



Since 1894

Date: February 7, 2024

To: Senate Committee on Federal and State Affairs  
Sen. Mike Thompson, Chair

From: Aaron M. Popelka, V.P. of Legal and Governmental Affairs, Kansas Livestock Association

Re: **SB 446 AN ACT concerning real property; relating to certain lands; prohibiting the acquisition of ownership interests in such lands by foreign nationals, foreign businesses and foreign governments unless authorized by the state land council; creating the state land council and providing for its membership, powers and duties.**

Position: Opponent, In-Person

*The Kansas Livestock Association (KLA), formed in 1894, is a trade association representing more than 5,700 members on legislative and regulatory issues. KLA members are involved in many aspects of the livestock industry, including seed stock, cow-calf, and stocker cattle production; cattle feeding; dairy production; swine production; grazing land management; and diversified farming operations.*

Thank you, Chairman Thompson, and members of the Committee, for allowing the Kansas Livestock Association (KLA) the opportunity to share our views on SB 446. KLA opposes SB 446, as it is likely unconstitutional and imposes unnecessary restrictions on investment, transfer of title, and credit. While KLA understands the desire to address foreign adversaries wishing to acquire property to harm the United States and its citizens, and would support an appropriately focused bill, SB 446 goes well beyond what is necessary.

As a general matter, KLA policy supports free markets. Modern agricultural operations are diverse, and often, must find unique ways to access capital. Given the global nature of markets, equity and debt financing could come from foreign sources. If these sources are from allies of the United States, such arrangements should not be discouraged. In addition, many friendly nations have allowed, and will continue to allow, U.S. citizens to own and operate land in their country. SB 446 would ban any foreign person or entity from acquiring any interest in Kansas real property. Furthermore, it would unreasonably restrict transfer of title and restrict credit, as publicly traded banks would be hesitant to lend because SB 446 would preclude the bank from foreclosing on real property in the event of a default.

As background, federal law requires all purchases of agricultural land by foreign nationals to be reported to the U.S. Department of Agriculture (USDA), which publishes an annual report<sup>1</sup>.

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<sup>1</sup> [https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/EPAS/PDF/2022\\_afida\\_annual\\_report\\_12\\_20\\_23.pdf](https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/EPAS/PDF/2022_afida_annual_report_12_20_23.pdf)

USDA's latest report discloses that 32 percent of all foreign owned agricultural land is held by Canadians. This is followed by the Netherlands with 12 percent, Italy with 6 percent, the United Kingdom with 6 percent, and Germany with 5 percent. China is near the bottom of the list with 346,915 acres nation-wide, a decline of 37,020 from the previous year's report of 383,935 acres. This amount is less than 1 percent of all foreign-held acres. Nearly 41 percent of all Chinese holdings are associated with Smithfield Foods, and in Kansas, Chinese nationals are listed as only owning one-half acre in Russell County Kansas. The USDA report also notes "[t]he changes in pasture and cropland are mostly due to foreign-owned wind companies signing, as well as terminating, long-term leases on a large number of acres . . . ."

KLA policy supports the free market with minimal government intrusion. In our view, this issue is best handled by the federal government, and we would ask that you allow Congress to address this issue. In the 118<sup>th</sup> Congress, U.S. Senator Tommy Tuberville introduced, and U.S. Senator Roger Marshall sponsored, S. 68. This bill places the U.S. Secretary of Agriculture on the Committee on Foreign Investment in the United States. It also requires the committee to review any investment that could result in foreign control of any U.S. agricultural business.

The primary reason KLA believes this issue is one best handled by Congress is because unless done with precision and restraint, attempts by state government to prohibit foreign ownership of land would likely violate the U.S. Constitution. SB 446 likely runs afoul of the U.S. Constitution on multiple fronts. First, the general prohibition of all foreign persons from owning any interest in real property in Kansas, violates Article IV, Clause 2, to the extent it prohibits foreign nationals from owning land in Kansas who reside in a country that has executed a treaty with the U.S. to allow land ownership.<sup>2</sup> This constitutional deficiency can easily be avoided by limiting the prohibition to foreign adversaries designated in 15 C.F.R. § 7.4. None of these designated foreign adversaries have treaties pertaining to real property interests.

Second, SB 446 interferes with the foreign affairs powers of the federal government because it allows a State Land Council to grant exemptions to the general prohibition without restraint. The U.S. Constitution vests the ability to conduct foreign relations in the federal government. Allowing a state council to favor one foreign national over another inappropriately interferes with the ability of the federal government to conduct foreign affairs.

Third, SB 446 likely runs afoul of Article I, Section 8, Clause 3 of the U.S. Constitution known as the Commerce Clause.<sup>3</sup> As noted in the Drake Journal of Law, in regard to existing state restrictions of foreign ownership of farmland:

Similarly, a dormant aspect of the Foreign Commerce Clause is recognized, though not as thoroughly developed as the interstate variant.<sup>4</sup> A facially discriminatory statute, like the land ownership restrictions at issue, would be per

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<sup>2</sup> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl.2.

<sup>3</sup> "The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes; . . ." U.S. Const. art. I, § 8, cl.3

<sup>4</sup> Grant Wilson, *Reforming Alien Agricultural Landownership Restrictions in Corporate Farming Law States: A Constitutional and Policy View from Iowa*, 516445 Drake Jnl of Ag Law 17.3 (2012).

se invalid if any nondiscriminatory means could be employed to achieve the desired end.<sup>5</sup>

In essence, anything the legislature attempts to do in this space that prohibits ownership would likely fail this test. While state and national security are an important local interest, creating exceptions for real property parcels of less than 3 acres casts doubt on the security purpose of the prohibitions and creates the appearance of protectionism prohibited by the Constitution. For instance, under SB 446, a foreign adversary would be prohibited from buying a quarter section of land in Wallace County, Kansas, but could readily buy 2.99 acres abutting a U.S. military or Kansas National Guard installation anywhere in the state.

While KLA firmly believes this matter should be left to Congress, we understand that some may want the State of Kansas to take a position in the interest of national and state security. To that end, KLA would support HB 2638, recently introduced by the House Committee on Agriculture and Natural Resources, or Senate Substitute for HB 2069, considered last year by the Senate Committee on Judiciary and currently on the Senate Calendar.

KLA appreciates the opportunity to submit opponent testimony on SB 446. KLA asks that the Committee not advance this bill and look to other legislation that is more consistent with the U.S. Constitution and less intrusive on legitimate business transactions.

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<sup>5</sup> *Dep't of Revenue v. Davis*, 553 U.S. 328, 337 (2008)