Approved: 4-2-93
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Jerry Moran at 10:05 a.m. on March 12, 1993 in Room 514-S of the Capitol.

All members were present except: All present.

Committee staff present: Michael Heim, Legislative Research Department
Gordon Self, Revisor of Statutes
Sue Krische, Committee Secretary

Conferees appearing before the committee:

Chief Justice Richard Holmes
Mike Zwahlen, Oswego, KS
Professor James Wadley, Washburn School of Law
Mike Rees, KDOT
Charles Jones, Director of Environment, Department of Health and Environment
Robert Fox, Kansas Corporation Commission
Darrell Montei, Department of Wildlife and Parks
Tom Stiles, Kansas Water Office
Joyce Wolf, Kansas Audubon Council

Others attending: See attached list

HB 2130 - Temporary assignment of judges to the supreme court.

Chief Justice Richard Holmes appeared in support of HB 2130 advising that the bill would allow assignment of retired justices and judges, and active Court of Appeals judges, to sit on the Supreme Court with full voting privileges (Attachment 1). It was noted that under current law, retired justices and judges may only serve on the Supreme Court in an advisory capacity.

Senator Bond moved that HB 2130 be recommended favorably for passage. Senator Emert seconded. Motion carried.

SB 293 - Private property rights.

Mike Zwahlen, Oswego, Kansas, appeared in support of SB 293 and told the Committee of his family's purchase of 250 acres of river bottom ground in Labette County which contains a 40 acre pecan grove they cannot farm because it is part of an easement (Attachment 2). Mr. Zwahlen feels citizens of Kansas who are not allowed to use their property to make a living should be reasonably compensated, as provided in SB 293.

Professor James Wadley, Washburn School of Law, cited problems with the definitions and the scope of SB 293 in his testimony (Attachment 3). Professor Wadley stated the statute indexes its protection to federal definitions of property rights and the fifth and fourteenth amendments of the U.S. Constitution do not offer significant protection to rural landowners. In addition, the bill only addresses state agencies, not local governments or the federal government which certainly impact property rights. Professor Wadley questioned the advisability of giving the attorney general the authority to decide what may be a "taking" in lieu of the courts and cited the problem that the bill does not address the situation when a state agency has no discretion, but is bound by state law to take a specific action.

Mike Rees, Kansas Department of Transportation, testified in opposition to SB 293 expressing concern that application of this bill to KDOT would involve the Department in an endless and nonproductive routine of assessment and submission (Attachment 4).

Charles Jones, Director of Environment, Department of Health and Environment, testified in opposition to SB 293 stating the bill would undermine KDHE's basic regulatory mission and offset the balance between individual freedom and the common good (Attachment 5). Mr. Jones noted that KDHE currently has the authority to run federal environmental programs in Kansas and he feels SB 293 could jeopardize that status.

Robert Fox, Kansas Corporation Commission, appeared in opposition to SB 293 stating the KCC's concern is its impact on rate cases when it must be determined what would be the appropriate return on equity and what the actual costs are. He stated the bill could require all material to be submitted to the Attorney General to decide if a "taking" has occurred.

Tom Stiles, Kansas Water Office, appeared in opposition to SB 293 noting the centerpiece of the water planning process is the management of state programs based on specific identified basin issues and SB 293 would drastically limit the state agencies' ability to implement that management through excessive burdens of procedure and cost (Attachment 6).

Darrell Montei, Department of Wildlife and Parks, appeared in opposition to SB 293 and provided written testimony (Attachment 7).

Joyce Wolf, Kansas Audubon Council, stated SB 293 ignores the basic purpose of many governmental regulatory programs to protect private property and other individual rights (Attachment 8).

Ron Todd, Kansas Insurance Department, submitted written testimony in opposition to SB 293 (Attachment 9) and Paul Fleenor, Vice-Chairman, Kansas Property Rights Coalition, submitted written testimony in support of SB 293 (Attachment 10).

Chairman Moran stated he will consider assigning SB 293 to a subcommittee to review and address the concerns raised by the conferees. The meeting was adjourned at 11:00 a.m. The next meeting is scheduled for March 15, 1993.

GUEST LIST

COMMITTEE: Senate Judiciary Comm. ~~HOUSE APPROPRIATIONS~~

DATE: 3-12-93

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Tom Kirker	TOPEKA	KDWP
Marty Burke	Topeka	KDWP
Sharon Stephens	Topeka	KDWP
Ted Ensley	"	KDWP
Janet Stubbs	"	HBAK
Art Brown	—	Ks. LBR dealers
[illegible]	"	Ks Co-op Council
Hannah Gaffin	Atwood	
Cassie Brown	Colby	
[illegible] Brown	Colby	
Jim Wadley	Topeka	W.U. law School
Joyce Wolf	Topeka	Ks. Audubon Council
[illegible]	Topeka	KDWP
JOHN STRICKLER	MANHATTAN	
KEN FRAHM	Colby	Ks Water Resources Assn
Chrissie FRAHM	Colby	
GORDON GARRETT	TOPEKA	Comm Prop Assn
Ron Smith	"	Ks Bar Assoc
Paul E. Fleener	Manhattan	Kansas Farm Bureau
Michael J Zwahlen	Oswego	Self
[illegible] L. Zwahlen	Oswego	Self
Bill Fuller	Manhattan	Kansas Farm Bureau
Constance Crittenden	Topeka	Div. Water Resources
Leland E. Rolfs	Topeka	
Darrell Montei	Pratt	KWP

SENATE JUDICIARY COMMITTEE

March 12, 1993

RE: House Bill No. 2130

Testimony of Chief Justice Richard W. Holmes

Thank you Mr. Chairman and members of the committee for allowing me to discuss with you HB 2130. This bill was requested by the Supreme Court to allow assignment of retired justices and judges, and active Court of Appeals judges, to sit on the Supreme Court with full voting privileges.

The proposed bill amends K.S.A. 20-2616 and K.S.A. 20-3002.

K.S.A. 20-2616 provides generally for the assignment of retired justices and judges to perform such judicial services and duties as they are willing to accept with full power and authority to decide all matters which come before them, *except* when the assignment involves service on the Supreme Court. Retired justices and judges may only serve on the Supreme Court in an advisory capacity.

Article 3, Subsection 6, of the Kansas Constitution, which applies to district courts, allows the Supreme Court to assign a district judge to serve temporarily on the Supreme Court. Because of the existing statute, only an *active* district judge has full judicial authority to vote and participate as a Supreme Court justice.

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Except for the prohibition in the statute, there is no valid reason why a retired judge or justice, who is still an actively registered lawyer, could not be temporarily assigned to the Supreme Court will full judicial authority. A retired Supreme Court Justice or Court of Appeals Judge has far more legal experience than is required of a district judge who only needs five years of legal experience before assuming judicial office.

At the present time we have three very active retired justices: Chief Justice Prager, Chief Justice Miller, and Justice Herd. These three justices have over 150 years of combined experience in the practice of law with over 60 years of that time as judges. We also have several retired district judges who have years of experience and who are well qualified to sit on the Supreme Court. This knowledge and experience should be available to the court.

The proposed amendment to K.S.A. 20-3002 would allow the Supreme Court to assign an active judge of the Court of Appeals to serve temporarily on the Supreme Court.

Court of Appeals judges possess the same qualifications as Supreme Court justices, and, they are selected in the same manner. K.S.A. 20-3002 and 20-3004. Under the present statutory scheme, a retired Court of Appeals judge may be assigned to sit in a district court, or on the Court of Appeals, and fully determine any case. K.S.A. 20-2616. In emergency situations it would be expedient and

efficient to use Court of Appeals judges, officing in the same building, to temporarily fill a vacancy on the Supreme Court.

We see no constitutional bar to passage of HB 2130. Retired Supreme Court justices, retired Court of Appeals judges, retired district judges, and active Court of Appeals judges have met the constitutional qualifications for the judicial position which they have held or now hold.

The temporary assignments would be on an individual case-by-case basis, and would be by concurrence of no less than four justices. At the discretion of the Chief Justice, the temporary assignment could include responsibility for presentation of a case in conference and opinion writing, but would not include general administrative duties. We would continue to use active district court judges when appropriate and convenient.

We would appreciate you favorable consideration of HB 2103.

Mr. Chairman and Members of the Committee

My name is Mike Zwahlen and I am here on behalf of my family and all property owners of Kansas.

Although, S.B. 283 Private Property Protection Act, may not change my personal dilema, I must try to prevent this from happening to others. Approximately 3 years ago my brothers and I purchased approximately 250 acres of River bottom ground in Labette County. We purchased it for three reasons. No. #1 - we felt we could farm the ground with easy access for our equipment. No #2 - There is a 40 acre Pecan Grove on this property to help make our payment. No #3 - My family and I enjoy wildlife and camping. This is why we accepted an easement on the property. Under the easement we would not be allowed to destroy animal habitat on the lake or wetland. Somewhere in the paper shuffle we were not aware the Pecan Grove was part of the easement plan. We

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Were under the impression that the lake and a strip of brushy wet land, which allowed deer and other animals to travel from one timber to another was the entire easement. If we had been aware the Pecan Grove was part of the easement we would not have purchased this property, and in my opinion, nor would anybody else. - Who would want a 40 acre Pecan Grove, which you make regular payments on and pay taxes on every year, that you Cannot use in anyway?

We purchased the land hoping some of the pecan crop would help us make our annual payment, plus it was our intention to pasture the Pecan Grove as it is already fenced and had been pastured by the previous owner.

The past 2 years has been a "No Win Situation", for us on the land we purchased. In 1991, drought brought disaster to our soy bean crop. 1993 saw the other side, the Neosho River flooded out our soy beans 3 times. If we could have relied on our pecan grove to help the past two years, the stress we endured would

have been greatly relieved.

Because of the easement restrictions on our own property and the financial struggle we have felt, next year we may lose our property.

I am not here for sympathy, but am hoping you will see that the "S.B - 293 Private Property Protection Act." is sound and morally right for all citizens of Kansas. I believe it is an injustice to the "taking" of "productive" land away from individuals whose dream is to make a living off of their own property.

I appreciate this time I was allowed to voice my opinion. I sincerely hope you will see the need for this new legislation to pass.

PROFESSOR JAMES WADLEY

WASHBURN SCHOOL OF LAW

SB. 293

PROBLEMS WITH THE PROPOSED LEGISLATION

PROBLEMS WITH DEFINITIONS

1. IT ATTEMPTS TO CODIFY THE CONCEPT OF "TAKING" AS SOLELY WITHIN THE CONFINES OF THE POWER OF FEDERAL DUE PROCESS LAW. THAT MAY BE A MISTAKE SINCE THE LANDOWNER HAS RECEIVED RELATIVELY LITTLE PROTECTION UNDER FEDERAL LAW. SEE, E.G.U.S. EX REL BERGEN V. LAWRENCE, 848 F 2D 1502 (10TH CIR 1988) SERT. DEN 109 S. CT. 528 WHERE A LANDOWNER WAS REQUIRED TO REMOVE 26 MILES OF FENCE FROM PRIVATE LAND BECAUSE IT BLOCKED THE MIGRATION OF ANTELOPE. THAT WAS HELD NOT TO CONSTITUTE A TAKING. THE SUPREME COURT HAS SAID

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THAT IT CANNOT ANNOUNCE A BRIGHT LINE TEST FOR TAKINGS BUT MUST DECIDE THESE ON A CASE BY CASE BASIS (PENN CENTRAL TRANSP. V. NEW YORK). THE PRESENT SUPREME COURT ATTEMPTED TO INDEX "TAKING" LAW TO STATE PROPERTY LAW IN ITS MOST RECENT DECISION (LUCAS CASE) SO IT WOULD BE UNWISE TO FREEZE THE STATE LAW DEFINITION AS WHATEVER THE 5TH AND 14TH AMENDMENT PROTECT. (SEE 33 BELOW).

IT IS HARD TO SAY THAT THE ATTORNEY GENERAL IS MORE CAPABLE THAN THE COURTS IN DECIDING WHEN A CONSTITUTIONALLY PROTECTED RIGHT IS ABUSED (TO SAY NOTHING ABOUT WHETHER THIS IS AN UNCONSTITUTIONAL DELEGATION OF AUTHORITY TO CHARGE THE A.G. WITH THE DECISION AS TO WHO IS RESPONSIBLE FOR COMPLIANCE WITH THE ACT. THAT WOULD SEEM TO ALSO BE AN UNCONSTITUTIONAL DELEGATION. (SEE #6 BELOW)

2. GOVERNMENT ACTION IS DEFINED IN TERMS OF GOVERNMENTAL ACTIVITY BUT NOT IN TERMS OF WHAT KIND OF LIMITS ON PRIVATE PROPERTY. IT MIGHT BE OBSERVED THAT EVERY GOVERNMENTAL ACTION WILL HAVE SOME LIMITING EFFECT UPON THE USE OF PRIVATE PROPERTY EVEN THOUGH THE EFFECT MIGHT BE INDIRECT.

SUBPART (C) IS ALSO PROBLEMATIC IN THE SENSE THAT MOST ACTUAL EXACTIONS ARE REQUIRED BY LOCAL GOVERNMENTS NOT STATE AGENCIES, E. G. IN THE FORM OR REQUIRED DEDICATIONS OF PUBLIC ROADWAYS AS A PREREQUISITE FOR SUBDIVISION APPROVAL, IN THE FORM OF IMPACT FEES OR IN A VARIETY OF DESIGN REQUIREMENTS BEFORE BUILDING PERMITS WILL BE ISSUED.

3. PRIVATE PROPERTY IS DEFINED ONLY IN TERMS OF WHAT THE 5TH OR 14TH AMENDMENT WILL PROTECT. IN UNITED STATES V. WILLOW RIVER POWER, THE SUPREME COURT NOTED THAT PROPERTY IS ONLY WHAT THE LAW WILL PROTECT AS PROPERTY. THAT MAKES THIS DEFINITION PURELY CIRCULAR. WHAT IS PROPERTY FOR THE 5TH AND 14TH AMENDMENT IS ONLY WHAT THE LAW WILL PROTECT FOR PURPOSES OF THE 5TH AND 14TH AMENDMENT. THIS DEFINITION IGNORES "NEW PROPERTY" AND SITUATIONS WHERE THE STATE LAW MAY WISH TO PROTECT THE INTEREST AS PROPERTY BUT WHERE IT IS CLEAR THAT THE 5TH AND 14TH AMENDMENTS TO NOT CONSIDER THE INTEREST TO EVEN BE PROPERTY FOR PURPOSES OF "TAKINGS LAW." SEE E.G. HUBBARD V. BROWN 785 P. 2D 1183 (CA. 1990), WHERE THE ISSUE WAS WHETHER THE POSSESSOR OF A FEDERAL GRAZING RIGHT THAT PERMITTED THE USE OF 40,000 ACRES OF FEDERAL LAND WAS A PROPERTY RIGHT FOR PURPOSES OF PROTECTING THE OWNER UNDER THE

STATE'S RECREATIONAL ACCESS STATUTE. THE LAW IS CLEAR THAT GRAZING RIGHTS ARE NOT PROPERTY FOR PURPOSES OF "TAKING LAW" BUT THE CALIFORNIA COURT HELD THAT THE OWNER OF THAT RIGHT HAD A SUFFICIENT PROPERTY INTEREST TO BE PROTECTED UNDER STATE LAW.

SCOPE OF THE STATUTE PROBLEMS

4. THE STATUTE PERTAINS ONLY TO STATE AGENCIES, AS IF THE AGENCIES INITIATE ALL OF THE LAW THAT AFFECTS PRIVATE PROPERTY. SUPPOSE THE "TAKING" IS ACTUALLY THE RESULT OF LEGISLATION IN WHICH THE AGENCY IS GIVEN NO INTERPRETATIVE DISCRETION. IT IS UNCLEAR WHETHER THAT WOULD BE GOVERNED BY THIS STATUTE. IF IT IS, THEN THE LEGISLATURE IS TYPING ITS OWN HANDS, PERHAPS UNWISELY, IN TERMS OF ITS ABILITY TO DEAL WITH FUTURE SOCIETAL PROBLEMS (E.G. MUGLER V. KANSAS.

5. AGAIN, MUCH OF THE ACTUAL DECISIONMAKING THAT AFFECTS THE USE OF THE LAND COMES FROM LOCAL UNITS OF GOVERNMENT WHICH WOULD BE UNAFFECTED BY THE STATUTE.

6. IF THE ONLY PURPOSE OF THE STATUTE IS TO SENSITIZE THE

AGENCIES TO THE POSSIBILITY THAT THEIR DECISIONS MAY AFFECT THE USE OF PRIVATE PROPERTY THE PURPOSE IS LAUDABLE BUT OF NO SIGNIFICANCE BECAUSE UNLESS THE AGENCY IS SOME HOW BOUND TO MAKE A DIFFERENT DECISION AS A RESULT OF THAT KNOWLEDGE, LANDOWNERS WILL RECEIVE NO MEANINGFUL BENEFIT FROM THE STATUTE. ON THE OTHER HAND, IF THE STATUTE IS BINDING ON THE AGENCIES, IT MUST BE CONSIDERED WHETHER THE IMPACT IS PROCEDURAL ONLY OR IS SUBSTANTIVE. IF IT IS PROCEDURAL, ALL THE AGENCY MUST DO IS CONSIDER THE CONSEQUENCES. IF THE AGENCY FAILS TO DO SO, IT IS UNCLEAR WHETHER THE AGENCY CAN BE SUED UNDER THE ACT FOR NONCOMPLIANCE. THE ACT DOES NOT DEFINE CONSIDERATION. ALL THE STATUTE SAYS IS THAT THE AGENCY MUST ADHERE, TO THE EXTENT PERMITTED BY LAW, TO THE GUIDELINES. THAT SEEMS TO ASSUME THE VERY FACTS TO BE PROVED IN EVERY CASE--THAT THERE IS AN ACTUAL PROPERTY INTEREST AND THAT IT IS TAKEN. IF THERE IS NO PROTECTED PROPERTY INTEREST, THERE CAN BE NO "TAKING".

IF THE ACT IS SUBSTANTIVE, I.E. THAT THE AUTHORITY AND POWER OF THE AGENCIES IS HEREBY CHANGED AND THE AGENCY MUST IMPLEMENT ITS CONSIDERATION OF THE GUIDELINES IN EVERY DECISION, IT WOULD SEEM THAT THE OUTCOME WOULD SHIFT WHAT IS BEING LITIGATED FROM WHETHER THE AGENCY ACTION TAKES PROPERTY TO WHETHER THE ACTION

IS ACTUALLY COVERED BY THE GUIDELINES AND IF SO WHETHER AGENCY ACTION IS ACCEPTABLE. EITHER THE A.G.'S OFFICE WILL BE THE PARTY TO BRING THOSE ACTIONS OR THE STATUTE MUST BE CONSIDERED TO CREATE PRIVATE RIGHTS THAT MIGHT BE ASSERTED AGAINST THE AGENCY. FURTHER, UNLESS THE "REPORT TO THE GOVERNOR, LEGISLATIVE BUDGET COMMITTEE AND A.G." REQUIREMENT IS PURELY PERFUNCTORY, IMPLEMENTATION OF THE STATUTE IS LIKELY TO GET BOGGED DOWN WITH REPLICATION OF THINGS THE POST AUDIT DIVISION ALREADY OVERSEES OR AGENCIES WILL BECOME QUITE INEFFECTIVE AS THE PUBLIC WAITS FOR FINAL DETERMINATIONS, IN THE LEGISLATURE, THE GOVERNOR'S OFFICE, THE A.G.'S OFFICE AND THE COURTS OF ALL THE UNANSWERED OR CONTESTABLE ISSUES IN EACH CASE. INSTEAD OF SAVING INDIVIDUAL PROPERTY OWNERS, THIS ACT IS LIKELY TO BURDEN THEM ALL. IT IS NOT IMPROBABLE THAT MORE PROPERTY RIGHTS WILL BE LOST THAN WILL BE SAVED WHICH IS A COST THAT ULTIMATELY THE PUBLIC WILL HAVE TO BEAR.

DIFFERENCES BETWEEN THIS AND REAGAN'S EXECUTIVE ORDER

7. THE FEDERAL EXECUTIVE ORDER IS CLEARLY APPLICABLE ONLY TO AGENCIES BUT DOES NOT SUBSTANTIVELY CHANGE THEIR MISSION STATEMENTS OR THEIR POWERS. THE CRITERIA FOR IMPLEMENTING THE

REGULATION ARE FIXED BY FEDERAL REGULATION, PROPERLY ADOPTED AFTER AN OPPORTUNITY FOR PUBLIC COMMENT (NOT PRESENT IN THE KANSAS PROPOSAL) AND NOT SIMPLY DEVELOPED BY THE FEDERAL EQUIVALENT OF THE ATTORNEY GENERAL.

8. THE FEDERAL EXECUTIVE ORDER IS NOTHING MORE OR LESS THAN THAT. IT HAS THE POWER OF LAW BUT ONLY WITHIN THE SPECIFIC CONTEXT OF AN EXECUTIVE ORDER. IT HAS NEVER BEEN APPROVED OR RATIFIED BY THE CONGRESS AND THEREFORE IS AT BEST PART OF THE INTERNAL ADMINISTRATIVE OVERSIGHT MACHINERY WITHIN THE EXECUTIVE BRANCH. IN CONTRAST, THE KANSAS PROPOSAL SEEKS TO CODIFY THIS POSITION AS PART OF STATE LEGISLATIVE LAW WHICH MAY NOT BE ADMINISTRATIVELY WISE AND MAY BE AN INTRUSION INTO THE AUTHORITY OF THE EXECUTIVE BRANCH IN DEROGATION OF THE DOCTRINE OF SEPARATION OF POWERS.

9. THE EXECUTIVE ORDER MAKES IT CLEAR THAT THE ORDER GENERATES NO PRIVATE RIGHTS OF ACTION AND THE FAILURE OF THE AGENCY TO FOLLOW THE GUIDELINES CANNOT BE A BASIS FOR CONTESTING AGENCY ACTION. IT IS NOT CLEAR THAT THE KANSAS STATUTE PROPOSES THE SAME AND POSSIBLY COULD BE HELD TO CREATE A PRIVATE RIGHT TO CHALLENGE AGENCY ACTION WHICH COULD LEAD TO A LOT OF LITIGATION.

FURTHER UNANSWERED QUESTIONS

1. IF ATTORNEY GENERAL DECIDES NO "TAKING", IS THE LANDOWNER STUCK?

2. CAN ATTORNEY GENERAL CATEGORICALLY DECIDE SOME KINDS OF ACTIONS ARE AND ARE NOT TAKINGS?

STATE OF KANSAS

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Michael L. Johnston
Secretary of Transportation

Joan Finney
Governor of Kansas

TESTIMONY BEFORE
SENATE JUDICIARY COMMITTEE
REGARDING S.B. 293
MARCH 12, 1993

Mr. Chairman and Committee Members:

This legislation purports to identify various actions of state government that fall within the ambit of the concept of governmental "taking". As to such activities S.B. 293 would create guidelines to be followed and apparently a process of review by the Attorney General to insure that they have been met. If enacted into law this bill would effect a significant change in state government. While no opinion is advanced concerning the advisability of such a change, in general, it is suggested that if S.B. 293 was determined to apply to the Department of Transportation serious and detrimental consequences would occur.

As stated in the preceding comment there is a question as to whether the terms of S.B. 293 were intended to apply to any operation or activity of the KDOT. Overall a reading of the legislation tends to indicate that it is not intended to gather the KDOT within its provisions. However, certain language and terms utilized can be construed as evidencing intent that the Department be subject to its terms. In this regard consider:

Section 1. (b)(1) "governmental action" or "action", means:

> (B) proposed or implemented licensing or permitting conditions, requirements or limitations to the use of private property";

Depending on the construction of these terms a number of activities of the Department that could be determined to fall within this concept. Several examples would be the prequalification of contractors, prequalification of engineers, the application of the KDOT Standard Specifications and the issuance of Highway Permit Agreements.

That this might be the case is a function of the term "taking". In general it is accepted that the state, through the exercise of its police powers, may regulate and to an extent

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diminish the property rights of its citizens without incurring any liability. At a point, however, permissible regulation without compensation becomes an impermissible taking for which compensation must be paid. As is recognized in Section 1(c) the concept of taking applies both to real and personal property. Thus, insofar as the KDOT is concerned, this legislation could be construed to apply to not only actions concerning rights of way but also "regulatory" responsibilities of prequalification of contractors, engineers and certain other licensing or permitting activities. Time does not permit reflection on S.B. 293 as it might apply to all KDOT functions but a brief discussion of its effects on one activity will be offered.

It is a fundamental principle that owners of land adjacent to a public highway have certain rights as a result of this proximity. The rule is simply stated that the owner of land has a right of reasonable access to the public way. It is equally accepted, however, that this is not an absolute right but rather is subject to the police power of the state. Thus, the KDOT is empowered to "regulate" access to the highway system. This is most commonly accomplished through the use of a Highway Permit Agreement. This document, entered into by the landowner and the Department, defines the terms and conditions whereby access is to be granted. Where appropriate the Permit Agreement may impose restrictions or requirements on the landowner and in a sense may, therefore, be said to restrict or limit the landowners rights. In theory, every access point to the Highway System should be the subject of a Highway Permit Agreement. In addition, each year approximately 2,500 new permits are issued. S.B. 293 purports to apply to any "permitting conditions,...to the use of private property;...". Whether this applies to the circumstances described is unclear as it can be argued that the "regulation" does not impinge on the landowner's property but only specifies conditions for use of the right of way. This view would negate any potential for "taking" as no property right can be said to be involved. On the other hand, a landowner of a tract adjacent to a public way has "rights" arising from the real estate's proximity to the roadway. These "rights" could be asserted as having been "taken" by a landowner who felt aggrieved by KDOT action. In addition, S.B. 293 refers to actions that affect the use of property and regulation of access can have significant implications for use.

Should it be determined that S.B. 293 is applicable to the Department, it is asserted that to subject the KDOT's long standing procedure for this regulation to the type of control contemplated by S.B. 293 is unwarranted and would lead to large inefficiencies in the Department's operations. By virtue of Section 3(d) an assessment and referral to the Attorney General would be required any time the KDOT "implements governmental action that has constitutional taking implications". If this is to be applied

literally, the Department could find itself in an endless and nonproductive routine of assessment and submission. In addition, it is worth noting that while many Highway Permit Agreements are issued routinely others are more complex and require consideration of traffic counts, turning conflicts, sight distance, grade and elevation factors, type of pavement and many other technical factors including engineering judgment. To assume that the Attorney General's office would have the expertise to balance these considerations when required to do so is not realistic.

In conclusion, it is noted that the Department does not present overall opposition to S.B. 293 but does oppose it to the extent it might apply to our operations. It is strongly suggested that the citizens of the State of Kansas would gain nothing by applying S.B. 293 to the KDOT and in fact would suffer from the inefficiency created. As far as is known there is no basis from which to assume that application of this bill to the Department is needed or warranted. While there are undoubtedly instances where unhappiness has followed KDOT action, on the whole this is not the case and the Department is proud of the sensitivity, concern and fairness that guides its relation with the people of Kansas.

State of Kansas
Joan Finney, *Governor*

Department of Health and Environment

Robert C. Harder, Secretary

913-296-1535

Testimony presented to

Senate Committee on Judiciary

by

The Kansas Department of Health and Environment

Senate Bill 293

Regulation, environmental or otherwise, embodies society's efforts to achieve a wise balance in the struggle between unbridled individual freedom and the common good. Because it would offset that balance and profoundly muddy waters in the process, Senate Bill 293 is opposed by the Kansas Department of Health and Environment.

Common good is nothing more than the combined rights of other community members. Curfew laws, history's first regulations, controlled the individual's use of fire in order to prevent a conflagration which could consume an entire village.

Likewise, current regulations are intended to preserve the value, usability and enjoyment of other people's property. For example, in issuing feedlot permits, KDHE considers separation distances to ensure that nearby residents don't suffer from the odors common to confined feeding operations. Because odors impact quality of life, rather than health or environment, provisions of SB 293 could strike down separation distance requirements altogether. If the separation distances survive, SB 293 could require the state to compensate the feedlot operator for portions of property taken out of usage. On the other hand, if feedlots were allowed to run right up to the property line, offended nearby residents might use the same law to seek redress or compensation for their loss of enjoyment. And if the neighboring property were occupied by money-making enterprise -- a restaurant, hotel, or medical office building -- the complexities increase. As in physics, where every action has an equal and opposite reaction, it must be recognized that expansion of the individual's rights is inextricably linked to constricting the rights of others.

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Attachment 5

Proponents of SB 293 state that "Private property is a cornerstone of our competitive enterprise system." That's true enough. But ample reserves of natural resources are equally important to economic development.

Unregulated energy exploration exposed our precious aquifers to hundreds of thousands of unplugged wells, and damaged the productivity of Kansas oil and gas fields. Recognizing the need for greater control, industry, citizens and government jointly forged regulatory programs which allow oil and gas production; while, at the same time, safeguarding water and energy reserves. Senate Bill 293 could require the state to complete site-specific assessments before demanding that wells be plugged, it could force the state to compensate producers for adhering to pumping controls meant to ensure maximum field productivity. We know what it means to have unregulated energy exploration, and we're still undoing that damage.

The history of the American West is punctuated with fierce battles over water rights. Drawdown of aquifers and the related deterioration of groundwater quality, in combination with periodic droughts, are increasing stresses on the state's water supply capabilities and tensions between water users. SB 293 will exacerbate problems. Parties involved in water transfers, claiming that the diversion or denial of water will impact property usage and value, will have an additional vehicle through which to thwart or promote their cause. Senior and junior water right holders could find themselves battling in the courthouse, while water flows are disrupted at critical times in the growing season.

Senate Bill 293 would also weaken the state's ability to prohibit or control certain activities on private property. While being sensitive to the costs and economic drag of regulations, the state of Kansas must be able to pursue aggressive control of certain high-risk operations. In its 1991 Contaminated Sites Report, KDHE identified 657 contamination sites in Kansas, not including the nearly 500 sites related to leaking underground storage tanks. Where the responsible party cannot be found or does not have the necessary resources to clean up the problem, this environmental liability falls squarely on the shoulders of taxpayers. SB 293 -- with its "real and substantial risk" provision -- would hamper proactive efforts to nip contamination in the bud. Even good people make mistakes, and for certain high risk activities, good intentions should be buttressed by strong, preventive regulatory measures.

Senate Bill 293 calls upon the Attorney General and agencies to fully develop fiscal impact statements prior to implementing regulatory requirements. Ironically, the sponsors of SB 293 seem to have neglected the responsibility they would impose on others: providing detail on implementation costs. KDHE believes that the administrative costs alone could cause a significant drain on agency resources. Additionally, to avoid delays and related compensation, KDHE would likely increase fees to staff up for quick

turnaround on permit and license applications. If compensation and litigation are combined with administrative and program costs, SB 293 promises to cost the state millions of dollars each year.

SB 293 also puts Kansas primacy over federal regulatory programs in jeopardy. When granting primacy to KDHE, EPA considers the agency's authorities, as enacted by the legislature, and program resources. In keeping with clear direction from the Kansas legislature, KDHE has generally developed programs which are no more stringent than EPA requirements. Reducing these already minimal programs would, in my opinion, trigger wholesale loss of Kansas primacy. If we were to lose primacy on federal programs, EPA would take over implementation in Kansas. Kansas industry has been consistently supportive of state primacy because of flexibilities which allow states to tailor programs to actual needs. Furthermore, KDHE has the well-deserved reputation for being easier and cheaper to deal with than EPA. Should SB 293 cause primacy to revert to EPA, the legislation could have the unintended consequence of aggravating regulatory problems which befall Kansas industry, commerce and private property holders.

Perhaps the most troublesome part of Senate Bill 293 is the high potential for unintended consequences.

Looking at the beleaguered airline and thrift industries, it seems clear that deregulation, no matter how well intentioned, can deeply damage the very interests it tries to protect. We believe that SB 293 contains the same risky dynamics.

As SB 293 shatters the existing social contract between individual rights and common good, it's possible that other elements of the contract could be up for renegotiation. At a minimum, response to SB 293 promises to tangle up the statehouse and courthouses for years to come. At worst, SB 293 opens a long and painful dialogue about the interaction of common good and individual rights.

Finally, passage of SB 293 would sorely test intergovernmental relationships at several levels:

> Even as the Energy and Natural Resource Committees are defining and directing KDHE efforts, SB 293 would undermine our basic regulatory mission;
>
> The Attorney General's office would be drawn into conflict with adminstrative agencies over program execution; and
>
> Local government could end up filling the vacuum created by state inaction, creating a fractured and uneven regulatory playing ground. (In passing we note that while SB 293 is targeted toward state agencies, "governmental action" as defined in Section 1 (2)(A) would appear to impact and possibly disrupt zoning and other locally applied regulations.)

For all the above-noted reasons, we urge this committee to reject Senate Bill 293.

Though imperfect and needing continuous oversight and adjustment, the state's current regulatory framework has been and continues to be both successful and serviceable. In contrast, Senate Bill 293 opens a Pandora's box of unanswered questions and unintended consequences.

Thank you for giving your attention to KDHE's concerns. I'll be happy to try to answer any questions the committee might have.

Testimony presented by: Charles Jones
Director of Environment
Department of Health and Environment
March 12, 1993

Testimony of
Thomas C. Stiles, Assistant Director
Kansas Water Office
to the
Senate Judiciary Committee
March 12, 1993

Re: Senate Bill No. 293

The Kansas Water Office is opposed to S.B. 293. While the Kansas Water Office has the utmost respect for property rights in Kansas as consistently espoused in the *Kansas Water Plan*, S.B. 293 appears to be an over-zealous effort to safeguard those rights. It is because of the zeal in this bill, that we are most concerned. Previous testimony on the bill outlined numerous "targets" for the bill, including wellhead protection, conservation easements, wetland and riparian protection and water right administration. The Kansas Water Office is not directly impacted by the bill, but the recommendations of the *Kansas Water Plan* regarding the preceding targeted programs most certainly are. The centerpiece of the water planning process is the management of state programs based on specific identified basin issues. The impact of S.B. 293 will be to drastically limit the state agencies' ability to implement that management through excessive burdens of procedure and cost.

It is the off-site impacts of activities on private land which are most worrisome. Taken individually, they may not amount to much, but as an aggregate accumulating downstream at a valued resource, the impacts to the public may be substantial. Such is the case with non-point pollution in the watershed above a water supply lake. To limit the ability of the state to effectively manage such a problem essentially writes off the downstream resource and its users.

Of primary concern is the burden of proof imposed on questions of public health and welfare. It would appear that the provisions of Section 2 will diminish the state's ability to take corrective measures in a timely fashion. The concept of a perceived threat to the public welfare

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is an oxymoron. A threat is a threat. It may not come to pass, but the possibility of it doing so cannot be discounted. S.B. 293 demands the threat to be real, which may not be determined until after the fact.

If overzealous administration of certain environmental regulations have brought about the need for this bill, the Kansas Water Office believes the bill swings the pendulum too far in the opposite direction. The underlying question posed by the presence of this bill is "what constitutes the public interest in Kansas, the sanctity of individual property rights or the degree of environmental protection prescribed by the state agency charged with that protection?".

If there has been documented state agency excess in administering the statutes beyond the Kansas legislative intent, then it would seem that the remedy is to revisit the appropriate statutes and clarify the scope of intended administration rather than introduce the umbrella approach of S.B. 293. The Kansas Water Office opposes this bill not because it pits private development against environmental regulation, but because its sweeping policies do not offer a pragmatic check and balance. We appeal to the committee to seek such a balance in protecting the public interest. Such a balance is not present in this bill.

STATE OF KANSAS

Joan Finney
Governor

DEPARTMENT OF WILDLIFE & PARKS
OFFICE OF THE SECRETARY
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Theodore D. Ensley
Secretary

S.B. 293

Testimony Presented To: Senate Judiciary Committee
Provided By: Kansas Department of Wildlife and Parks
March 12, 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.

S.B. 293 allows for a far broader interpretation of what is currently held to be a "taking." Current Supreme Court law defines such "takings" as occuring 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. By expanding the definition of such regulatory "takings", as proposed in S.B. 293, state agencies will be compelled to compensate the very entities and individuals that they govern.

Private property use is not defined and therefore could be almost any use within a private property owner's desire that is not specifically prohibited by law. Actions which only partially affect private property would also be considered as a "taking".

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.

By its very nature, management of that resource requires

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certain restrictions that are accomplished through regulatory actions. Under S.B. 293, agencies should avoid actions which may constitute restrictions on private property use and to avoid actions which may impact on the state treasury. This provision may place agencies in the position of inaction because any regulatory or permitting activity may constitute a "taking," and therefore require state compensation.

The broadness of S.B. 293 will adversely impact that management capability and will make effective resource management unaffordable.

Permitting functions are featured in S.B. 293 as those functions which may impact private land uses. This department is involved with many permitting activities particularly with such items as commercial wildlife harvesting. These permits are generally established by regulation and govern methods of take, limits, and selling and possession restrictions. Should individuals believe the regulatory restrictions reduce income regardless of resource protection needs, they could demand compensation.

Hunting and fishing regulations are used to set seasons and limit wildlife take. A private property owner realizing financial gain from hunting or fishing access charges may be able to establish that seasonal limitations and other regulatory restrictions on wildlife harvesting reduces the owner's potential income from leasing or access charges. Under S.B. 293, the Department may have to compensate that owner for the loss of that income.

Management of threatened and endangered species often requires special regulatory and/or permitting action to protect those species. Yet under this bill, any limitation of property use may render any such action as a taking and therefore subject to compensation.

Futhermore, S.B. 293 requires that before state agencies may implement any regulatory action, they must first provide an assessment of the regulation's "takings" potential to the legislative budget committee, the attorney general's office, and the governor. At the same time, however, the bill states that "undue delays in decision making," may carry a risk of also being catergorized as a "taking" and will then require compensation.

The issue of a state's higher responsibility to the needs of the state or its people may result in certain restrictions placed

on private or personal property uses. For those who feel they have been wronged, several remedies currently exist such as 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 reviews all regulations as to authority and that economic impact statements are a part of a regulatory action. Agencies are presently required to consider all alternatives to any regulatory action that would allow the objectives to be accomplished in the least restrictive manner.

In conclusion, S.B. 293 affects any regulatory action that would limit, curtail or influence any property interest. Such a broad based interpretation of a "taking" 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 promugating or even failure to promugate needed regulations and permits which benefit the general public, health, saftey, and welfare, the environment and the economy.

Kansas Audubon Council

March 8, 1993
Senate Judiciary Committee
SB 293

Thank you Mr. Chairman and committee members for this opportunity to appear before you today. I am Joyce Wolf, Legislative Liaison, for the Kansas Audubon Council. Because I am not an attorney, I requested assistance with preparation for the comments I will share with the committee on behalf of the Council. The testimony that I will read today are exerpts from a memorandum to the Idaho Audubon Council's representative from John D. Echeverria, Chief Legal Counsel, and Sharon Dennis, Staff Attorney, for the National Audubon Society. I believe they are relevant because similar legislation is under consideration in that state.

General Comments:

1. A major, it not the prime, motivation of those advocating SB 293 and similar bills in other States is to block the implementation of regulatory programs that they oppose on policy grounds. The progenitor of SB 293 and other similar bills is Federal Executive Order 12630, issued by President Reagan in 1988, which requires federal agencies to examine the extent to which proposed regulatory actions may interfere with private property rights. The historical record clearly shows that the Reagan administration developed the "takings" argument not out of concern about individual rights but rather as a pretext for blocking regulatory programs with which they disagreed. As the former U.S. Solicitor General Charles Fried wrote in a book recounting his experiences as an official of the Reagan administration, Order and Law: Arguing the Reagan Revolution:

> Attorney General Meese and his young advisors... had a specific, aggressive, and, it seemed to me, quite radical project in mind: to use the takings clause of the fifth amendment as a severe brake upon federal and state regulation of business and property.

There is no doubt that reasonable minds can differ on the types of regulatory programs government should adopt and how these programs should be carried out. It is fundamentally dishonest, however, to debate those issues under the guise of defending individual property rights.

2. The bill also is based on the mistaken premise that regulatory actions frequently result in "takings." Though the bill purports simply to protect existing rights, the unstated message of the bill is that legislative action is necessary to combat frequent violations of Fifth Amendment rights. For better or worse, the Fifth Amendment only proscribes rare and extremely burdensome government interferences with property. To the extent the bill seeks to create a different view, that view is inconsistent with current interpretation of the Fifth Amendment to the U.S. Constitution.

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3. The proposed bill threatens to distort government decision-making by focusing

undue attention on one particular right at the expense of all other important constitutional rights and values. The Federal and State Constitutions provide protection against certain government actions that result in property being "taken" or damaged. But the Federal and State Constitutions protect many other rights as well. Government officials have a duty to respect all of these rights, but it would obviously tie the government in knots to require the preparation of written assessments of how government actions affect all constitutional rights. There is no good reason to single out the prohibition against "takings" for special treatment. Furthermore, it is in fact especially inappropriate to single out this clause of the Constitution for special treatment because government programs rarely result in an unconstitutional "taking" and the US Supreme Court has emphasized that each "takings" challenge must be decided based on the fact of the particular case.

4. The proposed bill takes a distinctly one-sided view of the protection of private property and other individual rights. For example, the bill would exclude from the regulatory review process "repealing rules and regulations discontinuing governmental programs or amending rules and regulations in a manner that lessens interference with the use of private property." (Emphasis added.) The Federal and State Constitutions protect owners of property from certain types of government actions. At the same time, however, the basic purpose of many governmental regulatory programs is to protect private property and other individual rights. Pollutions prevention laws, for example, restrict certain property owners in the use they can make of their property, but they also protect other property owners, and the general public, from the harmful effects of pollution. Similarly, concern for individual rights undergirds a variety of other regulations in such areas as occupational health and safety, civil rights, and public health. The bill simply ignores the other side of the property rights issues. It is no exaggeration to say that this bill is not concerned with property protection at all, but rather with protecting the desire of select property owners to do what they want regardless of the effects of their actions on the community and their neighbors.

Specific Comments:

Section 3 requires governmental agencies to prepare written taking impact assessments for actions that "may result in a constitutional taking, including a description of how the taking affects the use or value of private property". This procedure would create a time-consuming and expensive bureaucratic process that would make government decision-making slower and less effective. Furthermore, the net result of all these requirements is that many regulatory programs designed to protect public health, safety, or the environment would be impeded under this bill, if not completely frustrated, despite the fact that many such regulations clearly could not be challenged as a "taking" or other unconstitutional interference with property rights. In short, the objective of government programs would be thwarted for no good reason.

The Kansas Audubon Council appreciates this opportunity to present these comments with the committee. We strongly oppose SB 293 and ask you to vote no.

STATE OF KANSAS

KANSAS
INSURANCE DEPARTMENT

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1-800-432-2484
Consumer Assistance
Division calls only

RON TODD
Commissioner

March 11, 1993

The Honorable Jerry Moran, Chairman
Senate Judiciary Committee
State Capitol, Room 255-E
Topeka, KS 66612

Dear Senator Moran:

Senate Bill No. 293 proposes to place certain duties upon state agencies concerning actions by such agencies which may constitute a taking of private property. Specifically, governmental action is defined in Senate Bill No. 293 in part to include "required dedications or exactions from owners of private property by a state agency." Senate Bill No. 293 does not appear to define what constitutes private property or "dedications or exactions."

We believe Senate Bill No. 293 presents a serious threat to the ability of the Kansas Insurance Department to regulate and may be used to effectively hamper the majority of the Kansas Insurance Department's activities. Although Senate Bill No. 293 does provide that orders authorized by statute that are issued by state agencies as a result of a violation of a state law are not defined as governmental action, much of this department's activities involve the collection of monies which are not assessed pursuant to an order. Examples of such collections would include but not be limited to the following:

Semi-Annual Estimated Tax Billings
Annual Tax Remittance Statements
Miscellaneous Tax Assessments
Fines and Penalties Assessed Without an Order
Insurance Company Admission Fees
Agent Application Fees
Agent Appointment and Renewal Fees
Workers' Compensation Fund Assessments
Insurance Department Fee Fund Assessments
Administrative Assessments to Group-Funded Pools
Health Care Stabilization Fund Surcharge Payments
Insurance Company Examination Billings

During FY 1992, these collections totaled over $178 million and involved the sending of some 20,000 notifications or assessments to various individuals and companies.

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In addition to the fees and assessments listed above, it is at least conceivable that insurance rates and rating plans filed by or on behalf of insurers for approval could be construed as a "governmental action" if such filings were disapproved in whole or in part. If so, this would encompass thousands of transactions annually.

Should the above examples be interpreted as "exactions" from owners of private property, Senate Bill No. 293 would require our agency, prior to collecting such amounts, to "submit a copy of the assessment of constitutional taking implications to the governor, the attorney general and the legislative budget committee." Obviously, such an interpretation would be burdensome and onerous on the Insurance Department as it relates to the payment of taxes, fees and other monies which we are required to collect by state law.

Equally or even more important, the fact that the issue could even be raised will most assuredly be used by insurers in an attempt to thwart proper regulatory action. As a result, it could produce or lead to a chaotic situation.

We question whether it was the intent of the legislature to make these types of collections and regulatory issues subject to Senate Bill No. 293 and respectfully request our concerns be considered by your committee.

Very truly yours,

Ron Todd
Commissioner of Insurance

RT:rkn

Kansas Property Rights Coalition

March 12, 1993

TO: Senator Jerry Moran, Chairman, and
Members of the Senate Judiciary Committee

FROM: Paul E. Fleener, Vice-Chairman

SUBJ: SB 293 - The Private Property Protection Act

This brief memo and attached objection and response section is authored by the Vice-Chairman of the Kansas Property Rights Coalition in the absence of the Chairman - M.S. Mitchell - who is in California with an ailing mother.

Several questions have arisen concerning the scope and breadth of SB 293. All are answerable. We submit for your consideration our restatement of some of the questions that have arisen and a response to those questions/objections.

SB 293, it is becoming readily more apparent, is necessary for the guidance of state agencies, many of whom have expressed objections or concerns. Our point is this: Property owners in the State of Kansas are continually expected to bear the costs of use restrictions imposed by state and federal agencies. Recent court cases indicate that some of those restrictions are "takings" and should be compensated for under the U.S. Constitution. One of the most recent and most famous cases is Lucas v. South Carolina Coastal Council. There has been much analysis of the Lucas case. One such examination was made by Mr. Andrew R. Mylott in the Wisconsin Law Review. In the preface of this examination Mr. Mylott indicated the Lucas decision may:

> **Have the practical effect of requiring state land-use regulators to take into account - for the first time - the private costs of their actions, costs which in many cases had been excluded from the calculus of their decision-making. This Comment examines some recent state land use regulation cases to demonstrate how in some circumstances the recognition of private costs is both a more desirable alternative, and one that is not disastrous to the public fisc.** SJ

4210 Wam-Teau Drive, Wamego, Kansas 66547

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SB 293 - PRIVATE PROPERTY PROTECTION ACT - Objections and Responses

Objection: How can the Attorney General decide whether a "taking" occurs?

Response: The Attorney General does not make the decision. Under SB 293 the Attorney General is to adopt guidelines "to assist state agencies in the identification of governmental actions that have constitutional taking implications."

Objection: SB 293 would have an adverse effect on the planning and zoning of counties and municipalities.

Response: SB 293 - The Private Property Protection Act - is limited to "state agencies." SB 293 does not affect local units of government.

Objection: SB 293 would disrupt all agency actions and activities.

Response: SB 293 addresses **only** those state agency actions with "taking" implications. Actions without "taking" implications would require virtually no evaluation by an agency since the Attorney General's guidelines can be expected to identify agency actions that do not have "taking" implications.

Objection: SB 293 could be unreasonably burdensome for state agencies to administer.

Response: The requirements of SB 293 provide for advance guidance from the Attorney General on "taking" implications and are specifically designed to avoid costly and burdensome considerations for state agencies.

Objection: SB 293 expands the scope of existing law requiring government compensation for private property "takings."

Response: SB 293 **does not** expand existing "takings" law. In developing guidelines the Attorney General is to review court rulings on "taking" decisions and is to review those guidelines on an annual basis "to maintain consistency with court rulings."

Objection: SB 293 is patterned after an Executive Order that has no power because Congress has never approved it.

Response: Executive Order 12630, until rescinded, is a directive to federal agencies to take into account governmental (federal) actions that have "taking" implications. Until rescinded the Executive Order is the direction to federal agencies. SB 293 is patterned after the Executive Order and effects state agencies requiring them to "be sensitive to, anticipate and account for the obligations imposed by the Fifth and Fourteenth Amendments of the Constitution of the United States in planning and carrying out governmental actions to avoid imposing unanticipated or undue additional burdens on the State Treasury."