

Approved: March 9, 1993  
Date

## MINUTES OF THE SENATE COMMITTEE ON AGRICULTURE

The meeting was called to order by Chairperson David Corbin at 10:30 a.m. on February 24, 1993 in Room 527-S of the Capitol.

All members were present except: all members were present

Committee staff present: Raney Gilliland, Legislative Research Department  
Jill Wolters, Revisor of Statutes  
Lila McClafin, Committee Secretary

Conferees appearing before the committee: Senator Jerry Karr  
Charles Rayl, Attorney for Southfork Watershed District,  
Cottonwood Falls  
Bill Craven, Sierra Club  
K. Verdou Parish, Derby  
Elvin Perkins, Emporia

The Chairman opened the hearing on SB 302 - concerning watershed districts; relating to the powers and duties. He called on Senator Karr

Senator Karr said he had co-sponsored the bill at the request of Mr. Rayl on behalf of the Southfork Watershed district in Butler, Chase and Greenwood Counties, Kansas.

Mr. Rayl said failure to amend the statute as requested is that it allows one person in concert with the Department of Wildlife and Parks to stop or significantly hamper many types of public projects untaken by various governmental entities (Attachment 1) Included with his testimony is Attorney General Opinion No. 91-51 regarding eminent domain -- condemnation in cities -- cities; authority to condemn public property.

Due to family illness, Lowell K. Abeldt, legislative liaison for the State Association of Kansas Watersheds, was unable to be present but his letter supporting SB 302 was distributed (Attachment 2).

Bill Craven asked that watershed districts not be given the power of eminent domain over state government agencies which are accountable to the public (Attachment 3)

K. Verdou Parish spoke in opposition to SB 302 and gave the history of situation in Derby, Kansas, and how the easement deed statute had preserved the habitat on Spring Creek Watershed from being destroyed by a sewer project in their city (Attachment 4)

Elvin Perkins an attorney representing the people that are involved in the suite against the Southfork Watershed District gave lengthy testimony opposing the bill (Attachment 5).

The Chairman asked Mr. Perkins to submit his remarks in writing for the record.

The hearing on SB 302 was continued until February 26, and SB 136 will be heard on February 25.

The next meeting is scheduled for February 25, 1993. The meeting adjourned at 11:05.

# GUEST LIST

COMMITTEE: Senate Agriculture

DATE: Feb 24, 1993

NAME	ADDRESS	ORGANIZATION
LARRY D. WOODSON	TOPEKA	KSBA
Devern H. Phillips	Topoka	KSBAH
Dean Doosen		Legislature
CHARLES R. RAYL	COTTONWOOD FARM	South Fork watershed
Robert Glanville	Cottonwood Falls	South Fork Watershed
Glen Kirk	Topoka	KS Water Office
Ch. Duffy	"	Ks Petro Council
Jerry Haylett	"	Ks Wildlife Fed
Joe Eisenhauer	"	Propane Motor Assoc of KS
Gene Hufst	"	KSBA
Blake Henning	"	KS Water Office
Jane Wolf	Lawrence	Ks Audubon Council
Bill Gaven	<del>SENE</del> Topoka	Sierra Club
Alan Pollom	TOPEKA	THE NATURE CONSERVANCY
Sharon H. G. Gons	Topoka	KDWP
DARRELL MONTEI	PRATT	KDWP
Tom Huhn	TOPEKA	KDWP
Lynn & Perkins	Emporia	Fresh Hous
Ted Enslley	+ greher	KDWP
K. VERDO (KRS) St	DEBIS KS	N/A
Bill Fuller	Manhattan	KFB

BEFORE THE SENATE AGRICULTURE COMMITTEE

AMENDMENT OF WATERSHED DISTRICT ACT K.S.A. 24-1209

SUMMARY

The real significance of failing to amend the statute as requested is that it allows one person in concert with the Department of Wildlife and Parks to stop or significantly hamper many types of public projects undertaken by local governmental entities, including counties, cities, watershed districts, drainage districts, etc. Although the Department of Wildlife and Parks may have a review process they undertake before accepting such an easement, it should be noted that the review process does not provide for consultation with governmental entities or districts where the proposed easement is located. The procedures currently in place allow for one individual to effectively stop public improvement projects even though the U. S. Congress and Kansas Legislature determined that such projects should proceed by the grant of eminent domain powers to local governmental entities or districts. To allow such action, without appropriate review or appeal on behalf of local governmental entities, will result in a substantial increase in costs to many such entities on various projects undertaken throughout the state.

INDEX

ISSUE

LEGISLATIVE HISTORY

Federal - Watershed Protection and Flood Prevention Act

Kansas - Watershed District Act

CONFLICTING STATUTES

Parks and Wildlife, K.S.A. 32-807

Watershed District Act, K.S.A. 24-1209

SOUTHFORK

Articles of Incorporation

General Plan

MAP

Five Creek Easement

ATTORNEY GENERAL OPINION 91-51

REGIONAL COUNSEL USDA - Letter

*Charles Rayl*  
*Senate Agr. Co.*  
*2-24-93*  
*attachment 1*

BEFORE THE SENATE AGRICULTURE COMMITTEE

WATERSHED DISTRICT ACT K.S.A. 24-1201 et. seq.

ISSUE: CORPORATE POWERS OF WATERSHED DISTRICTS TO ACQUIRE LAND RIGHTS BY GIFT, PURCHASE OR EMINENT DOMAIN TO CONSTRUCT WORKS OF IMPROVEMENTS PROVIDED BY K.S.A. 24-1201 et. seq. ON LANDS WHICH THE SECRETARY OF WILDLIFE AND PARKS HAS ACQUIRED RIGHTS UNDER K.S.A. 32-807.

PROPOSED AMENDMENT TO K.S.A. 24-1209:

EIGHTH. To acquire land and interests in land including rights, title, interests, grants or easements owned or possessed by the Kansas department of wildlife and parks pursuant to K.S.A. 32-702 and 32-807, and amendments thereto, by gift, purchase, exchange or eminent domain; The power of eminent domain shall be exercised within or without the boundaries of the district in the manner provided by K.S.A. 26-501 to 26-516, inclusive, and amendments thereto.

LEGISLATIVE HISTORY

FEDERAL

Congress adopted the Watershed Protection and Flood Prevention Act. The policy statement enacted by Congress is as follows:

18 USC § 1001

Erosion, floodwater, and sediment damages in the watersheds of the rivers and streams of the United States, causing loss of life and damage to property, constitute a menace to the national welfare; and it is the sense of Congress that the Federal Government should cooperate with States and their political subdivisions, soil or water conservation districts, flood prevention or control districts, and other local public agencies for the purpose of preventing such damages, of furthering the conservation, development, utilization, and disposal of water, and the conservation and utilization of land and thereby of preserving, protecting, and improving the Nation's land and water resources and the quality of the environment.

KANSAS

Kansas enacted the Watershed District Act in 1953. The declaration of public necessity for creation of districts is set forth in K.S.A. 24-1201a as follows:

Declaration of public necessity for creation of districts; power; benefits. It is recognized that serious problems of water management resulting from erosion, floodwater or sediment damages or instability of natural water supplies are arising in the watersheds of the rivers and streams of the state of Kansas; that for the purpose of alleviating such damages and furthering the conservation, development, utilization and disposal of water and thereby preserving and protecting the state's land and water resources, it is legislatively determined that it is necessary and advisable to establish watershed districts with the power to construct, operate and maintain works of improvement needed to carry out such purposes; that there is hereby declared the public necessity for the creation of such districts in watersheds including lands that are subject to erosion, floodwater or sediment damages or that would be benefited by the construction of works of improvement for the conservation, development, utilization and disposal of water; and that it is further declared that the formation of such districts will inure to the general benefit of all of the taxable, tangible property included therein.

The watershed district act granted each watershed district corporate powers including:

EIGHTH. To acquire land and interests in land by gift, purchase, exchange or eminent domain; such power of eminent domain to be exercised within or without the boundaries of the district in like manner as provided by K.S.A. 26-501 to 26-516, inclusive, or any amendments thereto.

#### CONFLICTING STATUTES

The problem is that a conflict has developed between the rights of the watershed districts and the Secretary of Parks and Wildlife due to easements acquired by the Secretary of Parks and Wildlife under K.S.A. 32-807(f), (g) and (q).

32-807 POWERS OF SECRETARY. The secretary shall have the power to:

(f) purchase, lease, accept gifts or grants of or otherwise acquire in the name of the state such water, water rights, easements, facilities, equipment, moneys and other real and personal property, and interests therein, and maintain, improve, extend, consolidate, exchange and dispose of such property, as the secretary

deems appropriate to carry out the intent and purposes of the wildlife and parks laws of this state;

(g) acquire, establish, develop, construct, maintain and improve state parks, state lakes, recreational grounds, wildlife areas and sanctuaries, fish hatcheries, natural areas, physical structures, dams, lakes, reservoirs, embankments for impounding water, roads, landscaping, habitats, vegetation and other property, improvements and facilities for the purposes of wildlife management, preservation of natural areas and historic sites and providing recreational or cultural opportunities and facilities to the public and for such other purposes as suitable to carry out the intent and purposes of wildlife and parks laws of this state;

(q) provide for the preservation, protection, introduction, distribution, restocking and restoration of wildlife, and the public use thereof, in this state, including, ...

#### SOUTHFORK GENERAL

Southfork Watershed Joint District No. 76, Butler, Chase, and Greenwood Counties, Kansas, was incorporated in accordance with the watershed district act on August 11, 1967.

In 1973, pursuant to K.S.A. 24-1214, Southfork adopted its general plan prepared with assistance of the United States Department of Agriculture, Soil Conservation Service and the State of Kansas, State Conservation Commission.

Southfork has completed 1 PL 566 federally funded structure and 8 state funded structures. It is currently building 3 federal structures. Pursuant to its general plan, 7 federally funded structures and 25 state funded structures remain to be constructed. (see attached map)

Southfork was in the process of acquiring for land rights from the landowner Five Creek Ranch Co. to construct its Site #7, a PL 566 structure.

On June 16, 1992, Five Creek Ranch Co., a partnership, the landowner of Site 7 of the Southfork general plan granted an easement to the Kansas Department of Wildlife and Parks covering a 150 foot the center line of which is the center line of Rock Creek which is the location of Southfork's Site 7, a copy of which is attached hereto.

LEGAL DOCUMENTS AND AUTHORITIES RELEVANT TO ISSUE

The following documents and authorities are relevant to the issue, the powers granted to the watershed district under K.S.A. 12-1209 Eighth, powers of the Secretary of Parks and Wildlife, K.S.A. 32-807(f), (g) and (q), the Attorney General Opinion No. 91-51, a copy of which is attached, and letter dated October 2, 1992, by the Regional Attorney Office of General Counsel, United States Department of Agriculture, a copy of which is attached.

AGO 91-51 speaks specifically to the eminent domain authority of a city found at K.S.A. 26-201, which provides in part:

"A city shall have the right to acquire by condemnation any interest in real property, including a fee simple title thereto: provided . . . whenever it shall be deemed necessary by the governing body of any city to appropriate private property for the use of the city for any purpose whatsoever, the governing body shall by resolution declare ... the land or interest to be condemned ...." (Emphasis added).

The enabling legislation set forth in K.S.A. 24-1209 does not expressly limit the watershed district's rights of eminent domain to private property, it does not state specific authorization by the legislature the authority to acquire by interests of the Secretary of Wildlife and Parks in land by gift, purchase, exchange or eminent domain.

It is our understanding that the Secretary of Parks and Wildlife has advised the legislaturers representing the area within Southfork Watershed that the Secretary is unwilling to gift the easement to Southfork for the construction of its PL 566 structure.

In view of the language of City of Norton v. Lowden, 84F 2d 633 and other citations set forth in AGO 91-51, Southfork is requesting that the legislature adopt SB302 to be able to carry out the intent of the Federal Watershed Protection and Flood Prevention Act and Kansas Watershed District Act.

The real significance of failing to amend the statute as requested is that it allows one person in concert with the Department of Wildlife and Parks to stop or significantly hamper many types of public projects undertaken by local governmental entities, including counties, cities, watershed districts, etc. Although the Department of Wildlife and Parks may have a review process they undertake before accepting such an easement, it should be noted that the review process does not provide for consultation with governmental entities or districts where the proposed easement is located. The procedures currently in place allow for one individual to effectively stop public improvement projects even

though the legislature determined that such projects should proceed by the grant of eminent domain powers to local governmental entities or districts. To allow such action, without appropriate review or appeal on behalf of local governmental entities, will result in a substantial increase in costs to many such entities on various projects undertaken throughout the state.

Respectfully Submitted,  
RAYL AND FOWLER, CHARTERED



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CHARLES R. RAYL  
327 Broadway, P. O. Box 640  
Cottonwood Falls, KS 66845  
316-273-6333  
Attorney for Southfork Watershed  
Joint District No. 76



# STATE OF KANSAS



STATE OF KANSAS }  
CHASE COUNTY }

#287

This Instrument Filed for Record th

day of Aug. D. 1967 at 11 o'clock A

and recorded in Book 3 of ms

on Page 61

Roberta Heathana  
Register of Deeds

OFFICE OF SECRETARY OF STATE  
ELWILL M. SHANAHAN • SECRETARY OF STATE

## Certificate of Incorporation

To All To Whom These Presents Shall Come, Greetings:

WHEREAS, an organization bearing the name of \_\_\_\_\_

SOUTH FORK WATERSHED JOINT DISTRICT NO. 76

has filed in the office of the Secretary of State its petition in writing as provided by law and has, in all respects, complied with requirements of the Kansas Statutes Annotated governing the formation of watershed Districts.

NOW THEREFORE, I, Elwill M. Shanahan, Secretary of State of the State of Kansas, by authority of law do hereby certify that said organization has on the date hereof become a body corporate, duly organized under the name of

SOUTH FORK WATERSHED JOINT DISTRICT NO. 76

and is entitled to all the rights and privileges granted to corporations organized under the Watershed District Act.



IN TESTIMONY WHEREOF, I hereunto  
set my hand and affix the seal of my office.

Done at the City of Topeka, State of Kansas,

this 11th day of August, 1967

Elwill M. Shanahan  
Secretary of State

By William R. Shuman  
Assistant Secretary of State

31-4208



5-66-100

FORM No. 256

# GENERAL PLAN

## SOUTH FORK WATERSHED

### JOINT DISTRICT NO. 76

Butler, Chase, and Greenwood Counties, Kansas

February 1973

### AUTHORITY

The general plan, together with estimates of cost as to installation, maintenance and operation of the proposed works, and information as to the location and extent of areas that would be benefited by the proposed works, has been prepared pursuant to the requirements of Section 24-1213, Kansas Watershed District Act. Technical assistance in development of the general plan was obtained from the Soil Conservation Service under the authority of Public Law 566, 83rd. Congress, 68 Stat. 666, as amended.

The State Conservation Commission negotiated contracts for engineering services with Cook, Flatt and Strobel, Engineers, P. A., using funds provided by the State of Kansas.

### GENERAL PROVISIONS

This general plan provides for the installation, maintenance and operation of works of improvement within the watershed district for purposes of flood prevention.

The district will utilize federal funds under authority of Public Law 566 to cover the construction and engineering cost of floodwater retarding structures included in this general plan. The watershed district will be responsible for operation and maintenance of the Public Law 566 floodwater retarding structures.

Federal funds from the Rural Environmental Assistance Program will be used to the maximum extent possible for construction of detention dams included in this general plan. Private funds from landowners and beneficiaries and district funds will be utilized in the R. E. A. P. project installation as they become available. Assistance in engineering and project administration will be utilized as available from the Soil Conservation Service. The Watershed District will bear the costs of all land easements and rights of way. The detention dams built by R. E. A. P. and other funds will be maintained through agreements between the watershed district and landowners. Out-of-pocket costs to the watershed district for operation and maintenance of these sites is expected to be negligible.

Upon adoption of this general plan, together with adoption of an official method of financing by the watershed district as provided by Section 24-1213, Kansas Watershed District Act, the watershed district, in cooperation with the federal government, will join with the Butler, Chase, and Greenwood County Conservation Districts in carrying out a program for watershed protection and flood prevention, within the boundaries of the watershed district.

## DESCRIPTION OF THE WATERSHED

### Location and Size

South Fork Watershed includes 8,960 acres in Butler County, 14,349 acres in Greenwood County, and 161,241 acres in Chase County for a total of 184,550 acres (288.36 square miles). The mainstem of the South Fork of the Cottonwood River originates four miles south of the Chase County line along the Butler and Greenwood County boundaries. The mainstem drains north and enters the Cottonwood River  $3\frac{1}{2}$  miles east of Cottonwood Falls. Bloody Creek is an independent tributary to the Cottonwood River located to the east of the South Fork. Buckeye Creek and Spring Creek are also independent tributaries located to the west of the South Fork. The watershed is located approximately 20 miles southwest of Emporia, Kansas.

### Physical Characteristics

The watershed is approximately 24 miles long and averages 12 miles wide. Elevation at the south ridge is approximately 1,570 feet and at the Cottonwood River 1,130 feet. The total fall is 440 feet, or an average of 19 feet per mile. Nearly half of this fall occurs above Matfield Green in the upper third of the watershed.

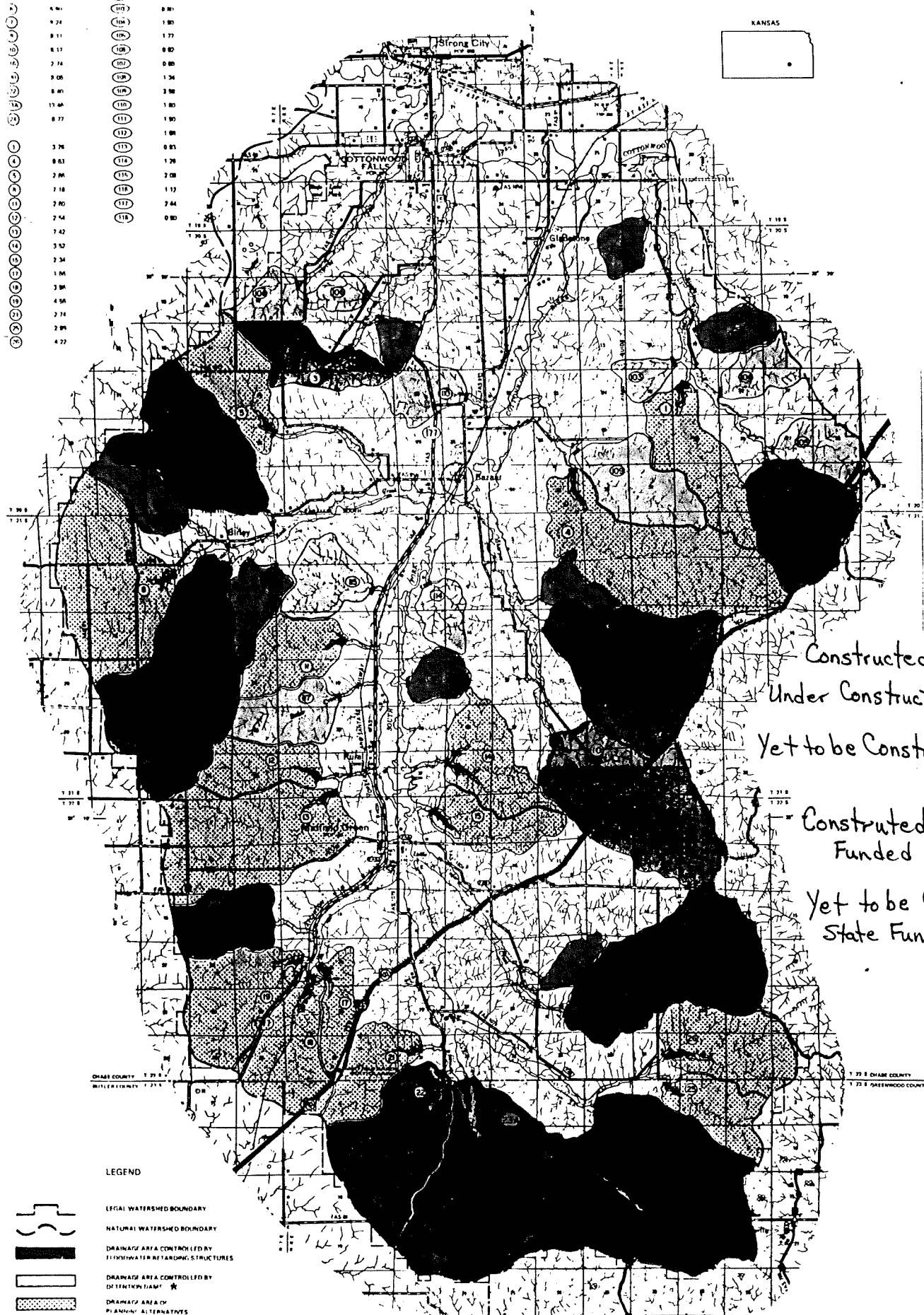
Upland topography is rolling to hilly. The drainage pattern is well-defined with many narrow tributary valleys. South Fork Cottonwood River is the main stream of the watershed. South Fork and several of its major tributaries have broad, well-defined floodplains.

DRAINAGE AREA IN SQUARE MILES

101	1.12
102	1.34
103	0.81
104	1.80
105	1.77
106	0.80
107	0.80
108	1.34
109	2.38
110	1.80
111	1.90
112	1.08
113	0.81
114	1.26
115	2.08
116	1.12
117	2.44
118	0.80

SCALE 0 1 2 MILES

KANSAS



Constructed 566

Under Construction 566

Yet to be Constructed 566

Constructed State Funded Dam

Yet to be Constructed State Funded Dam

LEGEND

- LEGAL WATERSHED BOUNDARY
- NATURAL WATERSHED BOUNDARY
- DRAINAGE AREA CONTROLLED BY FLOODWATER RETARDING STRUCTURES
- DRAINAGE AREA CONTROLLED BY DETENTION DAMS
- DRAINAGE AREA OF PLANNING ALTERNATIVES
- AREA REMITTED
- REMITTAL

ALTERNATIVE MAP

2-11

## GRANT OF NATURAL AREA PROTECTION EASEMENT DEED

THIS GRANT OF EASEMENT DEED is made this 16<sup>th</sup> day of June, 1992, by Five Creek Ranch Co., a Partnership, of which Fred W. Lyons, Jr. and Carol D. Lyons, Husband and Wife, are sole partners, having an address at 2720 Verona Circle, Shawnee Mission, KS 66208 ("Grantors"), in favor of Kansas Department of Wildlife and Parks, acting by and through the Secretary of Wildlife and Parks, having an address at 900 S.W. Jackson, Suite 502, Topeka, KS 66612 ("Grantee").

### WITNESSETH:

WHEREAS, it is and "shall be the policy of the state of Kansas to protect, provide and improve outdoor recreation and natural resources in this state and to plan and provide for the wise management and use of the state's natural resources, thus contributing to and benefiting the public's health and its cultural, recreational and economic life. For these purposes, the secretary, the commission and the department are hereby vested with the duties and powers herinafter set forth." (K.S.A. 1991 Supp. 32-702.); and

WHEREAS, K.S.A. 1991 Supp. 32-807 (f), (g) and (q) authorizes the Secretary of the Department of Wildlife and Parks to accept gifts or grants of or otherwise acquire in the name of the state easements and to acquire such for the purposes of wildlife management, preservation of natural areas and for such other purposes as suitable to carry out the intent and purposes of wildlife and parks laws of this state and to better protect, conserve, control, use, increase, develop and provide for the enjoyment of the natural resources of this state; and

WHEREAS, Grantors are the sole owners in fee simple of certain real property in Chase County, Kansas, more particularly described in Exhibit A attached hereto and incorporated by this reference (the "Property"); and

WHEREAS, the Property possesses attributes which will enable the Grantee to execute the diverse responsibilities as outlined in the Kansas Department of Wildlife and Parks' Mission Statement and Statement of Policy as set out by the Kansas Legislature in K.S.A. 1991 Supp. 32-702; and

WHEREAS, the Property's natural attributes, and its ecological and aesthetic values are of great importance to the Grantors, the Grantee, the people of the State of Kansas, and the general public and are worthy of preservation; and

WHEREAS, the Grantors intend that the Property's natural elements, and its ecological and aesthetic values be preserved by the continuation of uses that have proven historically compatible with such elements and values; and

WHEREAS, the Grantors, as owner in fee of the Property, desires to identify and to assure the preservation in perpetuity of the Property's significant natural elements, and to maintain its water quality; and

WHEREAS, the Grantee intends, by acceptance of the grant made hereby, forever to honor the intentions of the Grantors stated herein to preserve and protect in perpetuity the natural elements and ecological and aesthetic values of the Property; and to protect threatened or endangered species and accompanying habitat.

NOW THEREFORE, in consideration of the above and the mutual covenants, terms, and conditions, and restrictions contained herein, and pursuant to the laws of Kansas and in particular K.S.A. 1991 Supp. 32-807 (f), (g) and (q), Grantors hereby voluntarily grant and convey to Grantee, for the sum of one (1) dollar and other valuable considerations, an easement in perpetuity over the Property of the nature and character and to the extent hereinafter set forth ("Easement").

1. Purpose. It is the purpose of this Easement to assure that the Property will be retained forever in its natural condition and to prevent any use of the Property that will significantly impair or interfere with the natural values of the Property. Grantors intend that this Easement will confine the use of the Property to such activities as are consistent with the purpose of this Easement.

2. Rights of the Grantee and Its Agents. To accomplish the purpose of this Easement, the following rights are conveyed to Grantee and its agents by this Easement:

- (a) To preserve and protect the natural values of the Property;
- (b) To enter upon the Property at reasonable times in order to monitor Grantor's compliance with and otherwise enforce the terms of this Easement; provided that such entry shall be upon prior reasonable notice to Grantors, and Grantee shall not unreasonably interfere with Grantors' use and quiet enjoyment of the Property; and
- (c) To prevent any activity on or use of the Property that is inconsistent with the purpose of this Easement and to require the restoration of such areas or features of the Property that may be damaged by any inconsistent activity or use, pursuant to paragraph 7.

3. Prohibited uses. Any activity on or use of the Property inconsistent with the purpose of this Easement is prohibited. Without limiting the generality of the foregoing, the following activities and uses are expressly prohibited: mining, building construction (repair of existing buildings are excluded), quarrying, use for feedlot, commercial firewood harvest, discing (except as expressly permitted under paragraph 4 hereof), or channelizing.

4. Reserved Rights. Grantors reserve to themselves, and to their personal representatives, heirs, successors, and assigns, all rights accruing from their ownership of the Property, including the right to engage in or permit or invite others to engage in all uses of the Property that are not expressly prohibited herein and are not inconsistent with the purpose of this Easement. Without limiting the generality of the foregoing, the following rights are expressly reserved: general ranch purposes, pasturing of livestock (including holding and feeding for periods preparatory to pasturing), pasturing and wintering of horses, and discing of areas now seeded to tame grasses for the purpose of improving or reseeding the tame grass.

5. Baseline Data Inventory. Grantee acknowledges by acceptance of this Easement that Grantors' historical and present uses of the Property are compatible with the purposes of this Easement. In order to establish the present condition of the Property's natural, ecological, wildlife, and aesthetic resources, so as to be able properly to monitor future uses of



the Property and assure compliance with the terms hereof, Grantee shall prepare or cause to be prepared an inventory of the Property's relevant features and conditions, entitled Baseline Data Inventory. Baseline Data may include, but need not be limited to, aerial photographs, topographical maps, wildlife habitat and migration maps, measures of the quality of groundcover, and botanical and wildlife photographs and reports. The parties acknowledge and agree that in the event a controversy arises with respect to the nature and extent of Grantors' historical and present use or the physical condition of the property subject to this Easement as of the date hereof, the parties shall not be foreclosed from utilizing all other relevant or material documents, surveys, reports or other evidence to assist in the resolution of any controversy.

6. Enforcement of Grantee's Rights. In the event of a violation of any term, condition, covenant, or restriction contained in this Easement, the Grantee may institute a suit to enjoin by temporary and/or permanent injunction such violation, or for damages for breach of covenant, or may take such other action as it deems necessary to insure compliance with the terms, conditions, covenants and purposes of this Easement; provided, however, that any failure to so act by the Grantee shall not be deemed to be a waiver or a forfeiture of the right to enforce any term, condition, covenant, or purpose of this Easement in the future.

7. Restoration. Grantor further intends that should any prohibited activity be undertaken on the Property, the Grantee shall have the right to cause the restoration of that portion of the Property affected by such activity to the condition that existed prior to the undertaking of such prohibited activity. In such case, the cost of such restoration shall be borne by Grantor, its successors or assigns, against whom a judgment may be entered. Nothing contained herein shall be construed to preclude Grantor from exhausting their legal remedies in determining whether the proposed activity to which the Grantee has objected is consistent with this Easement.

8. Costs and Taxes. Grantor agrees to bear all costs of operation, upkeep, and maintenance of the Property and does hereby indemnify the Grantee therefrom. In addition, assessments which have been or may be levied by competent authority on the Property or on this Easement shall be the responsibility of the Grantor.

9. Costs of Restoration. Any costs of restoration necessitated by Grantors' violation of the terms of this Easement shall be borne by Grantors.

10. Acts Beyond Grantors' Control. Nothing contained in this Easement shall be construed to entitle Grantee to bring any action against Grantors for any injury to or change in the Property resulting from causes beyond Grantor's control, including, without limitation, fire from natural or accidental cause, flood, storm, and earthquake, or from any prudent action taken by Grantors under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from such causes.

11. Access. No right of access by the general public to any portion of the Property is conveyed by this Easement.

12. Extinguishment. If circumstances arise in the future such as render the purpose of this Easement impossible to accomplish, this Easement can only be terminated or extinguished, whether in whole or in part by either voluntary action on the part of the Grantee or by judicial proceedings brought by Grantors in a court of competent jurisdiction.

Should judicial proceedings be brought by a third party in a court of competent jurisdiction, causing either the termination or extinguishment in whole or in part, proceeds shall pass directly from the petitioning party to the Grantor.

13. Amendment. If circumstances arise under which an amendment to or modification of this Easement would be appropriate, Grantors and Grantee are free to jointly amend this Easement; provided that any amendment shall be consistent with the original purpose of this Easement, and shall not affect its perpetual duration. Any such amendment shall be recorded in the official records of the Register of Deeds in Chase County, Kansas.

14. Subsequent Transfers. Grantors agree to incorporate the terms of this Easement in any deed or other legal instrument by which they divest themselves of and interest in all or a portion of the Property, including, without limitation, a leasehold interest. Grantors further agree to give written notice to Grantee of the transfer of any interest at least twenty (20) days prior to the date of such transfer.

15. Estoppel Certificates. Upon request by Grantors, Grantee shall within twenty (20) days execute and deliver to Grantors any document, including an estoppel certificate, which certifies Grantors' compliance with any obligation of Grantors contained in this Easement and otherwise evidences the status of this Easement as may be requested by Grantors.

16. Notices. Any notice, demand, request, consent, approval, or communication that either party desires or is required to give to the other shall be in writing and either served personally or sent by first class mail, postage prepaid, addressed as follows:

To Grantors: Carol D. Lyons  
Fred W. Lyons, Jr.  
2720 Verona Circle  
Shawnee Mission, KS 66280

To Grantee: Office of the Secretary  
Kansas Department of Wildlife and Parks  
900 S.W. Jackson, Suite 502  
Topeka, KS 66612-1233

or to such other address as Grantor shall designate by written notice to the Grantee.

17. Recordation. Grantee shall record this instrument in timely fashion in the official records of Chase County, Kansas, and may re-record it at any time as may be required to preserve its rights in this Easement.

18. General Provisions.

(a) Controlling Law. The interpretation and performance of this Easement shall be governed by the laws of the State of Kansas.

(b) Liberal Construction. Any general rule of construction to the contrary notwithstanding, this Easement shall be liberally construed in favor of the grant to effect the purpose of this Easement and the policy and purpose of K.S.A. 1991 Supp. 32-702. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the purpose of this Easement that would render the provision valid shall be favored over any interpretation that would render it invalid.

(c) Severability. If any provision of this Easement, or the application thereof to any person or circumstance, is found to be invalid, the remainder of the provisions of this Easement, or the application of such provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected thereby.

(d) Entire Agreement. This instrument sets forth the entire agreement of the parties with respect to the Easement and supersedes all prior discussions, negotiations, understandings, or agreements relating to the Easement, all of which are merged herein. [No alteration or variation of this instrument shall be valid or binding unless contained in an amendment that complies with paragraph 13.]

(e) No Forfeiture. Nothing contained herein will result in a forfeiture or revision of Grantors' title in any respect.

(f) Joint Obligation. The obligations imposed by this Easement upon Grantors shall be joint and several.

(g) Grantors. Grantors shall be defined to include the original signatories as grantors, singly and jointly, their personal representatives, heirs, successors and assigns.

(h) Successors. The covenants, terms, conditions, and restrictions of this Easement shall be binding upon, and inure to the benefit of, the parties hereto and their respective personal representatives, heirs, successors, and assigns shall continue as a servitude running in perpetuity with the Property.

(i) Termination of Rights and Obligations. A party's rights and obligations under this Easement terminate upon transfer of the party's interest in the Property, except that liability for acts or omissions occurring prior to transfer shall survive transfer.

(j) Counterparts. The parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

(k) Easement Validity and Enforceability. The failure of Grantors to perform any act required by this paragraph shall not impair the validity of this Easement or limit its enforceability in any way.

TO HAVE AND TO HOLD unto Grantee, its successors, and assigns forever.

IN WITNESS WHEREOF Grantors and Grantee have set their hands on the day and year above written.

FIVE CREEK RANCH CO. a Partnership, By

Fred W. Lyons, Jr.  
Fred W. Lyons, Jr., Partner

Carol D. Lyons  
Carol D. Lyons, Partner

Grantors

Kansas Department of Wildlife & Parks

Grantee.

by Jack Henry

its Secretary

#### SCHEDULE OF EXHIBITS

##### A. Legal Description of Property Subject to Easement

##### EXHIBIT A

That portion of the Southwest Quarter of Section One (1), the Southeast Quarter of Section Two (2), Section Eleven (11) and the Northwest Quarter of Section Fourteen (14), all in Township Twenty-One (21) South, Range Seven (7) East of the 6th P.M., Chase County, Kansas, described as follows:

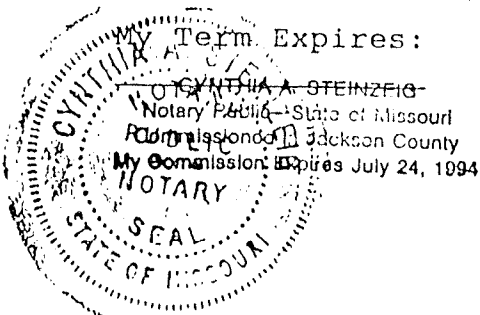
A tract 150 feet in width, the centerline of which is the centerline of Rock Creek, as the same now exists and a tract 150 feet in width, the centerline of which is a tributary to Rock Creek, commencing at the mouth of such tributary at a point approximately 550 feet South and 200 feet East of the center of Section Eleven (11) and extending in a Westerly and Southwesterly direction.

STATE OF Missouri )  
COUNTY OF Jackson ) ss:

BE IT REMEMBERED, That on this 16<sup>th</sup> day of June, 1992, before me, the undersigned, a Notary Public in and for the County and State aforesaid, personally appeared Fred W. Lyons, Jr. and Carol D. Lyons, Husband and Wife, as sole partners of Five Creek Ranch Co., a Partnership, who are known to me to be the same persons who executed the above and foregoing Grant of Natural Area Protection Easement Deed, and acknowledged the execution thereof as their free and voluntary act and deed as such partners, for the uses and purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year above written.

Cynthia A. Steinzig  
Notary Public



#432

STATE OF KANSAS  
CHASE COUNTY

Recorded July 7 19 92  
at 8:00 o'clock 9 M in

Book 2-101 of Land

page 172 to 180 incl.

Nadine M. Hollschalk

Register of Deeds

Deputy



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN  
ATTORNEY GENERAL

May 10, 1991

MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751  
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 91- 51

DeAnne E. Hupe  
Legal Counsel  
Kansas Wildlife and Parks  
900 Jackson St., Suite 502  
Topeka, Kansas 66612

Re: Eminent Domain -- Condemnation in Cities -- Cities;  
Authority to Condemn Public Property

Synopsis: K.S.A. 26-201, which delegates to cities in Kansas the right of eminent domain in general terms, does not authorize such cities to condemn property already devoted to public use, if such condemnation will substantially destroy or materially interfere with the present public use. In our opinion, the city of Derby may not condemn property in Spring Creek upon which the department of wildlife and parks currently possesses easements. Cited herein: K.S.A. 26-201; K.S.A. 1990 Supp. 32-807.

\* \* \*

Dear Ms. Hupe:

As legal counsel for the Kansas department of wildlife and parks, you ask our opinion on whether a municipality can condemn property in which the state has a property interest.

You inform us that the specific situation involves the city of Derby which contemplates condemning property along or within Spring Creek. The Kansas department of wildlife and parks currently possesses easements encompassing portions of Spring

Creek through which the city of Derby intends to construct a sewer. You inform us that the easements were obtained pursuant to the authority of K.S.A. 1990 Supp. 32-807(f) to preserve and protect in perpetuity the natural elements and ecological and aesthetic values of the property.

Initially we note that an easement is a type of property subject to the power of eminent domain. 29A C.J.S. Eminent Domain, § 69 Easements (1965). "Property" for purposes of a state statute authorizing a municipality to acquire by eminent domain any property necessary to carry out any of its powers or functions includes real and personal property and any interest therein. McQuillan Mun. Corp. § 32.13 (Third Ed.). Therefore, the department possesses a property interest which could be asserted in a condemnation proceeding brought by the city.

The general principals relating to a city's eminent domain authority are set forth in Weast v. Budd, 186 Kan. 249, 252 (1960):

"[E]minent domain is the right to take private property for public use without the owner's consent upon payment of just compensation. The right is an inherent power of the sovereignty and comes into being with the establishment of government and continues so long as the government endures, but its exercise may be limited by the constitution. Except as so limited, it may be exercised for any public purpose designed by the Legislature and in the manner it prescribes. While a municipal corporation has no inherent power of eminent domain, the legislature of Kansas has delegated that power to all cities of the state 'to condemn private property or easements therein for the use of the city for any purpose whatsoever'." (Citation Omitted).

Current legislative authority delegating eminent domain authority to cities is found at K.S.A. 26-201 which provides in part:

"A city shall have the right to acquire by condemnation any interest in real property, including a fee simple title



thereto: provided . . . whenever it shall be deemed necessary by the governing body of any city to appropriate private property for the use of the city for any purpose whatsoever, the governing body shall by resolution declare such necessity and authorize a survey and description of the land or interest to be condemned to be made by some competent engineer and filed with the city clerk. . . ." (Emphasis added).

Since that statute clearly authorizes a city to "appropriate private property," the issue becomes under what circumstances, if any, a municipality may condemn public property. The answer to that question was provided in 1936 by Judge McDermott writing for the Tenth Circuit in City of Norton v. Lowden, 84 F.2d 663, 665-666 (10th Cir. 1936).

"The power to take private property for public use inheres in the sovereign, is essential to the public welfare, and can neither be contracted away nor surrendered. It applies to property already devoted to one public use. However, statutes delegating to agencies of the state - municipalities, railroads, etc. - the right of eminent domain in general terms, do not authorize such agencies to condemn property already devoted to public use, if such condemnation will substantially destroy or materially interfere with the present public use. Power to destroy or materially interfere with an existing public use must be found in a specific authorization of the legislature. On the other hand, if the second public use does not substantially destroy or materially interfere with the existing public use, property may be condemned for the second public use under a statute conferring the power of eminent domain in general terms. The authorities are numerous. Many years ago Judge Pollock found this to be the law in Kansas, which he expounded in an able and exhausted opinion, frequently

cited and followed. Chicago, R.I. and P.  
Ry. Co. v. Williams (C.C.) 148 F., 442."

Judge McDermott went on to note that those legal principles did no more than apply common sense to the problem:

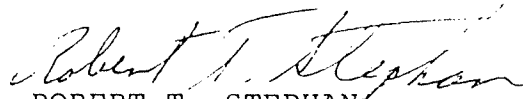
"A city should have the right, without express legislative authority, to open a street across a single track of railway where it does not substantially interfere with the railway use; but it should not have the power, without such express grant from the sovereign, to open a street through a station house." Norton, at 666. See also Brown v. Kansas Forestry, Fish and Game Commission, 2 Kan.App.2d 102 (1978).

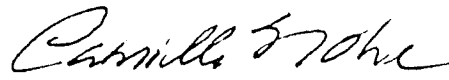
It is our understanding that installation of the proposed sewer through Spring Creek would necessitate the removal of very large, old, oak trees, the preservation and protection of which is the function of the easement granted to the Kansas department of wildlife and parks. Condemnation by the city of the easement would clearly substantially destroy or materially interfere with that present public use. Such an endeavor would be akin to "opening a street through the station house." As no statute grants specific legislative authority to the city to condemn public property already devoted to public use, the city of Derby may not condemn that property. The general grant of condemnation authority provided to cities by virtue of K.S.A. 26-201 is not sufficiently specific to authorize the condemnation of public property where that condemnation would destroy or materially interfere with the existing public use. A city "can exercise the power of eminent domain only by virtue of legislative authorization which 'should never be enlarged by implication.'" Isley v. Bogart, 338 F.2d 33 (10th Cir. 1964), citing Sutton v. Frazier, 183 Kan. 33 1958). See also 29A C.J.S. Eminent Domain, § 86 Public Property (1965), and McQuillan Mun. Corp. § 32.67 Property Already Devoted to Public Use (1991).

In conclusion, K.S.A. 26-201 which delegates to cities in Kansas the right of eminent domain in general terms, does not authorize such cities to condemn property already devoted to

public use, if such condemnation will substantially destroy or materially interfere with the present public use.

Very truly yours,

  
ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS

  
Camille Nohe  
Assistant Attorney General

RTS:JLM:CN:bas

October 2, 1992

Mr. James N. Habiger  
State Conservationist  
Soil Conservation Service, USDA  
P.O. Box 600  
760 South Broadway  
Salina, Kansas 67401

Dear Mr. Habiger:

Subject: South Fork Watershed District  
OGC Ref: JPC

We have reviewed the Grant of Natural Easement Deed from the Five Creek Ranch Co. to the Kansas Department of Wildlife and Parks and its possible effect on the acquisition of land rights for the South Fork Watershed District. The easement covers the property which is the site of one of the dams and permanent impoundments for the South Fork Watershed. The landowner apparently will not voluntarily convey the property for these project purposes.

Every watershed district in the state of Kansas has the power of eminent domain under K.S.A. 24-1209. The paragraph denoted as "Eighth" in this section of the statute states that a district is to acquire land and interests in land by gift, purchase, exchange or eminent domain. This grant of authority would have to be designated as a general power of eminent domain.

The district's efforts to acquire the Five Creek Ranch Co. property under eminent domain are complicated by the existence of the easement to the Kansas Department of Wildlife and Parks. Since the property has already been dedicated to a public use, the general grant of eminent domain authority does not automatically attach to this particular situation. A recent opinion from the Kansas Attorney General's office reiterated the position taken in 1936 by the Tenth Circuit: that unless a statute grants specific legislative authority to the state agency to condemn public property already devoted to public use, the agency may not condemn that property. A copy of the Kansas Attorney General's opinion is attached.

There are specific exceptions to this rule. The condemnation action must substantially destroy or materially interfere with the existing public use. If the second public use does not substantially destroy or materially interfere with the first one, the property may be condemned. You should consult with the Kansas Department of Wildlife and Parks for its interpretation of what effect the watershed district's usage will be.

If the Department of Wildlife and Parks would determine its easement would not be substantially destroyed or materially interfered with, then the watershed district could proceed with the condemnation. The Department could also decide to extinguish its easement pursuant to paragraph 12 of the easement deed. While each parcel of land is considered unique, perhaps the Department could be persuaded that another property would serve its easement purpose as well. The Attorney General's Opinion was written specifically for the Department of Wildlife and Parks, and in that case, the installation of a proposed sewer by a municipality would have necessitated the removal of very large, old, oak trees. The preservation of these trees was the very purpose of the Department's easement. The purposes stated in the Five Creek Ranch Co.'s deed are extremely broad; the preservation of an unusual landscape feature is not mentioned. If the purpose was to retain a certain amount of acreage in native grasslands, for instance, then other property could satisfy that need. If the Department will neither declare that the district's use is acceptable nor extinguish the existing easement, then some mitigation measure might be undertaken.

You had also inquired about the ability of the U.S. Fish and Wildlife Service to condition its "no jeopardy" biological opinions. We enclose the materials from a 1987 seminar presented by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service. The topic was the Section 7 Consultation process under the Endangered Species Act. The highlighted paragraph about midway through the materials states that a "no jeopardy" biological opinion cannot be issued subject to conditions prescribed by the Federal wildlife agency. It would appear that the statement was made by Patricia Montanio of the National Marine Fisheries Service as part of her remarks. Prior to publishing this course outline one would presume that all presentations were checked for accuracy, and if any misstatements were made, then corrections at the seminar would have been appropriate. As such, the material is useful and compelling regarding the impropriety of conditioning the biological opinions, but not as forceful as an official policy statement signed by the agency.

If we can be of any other assistance, do not hesitate to contact us.

Sincerely,

ROBERT L. PURCELL  
Regional Attorney

By

  
Jane P. Cornwell, Attorney

Enclosures

Members of the Senate Ag. Committee

RE: Hearing 2-24-93  
Room 4235

Dear Senator Corbin & Senators Kiser.

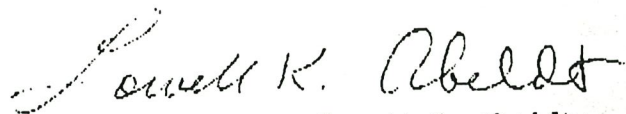
I am Lowell Abeldt legislative liaison for the State Association of Kansas Watersheds, past president of SAKW 8 years Charter Director of Turkey Creek watershed Dickinson County and have worked with Watersheds since the early 50's. I also serve on the Kansas Water Authority.

My wife's heart surgery prevents me from being there in person today.

I come today in support of SB 302. This is necessary to clear any misinterpretation of the statute on eminent domain. Example - South Fork Watershed #72 Chase, Butler and Greenwood Counties has a problem, where Wildlife and Parks entered into an easement with a land owner prior to the watershed ~~securing~~ some land through eminent domain. This stopped the eminent domain procedure and the structure. This, if not corrected by SB 302, can hamper the building of many structures across the state. The watersheds are a foundation to the Kansas water plan and are instrumental in helping catch, hold back pesticides, such as atrazine, from getting into Lakes such as Perry Lake. Another example is a sewer line for the City of Derby where an easement was entered into with landowners and wildlife and parks, thereby, causing a move in the sewer line location costing the city over 1 million dollars in extra construction costs. These two examples are easements with Wildlife and Parks. But it might be someone else causing the same problem.

It was not the legislative intent to provide a loop hole in KSA 26-501 to KSA 26-516 or in KSA 32-702 and 32-807. However, it appears to be there, and needs correcting. I trust that representatives from these entities are present for the hearing. SAKW, by resolution, supports SB 302. By resolution, KACD also supports this legislation.

In advance, my thanks to you Chairman Senator Corbin and all members of the Senate Ag. Committee for taking a favorable position to SB 302 and its passage.



Lowell K. Abeldt  
State Association of Kansas Watershed

Senate Ag. Co.  
2-24-93  
attachment 2



# SIERRA CLUB

## Kansas Chapter

Watershed Districts

S.B. 302

Testimony of William Craven

Legislative Coordinator, Kansas Sierra Club

Senate Agriculture Committee

Feb. 24, 1993

Thank you, Mr. Chairman, for providing an opportunity for the Kansas Sierra Club to testify against this bill.

This bill is the product of a single instance in which a watershed district is unhappy with a landowner who deeded some land along a riparian corridor to the Kansas Department of Wildlife and Parks. The first thing that must be stressed is that this bill is an attack on a voluntary decision made by a landowner, something watershed districts are usually quite vocal in supporting.

The Kansas Department of Wildlife and Parks is an executive branch agency, and as such, the department is accountable to the people, through the governor.

The fatal flaw of watershed districts is that they only allow landowners to vote, and as such, are subject to the same sort of constitutional challenge now pending in federal court involving the Kansas State Board of Agriculture. It is clearly unconstitutional to condition voting on the ownership of land.

It is not my purpose here today to ask you to draft new statutes for watershed districts that embody democratic principles. All I ask is that you not give watershed districts the power of eminent domain over state government agencies which are accountable to the public.

Thank you for your attention, and I will be pleased to answer any questions.

Senate Agriculture Committee ---

Re: Senate Bill #302

I am K. Verdou Parish, living at 8606 HiLa Road, Derby, Kansas. I am here this morning to speak in opposition to paragraph 8 of the Watershed District Amendment as proposed in Senate Bill # 302.

My wife, Helen, and myself as joint tenants of property located in Sedgwick County, Kansas, and adjoining the City of Derby, Kansas, executed a habitat easement deed to the Kansas Department of Wildlife and Parks in 1991. We were 1 of 15 landowners in Sedgwick County bordering the City of Derby who executed the same type of easement. All of us have natural habitat areas which are part of the Spring Creek Watershed that flows through the City of Derby, Kansas. We were confronted with the prospects of near total destruction of all of the habitat in the area our property ownership as a result of an Interceptor Sewer Utility Project by the City of Derby. That particular sewer project was immense and the habitat and watershed destruction of about three miles of the creek would have been absolutely devastating. All of you here would have to see the area to be able to grasp the devastation that was going to take place. The landowners as a group spent about 12 months of time, a lot of money, and hard work to present alternate routes and requests for consideration to prevent the destruction of our property values and preserve the habitat and Spring Creek Watershed. However, the City of Derby refused to consider our presentations.

Early on in the process of contacting departments and agencies of the county, state, and federal governments one of the contacts that I specifically made was to the Kansas Department of Wildlife and Parks. All of the agencies were contacted several times as we gathered documentation and information pertaining

*Senate Ag Co.  
2-24-93  
Attachment 4  
4-1*



(2)

to the scope of the habitat destruction and alternate route possibilities. As a matter of fact, Lieutenant Governor Francisco provided the leadership which culminated in a meeting with several state agencies at the Spring Creek location to discuss the project and the alternate routes.

As we continued to do research and began to bring our information together it became more and more evident that the City of Derby was not under anyone's jurisdiction and they could proceed as they wanted with complete disregard for depleted property values and extensive habitat destruction. I might add this habitat included Burr Oak trees that have been established by more than one qualified forester to be over 150 years old. Friends, that is older than the State of Kansas and is certainly older than the City of Derby. However, to the City of Derby that fact was of no significance.

As I mentioned earlier one of my early conversations was with the Kansas Department of Wildlife and Parks. Initially, I asked them if there was any type of easement arrangement that could be entered into similar to the easement arrangement that is attached to farms repossessed by Farmers Home Administration. Later, another landowner who was compromised by the <sup>sewer</sup> project made a separate verbal inquiry about the possibility of the same type of easement I had inquired about earlier. These early conversations and willingness of Sedgwick County landowners led to the Wildlife and Parks easements currently in place. In the meantime, we continued to gather information, engineering data, and public support and, asked various state boards and agencies and private environmental groups to testify before the Derby City Council. All of this had very little impact on the City of Derby and their interest in altering their original interceptor sewer route.

(3)

In March of 1991 Kansas Department of Wildlife and Parks reported back to us and asked if we were still interested in pursuing the easement project. The landowners had a short meeting at the conclusion of a City Council meeting and decided that we needed to meet with the Kansas Department, survey our options, and possibly proceed. It was the conclusion of the landowners that because of the distinct lack of individual landowner rights and habitat protection in the State of Kansas we had no choice but to proceed. We told the department that we were definitely interested and that we would contact landowners affected by the project to determine the actual number of interested parties that would proceed with executing an easement to the department. Our solicitation was to 17 landowners; 1 refused, 1 property was near foreclosure so theirs was not an option, and the other 15 volunteered their property in exchange for protection from the Kansas Department of Wildlife and Parks. Quite frankly, as soon as those easement deeds became public knowledge the public and the press rallied with excitement and determination to our cause. And interestingly enough, the City of Derby then decided there was possible alternate routing for the sewer project.

The end result was an alternate route that included crossing the Kansas Department easement at one location which was minimal and the saving of a couple of miles of precious Spring Creek Basin. My, how I wish the people in this room could, right now, see what was saved and could see the size and scope of the route for that sewer line. Today the City of Derby has a new city engineer. I went to see him after his appointment last fall. My purpose was to let him know that we are still concerned about Spring Creek; we felt that it was still at risk and that if any future projects involved Spring Creek to keep in mind that our group is positioned and ready to try to save the creek.

(4)

At the conclusion of our couple of hours of discussion he asked two very interesting questions.

- 1.) Who do you think won the interceptor controversy? My answer was we did. We saved the creek and the natural habitat and our property values.
- 2.) Do you think the Kansas Department of Wildlife and Parks easements are valuable instruments for people with habitat at risk? I answered with an affirmative, "Absolutely," because the people that seek out the department and execute easements desperately want to preserve and protect the natural environment and all the floral and fauna that goes with it.

Therefore, I have no alternative but to ask that you consider opposing the bill. The habitat in Kansas deserves and desperately need somebody to help protect it. If this bill becomes law then quite frankly, we are nearly back to square one again in trying to preserve some of the natural environmental history in our state.

It would appear to me that even something the magnitude of the Cheyenne Bottoms would be at risk if this bill becomes law. Then the Bottoms could become part of the watershed district subsequently under the jurisdiction, and under the direction of a watershed board of directors and that in itself would be a tragedy.

As a result of my past two years of becoming more educated and definitely more concerned about our habitat I am realizing that our natural environmental history in Kansas is really without any protection. I think that should be disturbing to all of us including our state legislators. If you, as part of our legislators, have a real appreciation for our natural habitat and its environmental protection here in Kansas, then you should consider the importance

(5)

of these easements especially in view of the fact that there is NO other protection for our habitat. Interesting enough, east of the Mississippi River where older and larger timber stands are more abundant, environmental laws are in place and they do really and truly protect and preserve the environment. Disturbing and destroying the habitat is taken very seriously regardless of the cause or reason.

We all know the need to preserve our natural environment and habitat. We all know the need to reduce consumption of our natural resources. It is the "in thing" to use recycled materials. It is the "in thing" to save our atmosphere and our global forests, but I really question whether it is really the "in thing" to save any of our natural environment in Kansas? I really would like for someone to tell me why it is not important in Kansas. You know, really and truly, there is life after real estate development. Really and truly there is life after agriculture. I think that we all have a distinct and immediate need to recognize that fact and respond to it.

I mentioned early on that we had presented alternate routes to the City of Derby that were feasible for their Interceptor Sewer Utility Project. Specifically in the case that created this bill I know from my limited knowledge and experience with watershed districts there is an alternate location for this particular retaining structure. It might be another 500 yards downstream or it might be 500 yards upstream, but, believe me, from an engineering point of view an alternate location can be established and dealt with satisfactory.

In summary the intent of the easement deeds needs to be protected. The individual, John Q. Public Landowner, needs just a window of protection so as to preserve his personal real estate values, exercise his desire to preserve

(6)

and protect the environment and habitat around him. Finally, ALL citizens of the State of Kansas deserve to have our natural beauty and environment protected. We all know how limited it is in Kansas and we all know what an important part it plays in the ecological balance.

I STRONGLY ASK YOU TO OPPOSE THIS BILL.

RESPECTFULLY  
VERNON R. RIFE

PERKINS & HOLLEMBEAK, CHARTERED

Attorneys at Law

Elvin D. Perkins  
Ted Hollembeak

(316) 342-6335

March 3, 1993

Suite 401, BANK IV Building  
527 Commercial Street  
Emporia, Kansas 66801  
Telecopier (316) 342-0411

TO: Members of the Kansas Senate  
Committee on Agriculture

This will memorialize and extend the remarks your Committee kindly permitted me to discuss with you at the hearing before your Committee on Wednesday, February 24, 1993.

It is important that the members of the Committee understand that events in which disagreements arise between the Wildlife and Parks Department on one hand, and watershed districts on the other hand, neither indicates nor creates a fundamental or continuing conflict of interest between watershed districts and the Wildlife and Parks Department.

The presentation of Mr. Rayl on behalf of South Fork Watershed District demonstrated conclusively that Senate Bill No. 302 was drafted as a remedy for and in response to the inability of South Fork Watershed District to obtain an easement on property owned by the partnership, Five Creek Ranch, in which partnership Fred W. Lyons, Jr. and Carol Dee Lyons are partners. The testimony and statement of Mr. Rayl centered around a contention that construction of the specific project on the property of Mr. and Mrs. Lyons was critical to the total, general plan of the Watershed, and intimated that no alternative sites were available. The fact is, an alternative site was not only available upstream from the proposed site, but could be constructed at a cost substantially less than the cost of the site on the Lyons' property. The Soil Conservation Service, through the engineering personnel, prepared and made available to me and to the Board of the Watershed District, a preliminary study of the alternative site. I presented these figures and the data supporting the figures to the Watershed Board. The Board never refuted the accuracy of the figures, but apparently vetoed the alternative site because the construction of the detention structure at that location would, for a brief period of time following heavy rainfall, make an upstream county road impassable. This county road, while utilized for access to pasture land, does not lead to any residence not also served by an equally accessible road. The response of the Board of the Watershed District to a suggestion that the Board of County Commissioners could grant an easement for temporary inundation of the road, was that the Board of County Commissioners was opposed to doing this unless the road was elevated at a significant cost.

*Senate Ag. Co.  
2-24-93  
attachment 5*

The importance of the position taken by the Watershed Board on the issue of the alternate site is three-fold. First, the obvious difference of opinion as to the proper location of a detention structure should be settled on some level other than special legislation (couched in terms of general legislation for constitutional purposes) and includes many elements too complex and diverse to lend themselves properly to resolution in the Legislature. Second, if the detention structure is as essential as the Watershed Board has contended, the local Board of County Commissioners should be sufficiently cooperative to grant an easement which would accommodate an alternate site which could be constructed with a cost benefit ratio much more favorable than the site proposed by the Watershed District. Third, if any legislation is enacted which would grant the power of eminent domain to a watershed district over some other governmental entity, public interest would be much better served by that power being granted to condemn an easement across a public road, than to condemn property or rights therein of a State Agency.

The power of eminent domain is not only an awesome power but it is a dangerous power. The statutes granting the power of eminent domain and the statutes clearing the way in which that power is to be exercised, permits the landowner whose land or rights in land is being threatened by condemnation by some governmental or utility interest, to defend against the condemnation only on the basis of the rights of the entity to exercise the right of condemnation and the right to attack whether the condemnation is occurring for one of the purposes provided by the law which grants that entity the right of eminent domain. It is not only dangerous, but of questionable constitutionality, for the Legislature to grant the power to any and all watershed districts within the State of Kansas to acquire by eminent domain property or rights in property owned by a State Agency. A review of the statutes of Kansas reveals literally dozens of types of entities which possess the power of eminent domain, which entities include the Wildlife and Parks Department of the State of Kansas. Watershed districts are formed pursuant to statute on a local basis to encompass only territory within the watershed of a specific creek, river or stream. By nature, watershed districts are locally formed and locally governed. Senate Bill No. 302 as drawn would grant the power to a watershed district which could comprise fewer than 5,000 acres and could contain zero residents to acquire rights from the Wildlife and Parks Department which could be critical to that Department, with no restrictions, restraints or defenses.

As a matter of policy, it is imprudent and improper for any local, quasi-municipal corporation to possess the power to acquire rights owned by the State of Kansas or any agency, commission or department of the State of Kansas.

It is particularly significant that Senate Bill No. 302 is designed and drawn to single out and grant to one type of quasi-municipal corporation, constituting only one of numerous entities possessing the power of eminent domain, and grants to that type of entity only, the power to acquire the rights and property of one State Agency or Department alone, out of the literally hundreds of entities, agencies, commissions and departments, including municipal corporations, utilities and others, whose rights might also be of interest for acquisition. All this broad and all-encompassing power is being sought because one watershed district has directed its efforts toward one course of action, ignoring alternative courses available. The enactment of legislation of this type could and would lead to confusion, conflict, litigation, abuse of power and disruption of essential services.

Members of the Committee have expressed their interest in and sympathy toward functions of watersheds. As I pointed out to the Committee, I now represent watershed districts and have represented watershed districts for many years, both in the formative stages and in the process of acquisition of land rights to build watershed structures. On the Upper Verdigris Watershed alone, I was instrumental in acquiring easements and rights to build over forty detention structures, and similarly was instrumental in and involved in acquiring easements and rights for construction of many other structures in the watershed districts that I have represented and do represent. Not one of those districts found it necessary to exercise its power of eminent domain in such a way as to adversely affect the rights relating to use and enjoyment of a dwelling, contrary to the wishes and desires of the resident in that dwelling.

To reiterate the importance that neither this Committee nor the Legislature cast itself in a role of judge, arbitrator or jury on the merits of one particular location for a watershed structure over another location, I would point out that in order for the final determiner or arbitrator of any such decision to act fairly and fully, many hours of study and testimony would need to be devoted.

For the purpose of informing the Committee of the "rest of the story", I would point out that Fred and Dee Lyons acquired the particular property in question because of its location adjacent to overlooking woodlands, valley and a small stream, all of which abounds with wildlife, and on this site constructed a beautiful and lasting structure with the intention of spending as much time as possible there, becoming an integral part of the community and, ultimately, retiring to that location. The construction of a watershed detention structure at the proposed location would shatter the plans and dreams of Mr. and Mrs. Lyons, destroy the beauty



that they sought and acquired, and inundate the access to their property and alter, to the detriment of their property, the operation of that portion of the ranch operations. The Watershed Board apparently has considered that these elements are less important than keeping a County Road open at all times which serves no residence which otherwise could be closed only for short periods of time and around which an alternate route could easily be obtained.

The recital of these fundamental differences demonstrates why this Committee and this Legislature should not involve itself in enacting legislation which, on its face, would be contrary to public policy and which, in effect, would repeal portions of the stated general policy of the State of Kansas as contained in K.S.A. 32-702, which reads:

"It shall be the policy of the State of Kansas to protect, provide and improve outdoor recreation and natural resources in this State, and to plan and provide for the wise management and use of the State's natural resources, thus contributing to and benefitting the public's health and its cultural, recreational and economic life. For these purposes, the secretary, the commission and the department are hereby vested with the duties and powers, hereinafter set forth."

A suggestion was made that since the easement which the Wildlife and Parks Department owned and enjoyed on the Lyons' property was only 150 feet in width, it was an unimportant easement. The easement was granted for the purpose of protecting the environment of aquatic life of a rare species and indigenous to this property and similar properties. There was no need for the Wildlife and Parks Department to acquire a greater amount of easement than was necessary for the purpose of protecting that environment, so the width of the easement is not in anyway an indication of its importance.

Thank you again for the opportunity to appear before the Committee.

Yours very truly,

A handwritten signature in dark ink, appearing to read 'Elvin D. Perkins', with a long horizontal flourish extending to the right.

Elvin D. Perkins

EDP:cp