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(August 1995).

GETTING BUSINESS OFF THE PUBLIC DOLE:
State and Local Model Laws to Curb Corporate Welfare Abuse

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Introduction: The Business Fist In The Public Treasury

American business has been on the government dole since the Republic began. But now the business finger in the pie of the public treasury has become a greedy fist, grabbing tax breaks, subsidies, sweetheart deals, and direct handouts that add up to hundreds of billions of dollars a year.

Several think tanks and non-profit organizations--left-wing, right-wing and center--have shown that from $50 billion to $200 billion a year could be saved in the federal budget alone by eliminating business giveaways for such things as subsidies to agribusiness, free gold to mining companies, and tax dollars to advertise Chicken McNuggets and M&M/Mars candy bars abroad.1

The corporate welfare bill adds up to billions more than the cost of all federal welfare programs for individuals, including help for the blind and deaf, drug and alcohol treatment, aid to the handicapped and elderly, care for the mentally retarded, children's vaccination programs, food stamps, and the rest.2 Yet even while taking public funds for itself, business ridicules government and urges death-cuts in public budgets for education, health, the environment, the elderly, children and the poor.

It is time to expose this rank hypocrisy, its perverted ethics, its bad economics, and its wasteful draining of public resources. It is time, indeed, to put a stop to it by pulling the plug on corporate welfare.

At the federal level, the battle against corporate welfare is on a roll, pushed by bi- partisan, populist anger. Labor Secretary Robert Reich launched the term in a speech in 1994. Within weeks, it was a household phrase. Frank Luntz, a pollster who works for the

Republican leadership and who tests words for political appeal, says "corporate welfare" is third in the list of "things the public flips out on." First, is "foreign aid." Second is "waste, fraud and abuse."3 Two citizen information groups have bubbled onto the Internet: list.corp-welfare@ursus.jun.alaska.edu and list.corporate- welfare@essential.org.

In Congress, Democrats and Republicans alike are saluting the anti-corporate welfare flag. The current Budget Bill will make at least a modest genuflection to cutting corporate welfare. Other bills are being introduced: so far, The Corporate Welfare Reduction Act of 1995, The Public Resources Deficit Reduction Act of 1995, and the Come Home, Corporate America Act of 1995.4 Meanwhile, the press is turning up "Believe it or Not" stories, such as the one about the Sandia National Laboratories spending $300,000 in federal tax dollars to show Disneyland how to shoot off fancier fireworks.5

But similar abuses at the state and local level have not yet been targeted.

Consider what business is doing in most cities and states, probably in yours:

- Extorting local tax giveaways. By threatening to move elsewhere, companies are blackmailing state and local governments into giving them billions in tax freebies.
- Not paying fair share for public services. Developers and others increase the need for schools, roads, sewers, parks, etc., but they frequently manage not to pay for it themselves.
- Taking public property without paying for it. Business treats the air, water and the rest of the environment--the common property of us all--as a free private waste dump.
- Wining, dining, golfing and lobbying at public expense. You pick up the tab through business people's tax deductions. And many of these same folks favor eliminating food stamps and school lunch programs.

There is a place for business-government partnerships. There is even a place for public subsidies to business for important public goals that would not otherwise be met. None of the items listed above is in that place. The practices listed are ethically perverse and economically unsound. They promote an ethics of irresponsibility, greed, profligate waste and reckless endangerment of the community. They distort the so-called free- market to which business swears allegiance. They erode efficiency and self-reliance. They tilt the economic playing field in favor of businesses dependent upon the public dole.

There are other corporate welfare abuses at the state and local levels, but these are among the worst. Let us begin with them and eliminate them everywhere, immediately. This pamphlet proposes model laws to deal with each problem. The laws may have to be modified to fit local circumstances and legal requirements, but they provide a serious first step. Take them to your state, city and county legislators. Ask for action.

The United States Congress, with support from corporate America, is considering social welfare reform through the Personal Responsibility Act of 1995, the declared purpose of which is "to help, cajole, lure or force adults off welfare." Let us start a grass roots rebellion in our local communities to enact laws to help, cajole, lure or force corporations off welfare. We will save taxpayers more money. And we will encourage personal responsibility among a morally errant group that is more worrisome than single mothers living in poverty: the welfare kings in the corporate suites.

--END OF INTRODUCTION--

GETTING BUSINESS OFF THE PUBLIC DOLE: STATE AND LOCAL MODEL LAWS TO CURB CORPORATE WELFARE ABUSE

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Chapter 1. Extorting Local Tax Giveaways

Businesses are extorting billions of dollars from state and local governments in exchange for promises to create jobs. Not only are the promises often broken, but the cost to the public treasury is often much greater than any conceivable benefit to the economy. State and local governments, blackmailed by businesses threatening to move elsewhere, are competing in a race to give away their tax bases.

Illinois gave Sears land and bonuses worth $240 million near Chicago to keep Sears from moving. Soon after, Sears announced large Illinois layoffs as part of a restructuring plan.6

Kentucky gave Dofasco, Inc. and Co-Steel, Inc. $140 million in aid for a 400- employee mini-mill: $350,000 per job!7

Rio Rancho, New Mexico attracted Intel (close to becoming "the most profitable company on the earth," according to the Wall Street Journal 8)with a $114 million package of incentives and tax breaks, including the promise of no property taxes for 30 years.9 Then, the town found it couldn't afford to build a needed high school without the property taxes. Intel magnanimously offered to build the $28.5 million high school, in exchange for approval of a further $8 billion industrial revenue bond and a tax giveaway worth another $480 million over the 30 year life of the bond.10

The Texas Legislature is considering legislation that would refund 80 percent of the school taxes paid by large corporations. School districts were prohibited recently from joining the tax abatement giveaway game in Texas. "Since then, corporations have been seeking another way to cut their tax bill, particularly because school taxes account for about 60 percent of all property taxes in Texas. SB 345 is their solution. It cuts corporate expenses by shifting the cost of school taxes onto state taxpayers, who must foot the bill for refund checks. . . . The plan is being hustled through the Legislature by a powerful coalition that includes Dow Chemical, Union Carbide, DuPont, Amoco, Motorola and several big-business lobbyists. Benefits would be limited to giant companies. . . ." To qualify, they must merely be "reasonably likely" to contribute to the economic development of their cities.11

"According to the Council of State Governments, many incentives that were not very common fifteen years ago are now offered by 40 or more states; and the number of states that authorize cities and counties to lend for job creation or retention is also sharply up."12

Columnist Peter King in the Los Angeles Times sums up the problem perfectly:

"Sports teams, computer chip plants, military bases, forklift factories, fast-food chains, prisons, universities--all that stuff and more has been fair game in this raging war of municipal seduction. . . . [A]ny softhearted municipality that frets about taking jobs from a neighbor might wake up one morning to find its own fertilizer factory loaded up and making tracks for the next county.

"And there always is a next county. . . . they raid one another day and night. They swoop in on private jets, governors, mayors, industrial pooh-bahs, dazzling CEOs with promises to suspend taxes, grease permits, sacrifice native fauna--whatever it takes to persuade their quarry to jump ship. . . At the same time, to prevent defections, these suitors are obliged to offer their own firms the same fiscal delights.

"It can add up, draining the public coffers, but no one seems to care much during the competition itself. Like the man said, just win, baby. And pay later."13

A Solution:

A state law declaring incentive packages to be illegal gifts of public property--unless justified by a cost-benefit analysis showing a net return to the people of the state.

There are two problems to be solved. The first is that taxpayers are not getting their dollar's worth in exchange for these breaks for business. Jobs and boosts to the economy are promised, but often not delivered. The second problem is that local governments are raiding one another's territories. Thus, even if one area does benefit by attracting a company through tax incentives, its prosperity may come at the expense of another area abandoned by the same company.

To address the first problem, the Model Act declares that incentive packages are illegal gifts of public funds unless justified by a cost-benefit analysis showing a net return to the public. Legal doctrine in every state has long held that government gifts of public funds, property or credit are illegal.14 The doctrine became vital in the 19th century when robber barons controlled state legislatures and began handing out state land, money and credit to themselves, especially to their railroad companies steaming across America. Most state constitutions were strengthened specifically to prohibit such abuses.

The prohibitions were taken pretty strictly until recent years when a new breed of robber barons arose to seduce and pillage local governments. At first the courts resisted, striking down many schemes for public financing of private benefits. Then the judges, too, became pliant. Nowadays, they resort to legal fictions to uphold the schemes. They will not second-guess the legislature, they say. They will "presume" that a financing scheme has a legitimate public rather than private purpose and, on the basis of the scantiest evidence, that the public is getting its money's worth, so there is no illegal gift.

The Model Act reverses that presumption and adopts an attitude for which the citizens of Missouri were once famous: "Show me." Based upon traditional legal doctrine and reasonable requirements for evidence, the Model Act is not vulnerable to charges that it is radical or reckless legislation. It does not outlaw all public incentive schemes for business. It merely holds governments accountable to the constitutional standards they claim already to be meeting.

To address the second problem--local governments raiding one another's companies--the Model Act requires the analysis justifying incentives to consider the citizens of the state as a whole in its calculations of costs and benefits. San Diego incentives that lure a company from Los Angeles will probably not pencil out to be a net benefit for the citizens of California. Incentives that close jobs in Philadelphia to open them in Pittsburgh are not likely to benefit the citizens of Pennsylvania as a whole. Such schemes will be illegal under the Model Act. This goes beyond current legal doctrine, which generally requires only that local government agencies consider benefits to the citizens within their own jurisdictions.

Note that the Act, however, does not reach rivalry between states. Single states are probably powerless under the federal constitution to prevent the interstate competition even within their own borders, and would put themselves at a disadvantage if they tried to do it alone. The interstate problem must be handled by federal law, or regional interstate compacts. The staff of the National Conference of State Legislatures, and the authors of the book No More Candy Store , have proposed such laws,15 and a Democrat and a Republican are co-sponsoring the bill H.R. 1842 in the current Congress which reads simply: "No State may engage in the direct or indirect utilization of Federal funds of any kind, in whole or in part, to lure jobs and businesses from another State."

No enforcement mechanisms appear in the Model Act, for the reason that it fits into the existing mechanisms by which the state enforces prohibitions on gifts of public property.

A MODEL ACT
TO PREVENT LURING BUSINESS THROUGH ILLEGAL GIFTS OF TAXES AND OTHER INCENTIVES

Section 1. Purpose.

The legislature finds that cities, counties, the state , and their agencies are engaging in a ruinous race to give away the public tax base in order to attract, retain or expand business. Government-business partnership programs, including subsidies, can be important to promote the common good of all citizens. But abuses of these programs undermine both government and the economy by inducing gifts from public treasuries and by creating businesses dependent upon this form of public welfare. It is the purpose of this Act to curb such abuses by assuring that these government incentive programs do not violate the state's prohibition on gifts or loans of public property, funds or credit, and that they do deliver actual economic benefits to the people of the state as a whole.

Section 2. Applicability.

This Act applies to every business incentive program authorized by the state, its political subdivisions, their agencies, or any other public governmental authority organized under state law.

As used in this Act, "business incentive program" means any grant of property or funds, tax benefit, loan, loan guarantee, industrial revenue bond, or other financial aid to a taxpayer, which is intended as an incentive to attract, retain or expand business at a specific geographical location.

Section 3. Presumption of illegality.

Every business incentive program shall be presumed under state law to be an illegal gift of public property or funds, or illegal loan of public credit. The presumption may be rebutted only by evidence that all of the following have taken place:

(a) The governmental body authorizing the program has received a detailed cost- benefit analysis indicating that the incentives will result in a net economic benefit to the people of the state as a whole by the end of the period of the program. In determining whether a net economic benefit will result, the analysis shall consider costs and benefits to the people of the state combined as a whole, rather than to individuals or to the population in a specific location. The analysis shall be prepared by an independent economist who is appointed by the governmental body authorizing the program, who is paid by the taxpayer applying for the program's benefits, and who is free of any conflict of interest with either.

(b) The governmental body has held a hearing to receive comments from the public on the cost-benefit analysis at least 60 days before authorizing the program, has considered those comments, and has found that the program will result in a net economic benefit to the people of the state as a whole.

(c) The governmental body and the taxpayer applying for the program's benefits have entered into a legally enforceable agreement requiring annual reports from the taxpayer showing that the taxpayer has complied with its commitments that formed the basis of the cost-benefit analysis. The agreement shall also permit the governmental body to terminate the program at any time and assess the taxpayer for repayment of all benefits received, plus interest, plus a penalty of five percent if, after notice and hearing, the governmental body determines that the taxpayer has not complied with its commitments.16
--END CHAPTER 1--

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Chapter 2. Not Paying Fair Share For Public Services

This abuse is related to the first but is subtler and even more widespread. It goes on even when the government has no special tax incentive program to attract business. Businesses demand police and fire protection, schools, water, sewage treatment, waste disposal, roads and other public improvements to serve them. But they often don't want to pay their proportionate share of the expense. They negotiate sweetheart deals with local governments to pass much of their cost onto general taxpayers.

If you listen to developers tell this story, you'd think that they are being forced to pay not only their own but also everybody else's share of public services. They practically yell for the police when it is pointed out to them that their housing tract will bring new kids to an overcrowded school and that someone will have to pay for the additional desks and chalkboards. They sanctimoniously wave the Takings Clause of the Constitution's Fifth Amendment ("nor shall private property be taken for public use, without just compensation") if it is suggested that their permit to build a mini-mall be conditioned upon their payment for street widening to handle the increased traffic.

This is mostly posturing to gain advantage in bargaining with local government. No doubt, some local officials sometimes abuse their authority and, in exchange for building permits, extract more from business than its fair share. Those officials should be, and usually are, slapped down by the courts. But any claim that business generally gets the short end of the stick from local government must be greeted with the most profound skepticism. Truth is, many of these projects don't pay their own way. Business shoves its costs off onto general tax revenues.

What's happening in the suburbs of Washington, D.C. is typical. According to The Washington Post, local officials are hearing the plea that, "The county has to be very careful not to exact too much, or the developer will go bankrupt. . . . In Northern Virginia, several developers are saying they're ready to build, but only if they can scale back their promises to build roads, sewer lines and other improvements that would mitigate the impact of their projects on surrounding areas. . . .[A] similar issue has surfaced [in Maryland], with developers seeking to reduce the fees and taxes they must pay to construct residences and office buildings. . . . Under pressure from builders, Montgomery County Executive Douglas M. Duncan last month repealed a construction excise tax that would have been levied on most new residences and commercial buildings. 'The tax was a one-size-fits-all policy when we needed a policy that was more flexible,' said David Weaver, a spokesman for Duncan's office. 'We also had another problem, and that was the perception among the business community that Montgomery was anti-business and that we weren't encouraging business and growth.'"17

A one-size-fits-all policy, of course, means everybody pays their share of the burden equally. Business won't stand for that. It yelled for special treatment in Montgomery County and got it. Any official who tries to make developers pay the actual costs of their own growth is tarred as "anti-business."

Suppose a county supervisor had the courage to stand up at a chamber of commerce luncheon and say that developers deserve to go bankrupt if they cannot pay the real cost of their projects to the community, that they are free-riders on public infrastructure, and that they are mighty poor capitalists if they hinge their profits on taxpayer bailouts. Knives, forks and bread would rain down upon that supervisor as he dodged out the back door, and he would be hounded from office at the next election.

A lot of politicians actually trumpet their desire to spend tax dollars cleaning up problems delivered by business. The mayor of Brownsville, Texas, recently gushed about the money he was spending to handle the traffic crossing the U.S- Mexican border at Brownsville as a result of the North American Free Trade Agreement and increased trade with Mexico. "The City of Brownsville and Cameron County are doing their part to meet the infrastructure needs associated with accommodating this rapidly growing international trade. Both entities are spending millions of dollars to build new roadways to efficiently move these international goods," he enthused.18 But, alas, millions of dollars from local taxes would not do the job, so he was in Washington asking Congress for federal tax money as well:

- $0.5 million (on top of an earlier $0.5 million of federal dollars) toward an overpass accommodating an additional 20,000 vehicles a day ("this corridor will connect with the large commercial development area known as Amigoland and the B & M International Bridge").19
- $1 million toward the West Loop bypass road ("Brownsville presently must daily contend with large commercial international truck trade that has increased as a result of NAFTA. . . creat[ing] problems for both the local retail shopping traffic as well as the trucking industry. . . .").20
- $5 million in "demonstration funds" toward Los Tomates International Bridge, ultimately to cost $47 to $52 million.21

It amounts to a package of subsidies to one industry--the international trucking business and its corporate customers--that, in the pursuit of profit, has imposed a nightmare of congestion on a little border city. Why aren't the trucking firms paying for this themselves through, say, a bridge toll for trucks? Didn't these folks learn in kindergarten that you clean up your own messes?

The mayor and his colleagues, of course, justify the public expense by issuing Pollyanna statements about all the jobs and general public benefit to come from international trade and NAFTA. But this is where they must be held to the "Show me" test. And here they fail. NAFTA has created no net new jobs in the United States. It has lost jobs.22

It is negligent, even reckless management of public money for officials simply to assume that the community will get some payback in jobs or a booming economy from public expenditures on infrastructure for business. Experience too often shows otherwise. Whether it's trucks rolling with NAFTA goods, developers rolling with bulldozers, or pitchmen touting some other scheme for so-called "progress," the bottom line is the same: business wants the taxpayers to pay for the infrastructure that business wants, even when there is nothing in it for the public.

A Solution:

A flat rule for local governments that business must always pay its proportionate share for the burdens it imposes upon the public infrastructure.

The Model Act here is proposed for local government: counties, cities, towns, and independent authorities such as water and sewer districts, school districts and the like. Whether these units in your area have authority to adopt the Model Act generally turns upon the authority granted to them by the state legislature. There should be no question in most instances, since the Act merely supplements existing authority by which these units finance capital projects, and simply precludes waiver or compromise of the proportionate share of expenses assessed to business. If there is a question, however, then the Model Act should be taken to the state legislature instead.

The Model Act applies only to for-profit businesses, not to individuals or non- profit organizations. While everyone must pay their fair share of public capital improvements, existing finance mechanisms appear to accomplish that in general. It is only the costly abuses by business that warrant the extra procedural safeguards called for by the Model Act.

For ease of administration, The Model Act applies only to capital improvements, not to maintenance and operation costs or public services that do not involve capital expenses. While an argument could be made for extending the Act to all government expenses, it seems too complicated to attempt it. Capital expenses tend to be the big ticket items that attract abuse, and their expenses and beneficiaries are more easily traced in accounting systems.

The calculation of "fair share" under section 3 of the Act is worded to comply with constitutional requirements as most recently laid down by the U.S. Supreme Court in the case of Dolan v. City of Tigard .23 Exactions in exchange for permits may run afoul of the Takings Clause of the Fifth Amendment unless they can be reasonably shown to be related to the impact of the development in a "roughly proportionate way." The Model Act meets that standard by requiring a reasonable demonstration that the business project actually caused at least in part the need for the capital improvement, and by requiring that the fee collected be proportionate to the benefits to be received by the fee- payer from the improvement. In those few states that have even stricter nexus standards, lawyers may want to re-write the causation language in Section 3 (a) to adhere to state phrasing. This part of the Model Act should raise no controversy over the "taking" issue, since it complies with Dolan and exerts no pressure at all on the unconstitutional "taking" of property. Rather, its language is directed at the opposite problem: that public officials are failing to collect the amount they should collect in cases when there is clearly no "taking."

The methods of collection set out by the Model Act--impact fees, subdivision exactions, in-kind payments, user fees, or other assessments--are all familiar mechanisms to local governments, though they are too often waived or compromised. The Act invents no new collection mechanism, and imposes no taxes. An assessment is a fee for benefits received, rather than a tax. The distinction is important for jurisdictions whose authority to assess is different from their authority to tax. The Act imposes only a mandatory requirement that business be assessed for the costs it causes, to be collected by the usual mechanism appropriate to the context.

The actual calculation of the fees presents little problem. These calculations are complex but are performed every day by local government officials with reasonable precision.24

A MODEL ACT
TO ASSURE THAT BUSINESS PAYS ITS FAIR SHARE OF PUBLIC INFRASTRUCTURE IMPROVEMENTS

Section 1. Purpose.

The City Council25 finds that business activities often impose expensive burdens upon the community for capital improvements related to law enforcement, fire protection, roads, schools, sewers, water, waste disposal, health care, environmental protection, parks, recreation, libraries, housing and other similar public facilities and services.

The City Council finds further that the city, in its eagerness to provide a friendly business environment, has sometimes strayed from the path of fiscal fairness: it has not always collected the full share of these expenses from the businesses that cause them and benefit from them.

This practice is fundamentally unfair to the general taxpayers who must pay for more than their share. The practice dangerously drains public resources. And the practice is contrary to principles of economics to which business is itself committed, making business dependent upon public welfare, undermining self-sufficiency, and distorting so-called free-market investments by allowing some businesses to pay less than the full costs of their operations. Therefore, it is the purpose of this Act to collect from business its full fair share of costs for public capital improvements.

Section 2. Duty to pay fair share of public improvements.

Every corporation, partnership, sole proprietorship, and other business enterprise conducted for profit shall pay its fair share of the costs that its activities impose upon the city for capital improvements related to the public health, safety and welfare. The fair share shall be calculated according to section 3 of the Act.

Section 3. Fair share calculation.

Before collecting the amount due, the city shall issue a statement entitled "Fair Share Calculation" and allow the fee-payer and the public a reasonable time to comment on it. The Fair Share Calculation shall reasonably demonstrate (a) that the fee-payer's activities have at least in part caused the need for the capital improvements in question, (b) that the amount due is proportionate to, that is, neither more nor less than, the benefits to be received from the improvement by the fee-payer.

Section 4. Collection.

The city shall collect the share through impact fees, subdivision exactions, in-kind payments, user fees, or other assessments, as appropriate to the situation.

Section 5. Savings clause.

This Act does not affect any existing authority the city may have to finance operating and maintenance expenses for city facilities or services.

--END CHAPTER 2--

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Chapter 3. Taking public property without paying for it

Business constantly raises the constitutional complaint that government regulations threaten to "take private property for public use without just compensation." But the actual number of government takings is small. The bigger problem is just the reverse: business takes public property for private destruction or for a private waste dump without any compensation at all. It does this by destroying and polluting the global commons that is the heritage of all humankind, especially the oceans, lakes, drinking water, biological diversity of plant and animal life, topsoil, forests, wetlands, and the atmosphere affecting climate change.

Doesn't the myriad of environmental laws passed in the last 25 years have these problems under control? In a word: no. Those environmental laws (and business is currently on thunderous campaign to repeal even those!) have achieved some impressive cleanup of some of the water, some of the air, and some of the toxic dumps, but they have been only weakly successful in slowing the private sector's destruction of the planet's natural life-support systems that our children and our children's children need for survival.

Whole ecosystems--wetlands, forests, mountains and deserts--that since ancient times have preserved a complex web of life of which humans are only one strand, are being lost forever. This is not about saving spotted owls because they are cute. We surely have an ethical duty to respect other forms of life, but this is also about saving our own skins. Moreover, it's about saving jobs by creating an economy that uses natural resources sustainably so that resources and jobs both last over the long-run rather than evaporate in one generation. "Loss of the world's biological diversity would be worse than "energy depletion, economic collapse, limited nuclear war or conquest by a totalitarian government," says Harvard's Pulitzer Prize winning scientist E. O. Wilson. "As terrible as those catastrophes would be for us, they could be repaid in a few generations. The one process ongoing . . . that will take millions of years to correct is the loss of genetic and species diversity by the destruction of natural habitats. This is the folly our descendants are least likely to forgive us."26

Independently of broad ecosystem destruction, topsoil and water are being depleted. America's topsoil is eroding at a rate of more than 5 billion tons per year, 16 times the rate of soil formation. One third of the original U.S. cropland has been permanently removed from production, due mostly to excess soil erosion caused by unsustainable farming practices. The annual cost of the erosion: $44 billion in decreased crop production, fertilizers carried off fields, soil piling up behind dams, and the polluting of waters.27

Water scarcity in the west and mid-west is getting worse, not better. Unbelievably, even the huge Ogallala Aquifer that sustains life in eight states from Texas to South Dakota is approaching its end, from over pumping and contamination. The situation in Nebraska is illustrative:

"No longer can Nebraska farmers pump water in every area of the state without fear of running out. . . . No longer can farmers assume that the pumping does not harm nearby rivers. State officials say it has helped reduce the flow of 12 rivers since 1960. And no longer can a million Nebraskans be certain that the underground water they drink is always safe. Seepage of nitrogen fertilizers has left unsafe amounts of nitrate in the drinking water of 47 towns in the past decade. . . . 'It's like your son's checking account," said Michael Jess, state director of water resources. "'He writes checks more often than he makes deposits.' That deposit is rainfall, and in some areas river flow as well. But there is little rain in southwest Nebraska. Each year, no more than an inch or two per acre percolates underground. . . . The repercussions of this pumping are felt beyond Nebraska. Kansas threatens a lawsuit. It says unregulated pumping in Nebraska has sharply reduced the flow of the Republican River into Kansas. Wyoming and Colorado say pumping along the Platte River in Nebraska makes them reluctant to send water down the river for endangered wildlife . . . ."28

Finally, we are filling the atmosphere with "greenhouse gases," especially carbon dioxide from burning oil and coal, and thereby threatening to change the entire global climate in ways that will wreak devastation through flood, drought, storms, and rapid warming of average temperatures. The fossil fuel industry poo-poos the greenhouse effect as unproved, yet it is unproved in the same sense that it is unproved that tobacco causes lung cancer: there is just a strong, frightening correlation. A consensus of scientists in every country in the world agrees that greenhouse gases have increased dramatically since the beginning of the industrial revolution and that it is exceedingly dangerous to ignore this fact since there is an historical and logical correlation between increases in the gases and increases in temperature.29

Ecosystem destruction, soil and water depletion, the atmosphere turning into a greenhouse: what's going on in every instance is that some people are taking what belongs to everybody in common and using it as a waste dump or just using it up. It is the classic "tragedy of the commons."30 Who are those people? Government agencies have caused some of the worst damage. And every individual who drives a gasoline car contributes to the greenhouse effect. But business is the greatest engine of destruction. The way the market is set up, it actually pays business to destroy. Conservative economists would say the problem is that business is permitted to "externalize" its costs, that is, throw the cost of its activities onto someone else, namely, society at large and future generations. This allows companies to sell their products cheaper than they really are, unfairly distorting the so-called free-market into gross inefficiencies that enrich the few and harm everyone else. The economists' answer is to force these costs to be "internalized," paid by those who generate them. That will stop the destruction faster and more efficiently than most regulations have been able to do.

A Solution:

A state law allowing law suits for damage to natural resources that are needed to sustain future generations.

The Model Act draws upon both economic theory and the ancient wisdom of Native Americans. The Great Law of the Iroquois League imposed a duty upon leaders to "have always in view not only the present, but also the coming generations, even those whose faces are yet beneath the surface of the ground--the unborn of the future Nation," 31 and the Iroquois tradition is to consider the impact of decisions on the next seven generations.32 The Model Act proposes that business be forced to take long range impacts into account by internalizing their costs, that is, making business pay for them.

This could be accomplished by taxes or regulation. But those are the existing approaches that fall short of doing the job, and there seems to be little support to expand them. The Model Act, instead, returns to basics and opts for an old fashioned tort suit. It allows damage suits by public prosecutors, or by citizens as "private attorneys general," all acting as trustees for the public interest. The approach is rooted in the traditional common law remedy of suits to abate public nuisances. Several federal statutes, and laws on the books in more than half the states, already permit such suits to recover damages for injury to land, air, water, fish, wildlife, biota, and other resources.33 So this is nothing new. Those laws, however, are mostly limited to damages caused by specific harmful events such as spills of hazardous waste. The Model Act merely extends the idea to any act that inflicts damage upon environmental resources vital to survival for future generations.

Valuation of damages to natural resources is tricky business, and can tie up the litigation so that everyone loses except the lawyers and accountants. To avoid this, the Model Act lays down specific valuation principles, following the recommendations of an important analysis by Professor Frank B. Cross.34

The Act imposes liability only for long-term damages to vital natural resources, so it is not a general environmental tort statute permitting law suits every time some business harms nature. The harm must result in damages likely to be suffered for 30 to 210 years. Thirty years is the dictionary definition of a generation, so the Act applies to harms that will be felt for between one and seven generations. Further, the harm must be to vital natural resources, defined as biological diversity, topsoil, water and air. The rather technical definitions of "biological diversity" and "ecosystem" in the Act are the same as in the United Nations Framework Convention on Biological Diversity.

Damages must be paid whether the vital natural resources are publicly or privately owned. A paper company that destroys vital biological diversity by clearcutting a primary forest, a developer who does the same by filling in a wetland, or a commercial farmer who over pumps the Ogallala Aquifer, for example, will all be liable to pay damages to the public even though they have title to the land. Rhetoric about "individual property rights" has reached such a shrill pitch in recent years that the public may have forgotten that it too has property rights even over private lands, and they are rooted in ancient, solid, sacred legal and political doctrines.

The first of these is the public trust doctrine. "The state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain," wrote Justice Oliver Wendell Holmes.35 Indeed, it is the trustee of these resources for all the citizens and has a duty to protect them. The courts are now beginning to recognize that the public trust doctrine, limited in the past mainly to water ways and sea shores, applies conceptually to all vital natural resources.36

Another doctrinal basis of the Model Act is the police power of the state to protect health, safety and welfare. "The limits set to property by other public interests," the U.S. Supreme Court has observed, "present themselves as a branch of what is called the police power of the State. . . .[I]t is recognized that the State as quasi-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land immediately concerned."37 The police power has always been used to abate harmful "public nuisances" emanating from private property, even if the property is rendered valueless: "All property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."38 Even the most conservative decisions of the current U.S. Supreme Court recognize that the state may go so far as to "prohibit all economically beneficial use of land" when the limitation "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. . . . [T]he owner of a lake bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault."39 The parallels to threats from destruction of vital natural resources are obvious.

In addition, the Model Act rests upon the fundamental human right of present and future generations to a healthful environment, acknowledged in recent years as a basic norm of international law40 and as a constitutional or common law right in a number of U.S. states.41

Finally, the Model Act is rooted in the deepest precepts of the social contract doctrine that underlies our Constitution. Influenced by 17th century philosopher John Locke,42 the drafters of our Declaration of Independence and our Constitution understood that individuals entered into a contract with civil society in order to protect life as well as liberty and property, and that a government that failed to protect them against others was breaking its part of the contract. Government has a duty to protect us not only from our neighbors' guns but also from their poisoning of the vital natural resources we need to support life on earth. In the words of a contemporary legal philosopher, whatever else it is, the Constitution is not a suicide pact.

A MODEL ACT
TO REQUIRE BUSINESS TO PAY FOR ITS DESTRUCTION OF NATURAL RESOURCES NEEDED FOR SURVIVAL BY FUTURE GENERATIONS

1. Short title.

This Act shall be known as The Seventh Generation Act.

2. Purpose.

The State Legislature is concerned that the present generation is rapidly destroying the natural web of environmental resources that will be needed to sustain future generations as it has ours. The Legislature finds that the destruction is especially propelled by businesses accustomed to using a seemingly endless abundance of land, air and water as if they were free for the taking. It finds that the free use and destruction of these resources amounts to a welfare subsidy to business that is contrary to the so-called free-market principles to which business claims to be committed, and contrary to the public interest. Conscious of the native American Indian wisdom that we should consider the impact of our decisions on the next seven generations, mindful of its legal responsibility as ultimate trustee of all natural resources in the State whether publicly or privately owned, acknowledging that a healthy environment is a fundamental human right under international law and the law of this State, and acting under its police power to suppress nuisances and protect the health, safety and welfare of its citizens, the Legislature adopts this Act to slow the destruction of vital natural resources.

3. Liability for damages to vital natural resources.

(a) Every corporation, partnership, sole proprietorship and other form of for- profit enterprise is liable for long-term damages it causes after the effective date of this Act through injury, destruction , or loss of vital natural resources.

(b) As used in this section: "long-term damages" means damages that are likely to be suffered by generations living between 30 years and 210 years from the time of the injury, destruction or loss. "Vital natural resources" means biological diversity, topsoil, water, and the atmosphere. "Biological diversity" means the variability among living organisms from all sources, including but not limited to terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems. "Ecosystem" means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.

4. Calculation of damages.

The court shall set damages in an amount adequate to restore or replace the resources injured, destroyed or lost. If restoration or replacement is infeasible, or is grossly disproportionate in cost to the value of the resources injured, destroyed or lost, then the court in its sound discretion shall set damages by another generally accepted method that best advances the purposes of this Act. In every case, however, the court shall value resources by their existence value and not by their use value.

5. Enforcement.

The State attorney general and the public prosecutors of any county or city in the State may bring suit in a court of competent jurisdiction to enforce this Act. Any person resident in the State may notify the attorney general and appropriate public prosecutors of an alleged violation of the Act. If none of those officers files suit within ninety days after receiving notice, then that person may file suit on behalf of the public as a private attorney general. A private attorney general who substantially prevails shall be entitled to attorneys' fees and court costs. Any damages recovered by the attorney general, public prosecutors, or a private attorney general shall be directed by the court wholly to fund restoration, replacement, or mitigation of damage to vital natural resources.

6. Preemption.

This Act neither preempts nor is modified by existing laws. It supplements them. Compliance with this Act does not relieve any duty arising from those laws. Compliance with those laws raises no defense to violations of this Act.

7. Effective date.

This Act takes effect one year after the date of its enactment.

--END CHAPTER 3--

GETTING BUSINESS OFF THE PUBLIC DOLE: STATE AND LOCAL MODEL LAWS TO CURB CORPORATE WELFARE ABUSE

By Robert W. Benson,
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(August 1995).

Chapter 4. Wining, dining, golfing and lobbying at public expense.

When corporate power-brokers "do lunch" they stick taxpayers with much of the tab for their poulet à l'orange and their Chardonnay. When they make deals on the golf course at private clubs, state taxpayers are likely to be paying their dues. When they meet with legislators to pressure for special treatment, their lobbying expenses may be deductible from state income taxes.

When ordinary people have lunch, they pay for it from their own pockets. And when poor people visit their state senator's office, they can't bill the taxpayers for their bus fare or their time.

Congress recently closed some of these loopholes in the tax laws at the federal level. As of 1994, for federal income taxes, business meals and entertainment are only 50% deductible (down from 80%) so we are paying merely $3 billion a year now for this executive class food-stamp program in which the required vegetable is apparently the olive in the Martini.43 Gratefully, private club dues and most lobbying expenses are no longer deductible at all from federal taxes.

But many of the states have not yet caught up. California, for instance, has copied the 50% cap on business meal deductions--meaning that California taxpayers still buy $250 million worth of meals for the executives each year--but the state still allows full deductions for private club dues at a cost of $11 million a year, and for lobbying expenses at a another $7 million.44

The special interest group that protects the deductions for meals and club dues is the restaurant lobby. Its members believe that it is good government and sound capitalist economics for their restaurants to prosper by having taxpayers fund high-on-the-hog feeding and pampering programs for the pin-stripe suit class.

The private Jefferson Club in Roanoke, Virginia is one place that believes the recent federal reforms are causing it to lose members and, according to the local press, to have "a harder time selling its brand of luxury." For a $150 initiation fee and $80 monthly dues, "members find a button in the elevator marked Jefferson Club that sends the car to the 16th floor. Men must wear jackets as they dine before views of the Roanoke Valley, paying $15 for lunch. Strawberries dipped in white chocolate are complimentary on the way out."45

Complimentary??? Guess who paid for the strawberries dipped in white chocolate.

The restaurant industry's worry may be misplaced. There is no evidence that business executives have stopped eating lunch, or that they are brown-bagging it at their desks in greater numbers. There is evidence that they are spending less now that more of the bill is real money (their own), so the high-end of the restaurant industry may be hurt but perhaps more reasonably priced restaurants will enjoy a boom. Restaurateur Fred White of Denver's Bianco Ristorante could be a harbinger. He claims his business fell off after Congress reduced the tax deduction for meals to 50%. So he reached out to his customers. He now calls his place Bianco's Pasta and Steakhouse.46

Solution: A no-compromise repeal of the state deductions for business meals and entertainment, private club dues, and lobbying expenses.

The language of the Model Act is partially based upon provisions in sections 162 and 274 of the United States Internal Revenue Code.

A MODEL ACT
TO REQUIRE BUSINESS TO ASSUME FINANCIAL RESPONSIBILITY FOR ITS OWN MEALS, PRIVATE CLUB DUES, AND LOBBYING EXPENSES

Section 1. Purpose.

The legislature finds that the policy of permitting tax deductions for business meals, entertainment, club dues and lobbying expenses amounts to a subsidy by all taxpayers for the self-gratification of a narrow class of taxpayers. The subsidy is fiscally imprudent, draining large sums from the state budget. The subsidy promotes a culture of profligacy among the business class, thereby undermining habits of personal responsibility and self-reliance that are said to be the basis of a successful economy. The subsidy is unconscionable at a time when the poor are facing cuts in public funding of food, health and other programs. With this Act, the legislature therefore terminates the subsidy.

Section 2. Denial of deductions.

In computing taxable income under the Tax Code of the state, no taxpayer shall be allowed a deduction of expenses for any of the following:

(a) Food or beverages.

(b) Entertainment, amusement, recreation, or facilities used in connection with such activities.

(c) Membership in any club organized for business, pleasure, recreation or other social purpose.

(d) Lobbying expenses. "Lobbying expenses" means expenses in connection with political campaigns, influencing legislation, attempts to influence the public with respect to elections, legislative matters, or referendums, or direct communications with executive branch officials in an attempt to influence the official actions or positions of such officials. However, a taxpayer engaged in the trade or business of conducting such activities may deduct expenses from conducting such activities directly on behalf of another person.47

Section 3. Repeal.

Provisions of the state Tax Code that are inconsistent with Section 2 of this Act are repealed.

--END CHAPTER 4, END OF DOCUMENT--

Footnotes :

1 Ralph Nader's Public Citizen organization, Friends of the Earth, the Sierra Club, the Progressive Policy Institute, the Cato Institute, the Heritage Foundation, the National Taxpayers Union and Citizens Against Government Waste have all published lists of corporate welfare targets. Some have acted jointly in right- left populist coalitions.

2 According to the Office of Management and Budget, the 1994 cost in direct subsidies and tax breaks to corporations was $104 billion. Cost of the federal welfare programs for individuals totaled $75 billion. Rachel's Environment & Health Weekly #422, December 29, 1994, citing James P. Donahue, Aid For Dependent Corporations (AFDC) (Washington, D.C., Essential Information, 1994).

3 David E. Rosenbaum, "Battle Over The Budget," New York Times May 18, 1995, p. B 13.

4 Respectively, H.R. 1278 (Rep. Evans, D-IL), H.R. 721 (Rep. Miller, D-CA), and H.R. 1629 (Rep. Sanders, I-VT).

5 Gilbert M. Gaul & Susan Q. Stranahan, "High Tech Handouts," The Philadelphia Inquirer June 4, 1995, p. 2 (reprint of seven part series published June 4 to June 10, 1995).

6 Greg LeRoy et al., No More Candy Store: States and Cities Making Job Subsidies Accountable, p. 2 (Federation for Industrial Retention and Renewal, and Grassroots Policy Project, 1994). This excellent book is the bible on the issue of job subsidies.

7 Id.

8 Don Clark, The Wall Street Journal, "Big Pentium Gamble Puts Intel in the Chips," The Phoenix Gazette, June 16, 1995, p. B-3.

9 Robert Tomsho, "Growing Pains: Rio Rancho Wooed Industry and Got It, Plus Financial Woes," The Wall Street Journal, April 11, 1995, p. A-1. Others put the tax and subsidy cost to the taxpayers of New Mexico at $250 million for the first five years alone. See the detailed study by Southwest Organizing Project, Intel Inside New Mexico: A Case Study of Environmental and Economic Injustice (Albuquerque 1995),p. 45. All of this for just 1,000 jobs. Id.at p. 40.

10 "Intel Offers Deal to Help Town Build School," New York Times, May 16, 1995, p. D-10.

11 Dianne Stewart, "Abatement is Corporate Welfare," Dallas Morning News , May 21, p. 6-J.

12 No More Candy Store at p. 3.

13 Peter H. King, "On California: Cats and Dogs," Los Angeles Times, June 28, 1995, p. A-3.

14 See generally 15 McQuillan, Municipal Corporations §3930 (3d ed. 1995).

15 No More Candy Store, pp. 17-21.

16 This last sentence is a "clawback" provision. Clawbacks are commonly used in connection with government subsidies in Europe, and are beginning to appear in the United States. No More Candy Store , pp. 43-71.

17 Peter Pae, "Pulling Back on Promises; Developers Rethink Roads, Other Improvements," The Washington Post, June 13, 1995, p. B-1.

18 Testimony of Henry Gonzalez, Mayor of City of Brownsville, Before the House Appropriations Committee, Hearing on FY 96 Transportation Appropriations, U.S. House of Representatives, Mar 22, 1995 (Federal Document Clearing House, Ind. 1995,

available in LEXIS/NEXIS database).

19 Id.

20 Id.

21 Id.

22 "When NAFTA was passed by Congress more than a year ago," writes James Hansen in the Business pages of the Rocky Mountain News, "supporters promised the treaty would create 100,000 American jobs in the first year. . . . The Transitional Adjustment Assistance agency helps workers displaced either by increased imports from Mexico or Canada or a shift of U.S. production to those countries. Their data suggest that, on the contrary, thousands of U.S. jobs were lost during the first year of NAFTA." James Hansen, "Where Are Trade Pact's Jobs?," Rocky Mountain News, July 1, 1995, Business p.70A. Remember Gary Hufbauer, the economist whose prediction that NAFTA would create 130,000 new jobs in five years was key to the White House strategy for winning approval of the pact? "The best figure for the jobs effect of NAFTA is approximately zero," he says now. "The lesson for me is to stay away from job forecasting." Bob Davis, The Wall Street Journal , April 17, 1995, p. A-1.

23 114 S. Ct. 2309 (1994). See St. Jeanos, "Dolan v. Tigard and The Rough Proportionality Test: Roughly Speaking, Why Isn't a Nexus Enough?," 63 Fordham Law Review 1883 (1995).

24 See James C. Nicholas, The Calculation of Proportionate-Share Impact Fees (American Planning Association, Planning Advisory Service Report No. 408 (1988)).

25 "City Council" should be changed throughout as appropriate to read, for example, "County Board of Supervisors," "Water and Sewer Board," etc.

26 E. O. Wilson, quoted in R. Goodland, C. Watson & G. Ledec, Environmental Management in Tropical Agriculture 207 (1984).

27 United States Department of Agriculture, The Second RCA Appraisal, Soil, Water and Related Resources on Non-Federal Land in the United States:Analysis of Conditions and Trends (Misc. Pub. No. 1482, June, 1989); United States Department of Agriculture, Summary Report 1987, National Resources Inventory (Statistical Bulletin No. 790, Soil Conservation Service, Iowa State University, December, 1989); Donella H. Meadows, "Ecology and Agriculture: A Marriage That Must Be Made On Earth," Los Angeles Times, November 19, 1989, p. M-4.

28 James Allen Flanery, "Water--So Much and So Little--Nebraskans Face Painful Decision on Limits," Omaha World Herald, December 11, 1994, p. 1-A.

29 The correlation shows up in the historical climate evidence and in theoretical computer models. Earlier computer models failed to give a precise fit between theory and observed data, but the Hadley Climate Centre in Britain has now presented a model that fits the data almost precisely from 1860 on and that predicts a 3 F degree warming by 2050. "Hadley Centre Publishes New Results," Global Environmental Change Report, April 14, 1995 (available on LEXIS/NEXIS database); see also, Donald J. Wuebbles & Jae Edmonds, Primer on Greenhouse Gases (1991); National Research Council, Synthesis Panel, Policy Implications of Greenhouse Warming (1991); Florentin Krause et al., Energy Policy in the Greenhouse (1992).

30 Garrett Hardin, "The Tragedy of the Commons," 162 Science 1243 (1969).

31 The Great Law of Peace of the Longhouse People (Iroquois League of Six Nations) Chapter 28 (White Roots of Peace, Mohawk Nation at Akwesasne, Rooseveltown, N.Y. 1973).

32 Paul Schneider, "Respect For The Earth: The Environmentalism of Chief Oren Lyons Stems from His Iroquois Heritage," 96 Audubon No. 2, p. 110 (March 1994).

33 Frank B. Cross, "Natural Resource Damage Valuation," 42 Vanderbilt Law Review 269 (1989).

34 Id.

35 Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907).

36 See David B. Hunter, "An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources," 12 Harvard Environmental Law Review 311 (1988); James P. Karp, "A Private Property Duty of Stewardship: Changing Our Land Ethic," 23 Environmental Law 735 (1993).

37 Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908).

38 Mugler v. Kansas, 123 U.S. 623, 665 (1887).

39 Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2901 (1992).

40 Experts Group on Enviornmental Law of the World Commission on Environment and Development, Environmental Protection and Sustainable Development: Legal Principles and Recommendations (1986) Article I.

41 Mary Ellen Cusack, "Judicial Interpretation of State Constitutional Rights to a Healthful Environment," 20 Boston College Environmental Affairs Law Review 173 (1993).

42 John Locke, Second Treatise of Government (1690).

43 Jacqueline M. Graves & Wilton Woods, "Business Hopes For Tax Break on Lunch," Fortune Magazine , April 3, 1995.

44 California Legislature, 1994 Revenue and Taxation Reference Book (1994), pp. 215-16.

45 Jeff Sturgeon, "Jefferson Club Waives Fee in Bid For More Members," the Roanoke Times & World News , June 14, 1995, p. B-6.

46 Jacqueline M. Graves & Wilton Woods, "Business Hopes For Tax Break on Lunch," Fortune Magazine , April 3, 1995.

47 This exception for professional lobbyists recognizes that for them these expenditures must be deductible as ordinary expenses of their business, though their clients may not deduct their payments to the lobbyists. The language of the exception is largely borrowed from the federal law. U.S. Internal Revenue Code section 162 (e) (1) (5) (A).