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January 25, 1980

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ATTORNEY GENERAL OPINION NO. 80- 22

The Honorable John Crofoot
Kansas State Senator
State Capitol
Topeka, Kansas

Re: Federal Jurisdiction--Federal Property--State
Restrictions on Exercise of Federal Power of
Eminent Domain

Synopsis: K.S.A. 27-101, if amended in accordance with the
provisions of 1980 Senate Bill No. 499, would
not effectively restrict the federal power of
eminent domain so as to require the consent of
the State of Kansas for acquisitions of land in
excess of 80 acres.

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Dear Senator Crofoot:

You request our opinion as to the "constitutionality" of the provisions of Section 1(b) of 1980 Senate Bill No. 499, which provisions would amend K.S.A. 27-101 so as to require the consent of the Kansas legislature (through approval of a concurrent resolution by both houses thereof) for the federal government's acquisition (by purchase, condemnation, or otherwise) of any land (within this state) exceeding 80 acres in area, which acquisition is not for a purpose specifically authorized by Section 1(a) of Senate Bill No. 499. Such an amendment to K.S.A. 27-101, if enacted, would clearly restrict and diminish the power of eminent domain which could be exercised by the federal government within this state. There are numerous

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decisions of the United States Supreme Court and other federal courts which consider the validity and effectiveness of such restrictions.

In Kohl v. United States, 91 U.S. 367, 371-374 (1875), the United States Supreme Court stated as follows:

"It has not been seriously contended during the argument that the United States Government is without power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the Constitution in the General Government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories and arsenals, for navy yards and light-houses, for custom-houses, postoffices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property holders to sell, or by the action of a State prohibiting a sale to the Federal Government, the constitutional grants of power may be rendered nugatory, and the Government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be.

. . . .

"But, if the right of eminent domain exists in the Federal Government, it is a right which may be exercised within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution. In Ableman v. Booth, 21 How. 523, 16 L.ed. 175, Chief Justice Taney described in plain language the complex nature of our government, and the existence of two distinct and separate sovereignties within the same territorial space,

each of them restricted in its powers, and each, within its sphere of action prescribed by the Constitution of the United States, independent of the other. Neither is under the necessity of applying to the other for permission to exercise its lawful powers . . . The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned. The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The fifth Amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken?

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"The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that, there exists no necessity, which alone is the foundation of the right. If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired." (Emphasis added.)

The principles enunciated in the Kohl case have been followed in many subsequent decisions. In Chappell v. United States, 160 U.S. 499, 510 (1896), the court stated that:

"It is now well settled that whenever, in the execution of the powers granted to the United States by the Constitution, lands

in any State are needed by the United States, for a fort, magazine, dock-yard, light-house, custom-house, court-house, post office, or any other public purpose, and cannot be acquired by agreement with the owners, the Congress of the United States, exercising the right of eminent domain, and making just compensation to the owners, may authorize such lands to be taken, either by proceedings in the courts of the State with its consent, or by proceedings in the courts of the United States, with or without any consent or concurrent act of the State, as Congress may direct or permit." (Emphasis added.)

In United States v. Carmack, 329 U.S. 230, 239 (1946), the Court quotes with approval "the principle of federal supremacy, so well expressed in the Kohl case." Other cases which specifically approve the rules laid down in Kohl include the following: Kincaid v. United States, 35 F.2d 235, 248 (1929); United States v. Jotham Bixby Co., 55 F.2d 317, 318 (1932); United States v. 458.95 Acres of Land, 22 F.Supp. 1017, 1018 (1937); United States v. Certain Parcels of Land, Etc., 178 F.Supp. 313, 317 (1959); United States v. Sixteen Parcels of Land, Etc., 281 F.2d 271, 274 (1960); and United States v. Gliatta, 580 F.2d 156, 158 (1978).

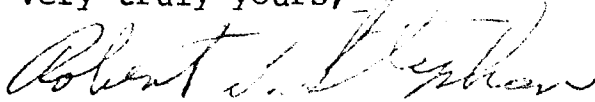
Our research has failed to locate any decision of the United States Supreme Court wherein the principles of the Kohl case, quoted above, have been overruled so as to permit enactment of state restrictions upon the federal power of eminent domain. It is, therefore, our opinion that K.S.A. 27-101, if amended in accordance with the provisions of 1980 Senate Bill No. 499, would not effectively restrict the federal power of eminent domain so as to require the consent of the State of Kansas for acquisitions of land in excess of 80 acres. This is not to say that state consent is not required to grant exclusive federal jurisdiction over lands within the state which have been acquired by the federal government. See Article I, § 8, cl. 17 of the United States Constitution; Surplus Trading Co. v. Cook, 281 U.S. 647, 650 (1930); Paul v. United States, 371 U.S. 245, 264-65 (1963).

Finally, we are aware that the Oklahoma Legislature has enacted restrictions upon the federal power of eminent domain similar to those set forth in Senate Bill No. 499. See 80 O.S. Supp. 1979

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§ 1(B). However, until such time as those restrictions are upheld, and the above-cited cases are overruled, by the United States Supreme Court, it is our opinion that the Oklahoma statute is no more than an exercise in futility.

Very truly yours,



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RTS:BJS:TRH:jm