

Regulations do have some impact on private property rights. I am not going to play Pollyanna and deny that. Their intent is to protect the private rights of everyone. The proponents have not proved their case, however, that an extensive new bureaucracy should be created to test these regulations under a faulty interpretation of the Fifth Amendment.

Finally, I wanted to bring to the committee's attention two quotations, one from the Kansas Attorney General, one from the Kansas Supreme Court.

In Attorney General Opinion 88-6, it was said:

> Private property may not be taken by a government for public use without compensation. A distinction must be drawn, however, between a taking of property for public use, which requires compensation therefor, and the exercising of a state's police power to protect the public health, safety, welfare, and morals which does not require compensation...[A]n action which merely adjusts the benefits and burdens of economic life to promote the public good is less likely to constitute a taking. There is no set formula for deciding whether justice and fairness require that economic injuries caused by public action must be deemed compensable.

And in the case of Small v. Kemp, 240 Kan. 113, 116 (1986), the Kansas Supreme Court summed up the rule as follows: "Constitutional provisions against taking private property for public use without just compensation impose no barrier to the proper exercise of the police power."

Now I ask you: Who is being conservative here: The Sierra Club which rests its case on the continued vitality of 200 years of constitutional doctrine, or the proponents of this bill who seek to make a radical change in what we now call takings laws?

Thank you for providing the Kansas Sierra Club an opportunity to testify.

STATE OF KANSAS

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S.B. 293
Testimony Presented To: House Judiciary Committee
Provided by: Kansas Department of Wildlife and Parks
March 22, 1993

S.B. 293 defines "taking" as that resulting from governmental action by a state agency through regulations which may limit private property use; and proposed or implemented licensing or permitting conditions, requirements or limitations on private property.

Current Supreme Court law defines such "takings" as occurring only when the imposition of government regulation so limits a property's use as to constitute a complete and total deprivation of the property's value.

Under K.S.A. 32-702, it is the policy of this state to protect, provide and improve outdoor recreation and natural resources and to plan and provide for the wise management of the state's natural resources, thus contributing to and benefitting the public's health and its cultural, recreational and economic life. The Kansas Department of Wildlife and Parks is charged with that mission to carry out the policy's intent on behalf of the state and its citizens.

HOUSE JUDICIARY
Attachment #10
03-22-93

By its very nature, management of that resource requires some restrictions that are accomplished through regulatory actions.

S.B. 293 requires that before state agencies may implement any proposed regulatory action, including license and permit conditions, they must first provide an assessment of the regulation's "takings" potential to the legislative budget committee, the attorney's general office, and the governor.

Several remedies already exist to address the "takings" potential of regulatory action including the Administrative Procedures Act, the courts and the legislature including the Joint Legislative Committee on Administrative Rules and Regulations. The bill also overlooks the fact that the Attorney General's office already review all regulations as to authority and that economic impact statements are a part of a regulatory action.

Our chief objection to S.B. 293 is that there has been no fiscal note as to the cost as to the taxpayer in requiring agencies to perform comprehensive "takings" assessment. The law in this area is constantly changing. One set of guidelines by the Attorney General which attempt to be applicable to all the various and diverse state agencies will not provide sufficient guidance in this area. Agencies would not only have to employ a team of economists in order to assess the potential of every proposed governmental action, but in all likelihood would also have to dramatically increase their legal staff.

In conclusion, S.B. 293 effects any regulatory action which would limit, curtail, or influence any property interest. Such a broad-based mandate to assess the "takings" potential of government

action envelopes virtually all state regulatory activity.

If this legislation becomes law it will: (1) dramatically increase the role of the Attorney General in order to monitor potential regulatory "takings," (2) increase costs to the state and to the taxpayer to pay for the litigation, staff, assessment, and compensation costs, and (3) cause serious delays in promulgating needed regulations and permits which benefit the general public.