

Testimony on HB 2502
to
The Senate Agriculture Committee

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Chairman Taddiken and members of the committee, thank you for holding this hearing regarding House Bill 2502, which amends the state corporate farming statutes. Kansas Department of Agriculture stands in support of HB 2502. I would like to offer some information from a legal perspective regarding the Kansas corporate farming statutes that I hope will be useful to you in your consideration of HB 2502.

The purpose of the bill is to make a change to the corporate farming statutes to change the requirements for corporate swine facilities to be able to locate in a particular county to mirror the requirements for corporate dairy facilities.

Under current law, a corporate dairy facility may be located in a county if the county commissioners adopt a resolution to permitting and if there is not a protest petition. If there is a protest petition, meeting the requirements in the law, then a countywide vote is required. However, for a corporate swine facility to locate in a county, county commissioners must first submit the proposition to a county-wide vote. This requires much more additional time, as the vote would occur at the next state or county-wide election.

The current restrictions in Kansas: Certain business entities are restricted from owning agricultural land, without the permission of the county, for certain types of enterprises.

The restricted enterprises:

1. Dairy production facilities: Under K.S.A. 17-5903, "Dairy production facility" means the land, structures and related equipment used for housing, breeding, raising, feeding or milking dairy cows. The term includes within its meaning only such agricultural land as is necessary for proper disposal of liquid and solid wastes and for isolation of the facility to reasonably protect the confined cows from exposure to disease.

2. Swine production facilities: Under K.S.A. 17-5903, "Swine production facility" means the land, structures and related equipment owned or leased by a corporation or limited liability company and used for housing, breeding, farrowing or feeding of swine. The term includes within its meaning only such agricultural land as is necessary for proper disposal of liquid and solid wastes in environmentally sound amounts for crop production and to avoid nitrate buildup

and for isolation of the facility to reasonably protect the confined animals from exposure to disease.

The restricted business entities: No corporation, trust, limited liability company, limited partnership or corporate partnership, other than a family farm corporation, authorized farm corporation, limited liability agricultural company, family farm limited liability agricultural company, limited agricultural partnership, family trust, authorized trust or testamentary trust shall, either directly or indirectly, own, acquire or otherwise obtain or lease any agricultural land in this state. (Definitions found in K.S.A. 17-5903 are attached.)

There are 18 exceptions to this rule in K.S.A. 17-5904, including agricultural land held or leased by a corporation or a limited liability company for use as a feedlot, a poultry confinement facility or rabbit confinement facility. Feedlot" means a lot, yard, corral, or other area in which livestock fed for slaughter are confined. The term includes within its meaning agricultural land in such acreage as is necessary for the operation of the feedlot.

The Kansas corporate farming law has been amended numerous times, and much has changed since the dairy and swine production facility provisions were written in 1994. Dairy and swine production facilities have been established, predominantly in Western Kansas, and have contributed much to the area economies. A favorite statistic of mine is that the 1st Congressional District of Kansas is the number one district in the nation in the value of agricultural products. Five Western Kansas counties produce 24 percent of the value of agricultural products for our state. Much of this success is due to the animal agriculture industry in Western Kansas and the crops produced to feed those animals. Much of that is of course the result of beef feedlots, but the growth of the dairy industry in Western Kansas is a great success story for our state. Much more may be achieved if we can attract more dairies and swine facilities to Kansas. Making the small changes in HB 2502 will give us the opportunity to compete successfully for those facilities.

HB 2502 makes no other changes in corporate farming statutes or requirements other than these changes in the county approval process. For instance, the regulation of animal facilities is under KDHE as provided in K.S.A. 65-171d, and the separation distances required between facilities and habitable structures are greater for swine than for other livestock species.

A question we've received is whether the restrictions on corporate farming are unconstitutional, especially in light of several cases in other states in the past decade. I understand this is a question that members of the Legislature may be asking the Attorney General to consider. There are nine states that have had corporate farming laws. Six of those states are in the 8th Circuit Court, and Kansas and Oklahoma are in the 10th Circuit Court. Only one, Wisconsin, is outside the 8th and 10th Circuits. In recent years, there have been three state laws challenged in the 8th Circuit, Iowa, Nebraska and South Dakota. In each of those cases, the 8th Circuit found the corporate farming restrictions unconstitutional under a dormant commerce clause rationale.

The "Dormant" Commerce Clause is the negative implication of the Commerce Clause of the U.S. Constitution, Article I, Section 8, cl. 3. It ultimately means that because Congress has

been given power over interstate commerce, states cannot discriminate against interstate commerce nor can they unduly burden interstate commerce, even in the absence of federal legislation regulating the activity.

Any state law which affects interstate commerce must be:

1. rationally related to a legitimate state concern, and
2. the burden on interstate commerce must be outweighed by the benefit to the state's interests.

In determining whether the burden is outweighed by the benefits, a court must examine whether the state objective could be achieved by a means less restrictive on interstate commerce. Courts examine whether the challenged law discriminates against interstate commerce through differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. Three indicators have been identified to determine whether a state law is discriminatory:

1. whether a statute was enacted with a discriminatory purpose,
2. whether a statute has a discriminatory effect, and
3. whether a statute discriminates against interstate commerce on its face.

If a statute is determined to be discriminatory, it is subject to the "strictest scrutiny" and will be upheld only if it can be shown that the law sought to accomplish a legitimate local interest and that there were no other means available to advance that legitimate local interest. The 8th Circuit Court found in the "Hazelton" case that the corporate farming amendment to the South Dakota Constitution, prohibiting corporations and syndicates, subject to certain exemptions, from acquiring land used for farming and from farming in the state, was motivated by discriminatory purpose of restricting in-state farming by out-of-state corporations and syndicates in order to advance perceived local interests in protecting family farms and environment, and thus the amendment was unconstitutional under the dormant Commerce Clause.

Based on the 8th Circuit line of cases, it is certainly conceivable that Kansas and 10th Circuit courts would find the Kansas law unconstitutional under a dormant Commerce Clause analysis. However, we believe the changes in HB 2502 would simplify the process in our current restrictions for swine production facilities and enable Kansas to compete in growing the swine industry in our state.

Thank you for your consideration and I will respond to questions at the appropriate time.

17-5903. Definitions. As used in this act:

(a) "Corporation" means a domestic or foreign corporation organized for profit or nonprofit purposes.

(b) "Nonprofit corporation" means a corporation organized not for profit and which qualifies under section 501(c)(3) of the federal internal revenue code of 1986 as amended.

(c) "Limited partnership" has the meaning provided by K.S.A. 56-1a01, and amendments thereto.

(d) "Limited agricultural partnership" means a limited partnership founded for the purpose of farming and ownership of agricultural land in which:

(1) The partners do not exceed 10 in number;

(2) the partners are all natural persons, persons acting in a fiduciary capacity for the benefit of natural persons or nonprofit corporations, or general partnerships other than corporate partnerships formed under the laws of the state of Kansas; and

(3) at least one of the general partners is a person residing on the farm or actively engaged in the labor or management of the farming operation. If only one partner is meeting the requirement of this provision and such partner dies, the requirement of this provision does not apply for the period of time that the partner's estate is being administered in any district court in Kansas.

(e) "Corporate partnership" means a partnership, as defined in K.S.A. 56a-101, and amendments thereto, which has within the association one or more corporations or one or more limited liability companies.

(f) "Feedlot" means a lot, yard, corral, or other area in which livestock fed for slaughter are confined. The term includes within its meaning agricultural land in such acreage as is necessary for the operation of the feedlot.

(g) "Agricultural land" means land suitable for use in farming.

(h) "Farming" means the cultivation of land for the production of agricultural crops, the raising of poultry, the production of eggs, the production of milk, the production of fruit or other horticultural crops, grazing or the production of livestock. Farming does not include the production of timber, forest products, nursery products or sod, and farming does not include a contract to provide spraying, harvesting or other farm services.

(i) "Fiduciary capacity" means an undertaking to act as executor, administrator, guardian, conservator, trustee for a family trust, authorized trust or testamentary trust or receiver or trustee in bankruptcy.

(j) "Family farm corporation" means a corporation:

(1) Founded for the purpose of farming and the ownership of agricultural land in which the majority of the voting stock is held by and the majority of the stockholders are persons related to each other, all of whom have a common ancestor within the third degree of relationship, by blood or by adoption, or the spouses or the stepchildren of any such persons, or persons acting in a fiduciary capacity for persons so related;

(2) all of its stockholders are natural persons or persons acting in a fiduciary capacity for the benefit of natural persons; and

(3) at least one of the stockholders is a person residing on the farm or actively engaged in the labor or management of the farming operation. A stockholder who is an officer of any corporation referred to in this subsection and who is one of the related stockholders holding a majority of the voting stock shall be deemed to be actively engaged in the management of the farming corporation. If only one stockholder is meeting the requirement of this provision and

such stockholder dies, the requirement of this provision does not apply for the period of time that the stockholder's estate is being administered in any district court in Kansas.

(k) "Authorized farm corporation" means a Kansas corporation, other than a family farm corporation, all of the incorporators of which are Kansas residents, family farm corporations or family farm limited liability agricultural companies or any combination thereof, and which is founded for the purpose of farming and the ownership of agricultural land in which:

(1) The stockholders do not exceed 15 in number; and

(2) the stockholders are all natural persons, family farm corporations, family farm limited liability agricultural companies or persons acting in a fiduciary capacity for the benefit of natural persons, family farm corporations, family farm limited liability agricultural companies or nonprofit corporations; and

(3) if all of the stockholders are natural persons, at least one stockholder must be a person residing on the farm or actively engaged in labor or management of the farming operation. If only one stockholder is meeting the requirement of this provision and such stockholder dies, the requirement of this provision does not apply for the period of time that the stockholder's estate is being administered in any district court in Kansas.

(l) "Trust" means a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it. A trust includes a legal entity holding property as trustee, agent, escrow agent, attorney-in-fact and in any similar capacity.

(m) "Family trust" means a trust in which:

(1) A majority of the equitable interest in the trust is held by and the majority of the beneficiaries are persons related to each other, all of whom have a common ancestor within the third degree of relationship, by blood or by adoption, or the spouses or stepchildren of any such persons, or persons acting in a fiduciary capacity for persons so related; and

(2) all the beneficiaries are natural persons, are persons acting in a fiduciary capacity, other than as trustee for a trust, or are nonprofit corporations.

(n) "Authorized trust" means a trust other than a family trust in which:

(1) The beneficiaries do not exceed 15 in number;

(2) the beneficiaries are all natural persons, are persons acting in a fiduciary capacity, other than as trustee for a trust, or are nonprofit corporations; and

(3) the gross income thereof is not exempt from taxation under the laws of either the United States or the state of Kansas.

For the purposes of this definition, if one of the beneficiaries dies, and more than one person succeeds, by bequest, to the deceased beneficiary's interest in the trust, all of such persons, collectively, shall be deemed to be one beneficiary, and a husband and wife, and their estates, collectively, shall be deemed to be one beneficiary.

(o) "Testamentary trust" means a trust created by devising or bequeathing property in trust in a will as such terms are used in the Kansas probate code.

(p) "Poultry confinement facility" means the structures and related equipment used for housing, breeding, laying of eggs or feeding of poultry in a restricted environment. The term includes within its meaning only such agricultural land as is necessary for proper disposal of liquid and solid wastes and for isolation of the facility to reasonably protect the confined poultry from exposure to disease. As used in this subsection, "poultry" means chickens, turkeys, ducks, geese or other fowl.

(q) "Rabbit confinement facility" means the structures and related equipment used for housing, breeding, raising, feeding or processing of rabbits in a restricted environment. The term includes within its meaning only such agricultural land as is necessary for proper disposal of liquid and solid wastes and for isolation of the facility to reasonably protect the confined rabbits from exposure to disease.

(r) "Swine marketing pool" means an association whose membership includes three or more business entities or individuals formed for the sale of hogs to buyers but shall not include any trust, corporation, limited partnership or corporate partnership, or limited liability company other than a family farm corporation, authorized farm corporation, limited liability agricultural company, limited agricultural partnership, family trust, authorized trust or testamentary trust.

(s) "Swine production facility" means the land, structures and related equipment owned or leased by a corporation or limited liability company and used for housing, breeding, farrowing or feeding of swine. The term includes within its meaning only such agricultural land as is necessary for proper disposal of liquid and solid wastes in environmentally sound amounts for crop production and to avoid nitrate buildup and for isolation of the facility to reasonably protect the confined animals from exposure to disease.

(t) "Limited liability company" has the meaning provided by K.S.A. 17-7663, and amendments thereto.

(u) "Limited liability agricultural company" means a limited liability company founded for the purpose of farming and ownership of agricultural land in which:

(1) The members do not exceed 10 in number; and

(2) the members are all natural persons, family farm corporations, family farm limited liability agriculture companies, persons acting in a fiduciary capacity for the benefit of natural persons, family farm corporations, family farm limited liability agricultural companies or nonprofit corporations, or general partnerships other than corporate partnerships formed under the laws of the state of Kansas; and

(3) if all of the members are natural persons, at least one member must be a person residing on the farm or actively engaged in labor or management of the farming operation. If only one member is meeting the requirement of this provision and such member dies, the requirement of this provision does not apply for the period of time that the member's estate is being administered in any district court in Kansas.

(v) "Dairy production facility" means the land, structures and related equipment used for housing, breeding, raising, feeding or milking dairy cows. The term includes within its meaning only such agricultural land as is necessary for proper disposal of liquid and solid wastes and for isolation of the facility to reasonably protect the confined cows from exposure to disease.

(w) "Family farm limited liability agricultural company" means a limited liability company founded for the purpose of farming and ownership of agricultural land in which:

(1) The majority of the members are persons related to each other, all of whom have a common ancestor within the third degree of relationship, by blood or by adoption, or the spouses or the stepchildren of any such persons, or persons acting in a fiduciary capacity for persons so related;

(2) the members are natural persons or persons acting in a fiduciary capacity for the benefit of natural persons; and

(3) at least one of the members is a person residing on the farm or actively engaged in the labor or management of the farming operation. If only one member is meeting the requirement

of this provision and such member dies, the requirement of this provision does not apply for the period of time that the member's estate is being administered in any district court in Kansas.

(x) "Hydroponics" means the growing of vegetables, flowers, herbs, or plants used for medicinal purposes, in a growing medium other than soil.

History: L. 1981, ch. 106, § 1; L. 1983, ch. 88, § 72; L. 1986, ch. 96, § 2; L. 1987, ch. 368, § 1; L. 1988, ch. 99, § 53; L. 1991, ch. 76, § 9; L. 1994, ch. 130, § 3; L. 1994, ch. 331, § 1; L. 1996, ch. 225, § 1; L. 1998, ch. 93, § 71; L. 1999, ch. 119, § 83; Jan. 1, 2000.