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January 19, 1988

ATTORNEY GENERAL OPINION NO. 88- 6

Mr. Gary Baker
Manager, Groundwater Management District No. 3
409 Campus Drive
Garden City, Kansas 67846

Re: State Boards, Commissions and Authorities -- Kansas Water Office and Kansas Water Authority -- Duties of Office -- Conservation Plans, Effect on Existing Water Rights

Synopsis: Water conservation measures which reduce an existing water right are compensable takings if such measures are imposed to preserve water for future public use. Compensation is not necessary if conservation is required in order to promote health, safety and welfare. Cited herein: K.S.A. 1987 Supp. 74-2608; 82a-711(d); U.S. Const., Amend. V.

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Dear Mr. Baker:

As manager for Groundwater Management District No. 3, you have requested our opinion concerning the imposition of conservation plans on land covered by an existing water right. Specifically, you ask whether conservation measures that have the effect of reducing an existing water right are a taking which require compensation.

Pursuant to K.S.A. 1987 Supp. 74-2608, the Kansas Water Office has developed guidelines for conservation plans. See, Water Conservation Planning Guidelines, Kansas Water

Office, December 1986. An applicant desiring a permit to appropriate water may be required to adopt and implement a conservation plan in accordance with those guidelines. K.S.A. 1987 Supp. 82a-711(d). While conservation plans are not currently required for existing water rights, you are concerned that future application to existing water rights may raise constitutional issues.

Private property may not be taken by a government for public use without just compensation. U.S. Const., Amend. V. A distinction must be drawn, however, between a taking of property for public use, which requires compensation therefor, and the exercising of a state's police power to protect the public health, safety, welfare or morals, which does not require compensation. Mugler v. Kansas, 123 U.S. 623, 669, 31 L.Ed. 205 (1887); Small v. Kemp, 240 Kan. 113, Syl. ¶ 2 (1986). It is therefore the nature of the state's action which is critical in takings analysis. When the government action is a physical invasion of property, a taking may be readily found. See, e.g., United States v. Causby, 328 U.S. 256, 90 L.Ed. 1206 (1946). However, an action which merely adjusts the benefits and burdens of economic life to promote the common good is less likely to constitute a taking. Penn Central Transportation Co. v. New York, 438 U.S. 104, 124, 57 L.Ed.2d 631 (1978). See also, Keystone Coal Association v. DeBenedictis, ___ U.S. ____, 94 L.Ed.2d 472, 491, 107 S.Ct. 1187 (1987), note 18. There is no set formula for deciding whether justice and fairness require that economic injuries caused by public action must be deemed compensable. Ruckelshaus v. Monsanto, 467 U.S. 986, 1005, 81 L.Ed.2d 815 (1984). Some factors have been identified and applied, however, to determine whether the economic impact of regulation should be borne by the individual experiencing loss or by the public as a whole. Those factors include the character of the governmental action, the economic impact of the governmental action, and the action's interference with reasonable investment-backed expectations. Pruneyard Shopping Center v. Robbins 447 U.S. 74, 83, 64 L.Ed.2d 741 (1980); Kaiser Aetna v. United States, 444 U.S. 164, 175, 62 L.Ed.2d 332 (1979).

In summary, state action that results in the destruction of property may or may not be a taking for which compensation is required. At one end of the spectrum, the state may exercise its police power to abate what amounts to a nuisance, and an injured person is not entitled to compensation. On the other end of the spectrum, if property is physically invaded and taken for public use, then the public must pay for that use by

reimbursing the injured person. Somewhere between those extremes are acts of the state which amount to regulation but are also acquisitions of property for public use.

The issue of conservation plans and their constitutional implications regarding existing water rights was thoroughly examined by Professor John C. Peck in Legal Constraints On The State of Kansas In Imposing Conservation Practices on Holders of Existing Water Rights (1986), a report prepared for the United States Department of Interior. Specifically, at pages VIII - 7-9, various legislative alternatives are examined as well as the constitutional consequences. Implicit in the analysis is the distinction between regulation for the health, safety and welfare of the people and the preservation of water for future public use.

We concur with the conclusions of Professor Peck insofar as the necessity for compensation is determined by the underlying purpose of a conservation scheme. If conservation of water is seen as necessary to promote health, safety and welfare, then there is not a compensable taking of an existing water right. If conservation is implemented merely to allow future public use, then reducing an existing water right may require compensation to the holder of that right. We decline to comment at the present on various schemes which may be implemented to achieve either purpose.

Very truly yours,

Robert T. Stephan

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