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DEPT. OF JUSTICE

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DATE: February 19, 1993

SUBJECT: Constitutionality of LB 301, an Act Relating to Water

REQUESTED BY: Senator Carol Hudkins, 21st District

WRITTEN BY: Don Stenberg, Attorney General
Marie C. Pawol, Assistant Attorney General

You have inquired whether two specific provisions of LB 301, introduced in the first session of the Ninety-Third Legislature, violate the Takings, Due Process or Equal Protection clauses of the United States Constitution.

In our opinion, the back-dating of water priorities for instream flow appropriation for public water supplies is an unconstitutional taking of private property for public use unless provision is made for just compensation to those existing users who are deprived of water under this bill. Even if the back-dating of water priorities were not an unconstitutional taking without just compensation under the Fifth Amendment to the U.S. Constitution and Article I, §21 of the Nebraska Constitution, it would violate Article XV, §6 of the Nebraska Constitution which provides that, "No inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user."

As a preliminary matter, we note that a statute is presumed constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. ***In re Application A-16642***, 236 Neb. 671, 463 N.W.2d 591 (1990). Further, the party claiming a statute to be unconstitutional has the burden of clearly establishing its unconstitutionality. ***Haman v. Marsh***, 237 Neb. 699, 467 N.W.2d 836 (1991). The Nebraska Supreme Court is also obligated to endeavor to interpret a challenged statute in a manner consistent with the

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Constitution. *In re Application U-2*, 226 Neb. 594, 413 N.W.2d 290 (1987).

The first provision under question concerns an amendment to Neb. Rev. Stat. § 46-204 (1988). LB 301 proposes to add the following language:

> No reduction of any lawful diversion because of the operation of the appropriation system shall be required unless such reduction would increase the amount of water available to and required by senior appropriations.

This language appears to be an attempt to codify the Nebraska Supreme Court's holding in *State ex rel. Cary v. Cochran*, 138 Neb. 163, 292 N.W. 239 (1940). In that case, the relators complained that state officials, in administering and enforcing irrigation laws, had continuously permitted junior appropriators to take and use water for irrigation, storage, and other purposes without regard to priority and to the prejudice of the relators. In its opinion, the Nebraska Supreme Court acknowledged that it is "the policy of the law that junior appropriators may use available water within the limits of their own appropriations so long as the rights of senior appropriators are not injured or damaged." 138 Neb. at 172-3. The court concluded by adopting the following rule:

> It is the duty of the administrative officers of the state to recognize this right and to give force to relators' priority. This requires that junior appropriators be restrained from taking water from the stream so long as such water can be delivered in useable quantities [to senior appropriators]. If it appears that all the available water in the stream would be lost before its arrival [for use by senior appropriators], it would, of course, be an unjustified waste of water to attempt delivery.

138 Neb. at 173. Although the wisdom of the Nebraska Supreme Court's strict interpretation of the prior appropriation doctrine has been the subject of debate, statutory codification of the foregoing rule does not implicate concerns under the Takings, Due Process or Equal Protection clauses of the United States Constitution. Prior appropriation is constitutionally protected by

Neb. Const. art. XV, §§ 4, 5, and 6. ***Wasserburger v. Coffee***, 180 Neb. 149, 141 N.W.2d 738 (1966). However, we suggest that LB 301 be revised to clarify that a senior appropriator is entitled to water as against an upstream junior appropriator as long as water in useable quantities can be delivered downstream.

Other provisions of LB 301 would grant public water suppliers, in addition to the Game and Parks Commission and each natural resources district, the opportunity to apply for an instream flow appropriation, as defined in Neb. Rev. Stat. § 46-2,108 (1988). Such appropriations would be limited to natural streams with an average annual discharge of 500 cubic feet per second. The second LB 301 provision under scrutiny pertains to an amendment to Neb. Rev. Stat. § 46-2,115 (1988) providing that:

> (3)The director [of the Department of Water Resources] shall assign as the priority date for the instream appropriation the date of the application, except that if the application is for public water supply purposes, the priority date shall be the earlier of the date of application or the date the applicant's public water supply well was constructed.

In any challenge to a statute under the Fourteenth Amendment's Equal Protection Clause, heightened scrutiny is invoked only if suspect classifications are created or if the legislation impinges upon a fundamental constitutional right. ***Dallas v. Stanglin***, 490 U.S. 19, 23, 109 S.Ct. 1591 (1989). When a fundamental right or suspect classification is not involved in legislation, the legislative act is a valid exercise of the state's police power if the act is rationally related to a legitimate governmental purpose. ***Cleburne v. Cleburne Living Center, Inc.***, 473 U.S. 432, 440, 105 S.Ct. 3249 (1985); ***State ex rel Spire v. Northwestern Bell Tel. Co.***, 233 Neb. 262, 445 N.W.2d 284 (1989). The Nebraska Constitution has identical requirements. Neb. Const. art. III, § 18; ***Haman v. Marsh***, 237 Neb. 699, 712, 467 N.W.2d 836 (1991); ***Robotham v. State***, 241 Neb. 379, 385, 488 N.W.2d 533 (1992).

The LB 301 provision at issue implicates neither fundamental rights explicitly or implicitly protected by the Constitution nor suspect classifications. Therefore, it would be upheld in the face of an equal protection challenge unless it bears no rational relationship to a legitimate governmental interest. The

introducer's statement of intent identifies the ends sought to be achieved by LB 301:

> Public water suppliers using groundwater have no recognized surface water rights under current Nebraska law even though public water suppliers serve the water needs of approximately three out of every four Nebraskans. Cities with river wellfields (particularly Platte River wellfields) depend on streamflow to recharge their wellfields and cleanse the aquifer -- even though technically, they are ground water users.
>
> The approach of LB 301, is to grant public water suppliers a surface water appropriative right to surface waters for ground water recharge. The ground water appropriation rights created by this bill would be administered by the Department of Water Resources through the instream appropriation system currently in place. The current instream appropriation system allows such appropriations to be obtained for the limited purposes of recreation, fish and wildlife. LB 301 would add another purpose, that of public water supply. The burden of showing what amount of water is reasonable [sic] necessary for such appropriation would be on the public water supplier.
>
> The instream appropriations system was chosen to administer such public water supply rights because consideration of induced recharge for municipal water systems is already something the Department of Water Resources is required to consider in granting instream appropriations for the other users; recreation, fish and wildlife.
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> * * *
>
> The priority date assigned to each public water supplier's [sic] would result in more

> water actually reaching the public water suppliers [sic] wellfield.

Introducer's Statement of Intent, LB 301, Before the Commission on Natural Resources, Ninety-Third Legislature, 1st Sess. (statement of Senator Chris Beutler, Chairman).

In our view, the proposed legislation is rationally connected to an important and legitimate governmental interest, that of assuring an adequate public water supply for the health, safety, comfort and overall economic benefit of the rural and urban inhabitants and communities of this state. To this end, the legislation seeks to protect the economic investments made by public water suppliers in the construction of their wellfields. Further, although public water suppliers furnish water for a variety of purposes, domestic uses are not insignificant. The public policy of this state, as evidenced in Neb. Const. art. XV, § 6, provides that "those using the water for domestic purposes shall have preference over those claiming it for any other purpose . . . ." Given this public policy, which has been reaffirmed in Neb. Rev. Stat. §§ 46-204 and 46-613 (1988), it is unlikely that the proposed legislation violates equal protection principles.

The Fifth Amendment to the United States Constitution, as incorporated against the states by the Fourteenth Amendment, provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Neb. Const. art. I, § 21 further provides: "The property of no person shall be taken or damaged for public use without just compensation therefor."

To determine whether the proposed legislation violates any of the foregoing constitutional provisions requires, first, an examination of the affected property interests at stake. In ***Enterprise Irrigation District v. Willis***, 135 Neb. 827, 831-32, 284 N.W. 326 (1939), the Nebraska Supreme Court stated:

> That an appropriator of public water, who has complied with existing statutory requirements, obtains a vested property right has been announced by this Court on many occasions.

Nevertheless, "a vested right to the use of the waters appropriated, [is] subject to the law at the time the vested

interest was acquired and such reasonable regulations subsequently adopted by virtue of the police power of the state." *State v. Birdwood Irrigation District*, 154 Neb. 52, 55, 46 N.W.2d 884 (1951); *See also, State, ex rel. Cary v. Cochran*, 138 Neb. 163, 175, 292 N.W. 239 (1940).

For those reasons previously articulated under our equal protection analysis, we do not believe that the proposed legislation would contravene substantive due process requirements:

> As related to legislation, it is generally held that due process is satisfied if the legislature had the power to act on the subject matter, if that power was not exercised in an arbitrary, capricious, or unreasonably discriminatory manner, and if the act, being definite, had a reasonable relationship to a proper legislative purpose.

Rein v. Johnson, 149 Neb. 67, 82, 30 N.W.2d 548 (1947), *cert. denied* 335 U.S. 814, 69 S.Ct. 31 (1948).

Nor, in our judgment, is the proposed legislation inimical to procedural due process guarantees. Neb. Rev. Stat. § 46-2,114 (Cum. Supp. 1992) requires that notice of any instream appropriation application be published at least once a week for three consecutive weeks in a newspaper of general circulation in the area of the particular stream segment affected and also in a newspaper of state-wide circulation. The notice is required to state that any person having an interest may in writing object to and request a hearing on the application. Pursuant to Neb. Rev. Stat. § 46-210 (Cum. Supp. 1992), any dissatisfied party may institute proceedings to appeal any order or decision upon which a hearing has been had before the Department of Water Resources. We believe these procedures satisfy procedural due process requirements.

It must be noted, however, that while a state regulation which deprives one of a property interest, or diminishes its value, may be a valid exercise of police power, just compensation may still be required. As stated by the United States Supreme Court, in *Nollan v. California Coastal Com'n*, 483 U.S. 825, 836 n. 4, 107 S.Ct. 3141 (1987):

> One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' ***Armstrong v. United States***, 364 U.S. 40, 49, 80 C.Ct. 1563, 1569 (1960).

Yet not every regulation which interferes with property interests results in a compensable taking. In ***Pennsylvania Coal Co. v. Mahon***, 260 U.S. 393, 413, 415, 43 S.Ct. 158 (1922), the United States Supreme Court stated:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits . . . When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. * * * The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

In ***Penn Central Transportation Co. v. New York City***, 438 U.S. 104, 98 S.Ct. 2646 (1978), the Court further characterized the inquiry as requiring an examination of many significant factors, including the extent of economic damages inflicted, the nature of the economic interests affected, the object of the regulation, and the public policy it serves.

More recently, in ***Lucas v. South Carolina Coastal Council***, _____ U.S. _____, 112 S.Ct. 2886, 2893 (1992), the Court acknowledged the difficulties involved in determining when property has been taken:

> . . . [O]ur decision in ***Mahon*** offered little insight into when, and under what circumstances, a given regulation would be seen as going too "far" for purposes of the

> Fifth Amendment. In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any " 'set formula' " for determining how far is too far, preferring to "engag[e] in . . . essentially ad hoc, factual inquiries," ***Penn Central Transportation Co. v. New York Cit***, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659 57 L.Ed.2d 631 (1978) (quoting ***Goldblatt v. Hempstead***, 369 U.S. 590, 594, 82 S.Ct. 987, 990, 8 L.Ed.2d 130 (1962)).

In ***Lucas***, the Court reviewed legislation in South Carolina which in 1988 prohibited new construction along beachfront property. Lucas' land was within the prohibited zone. When the petitioner purchased his two lots in 1986 at a cost of $975,000, the property was zoned for development as residential homesites. Lucas did not contest the validity of the legislation as a lawful exercise of the police power but maintained that because the construction ban rendered his property valueless, he was entitled to compensation. The South Carolina Supreme Court held that, because the legislation sought to prevent serious public harm, no compensation was owed regardless of the regulation's effect on property values.

The United States Supreme Court reversed the judgment of the state supreme court and remanded the case for further proceedings. The Court reiterated that there are:

> . . . at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property.
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> * * *
>
> The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.

112 S.Ct. at 2893.

The Minnesota Supreme Court had occasion to apply these espoused principles in ***Pratt v. State Department of Natural Resources***, 309 N.W.2d 767 (1981). In that case, the court fashioned the following test:

> . . . where the regulation only serves an arbitration function, regulating between competing private users for the general welfare, ordinarily no taking is involved; but where the regulation is for the benefit of a governmental enterprise, where a few individuals must bear the burden for a public use, then a taking occurs.

309 N.W.2d at 773.

In the matter presently at issue, we believe that valid arguments can be advanced both to support and refute a claim that provisions of LB 301 result in a compensable taking of property for a public use. On the one hand, it may be argued that the proposed legislation is merely a reasonable administrative regulation, designed to effect an orderly supervision and allocation of a common water supply among competing interests and users. Specifically, some existing surface water users may be suffering administrative regulation, in part, because of the current unrestricted consumption of groundwater by some public water suppliers. By recognizing the hydrologic connection between groundwater and surface water, and by subjecting such users to a system of regulation that respects the time when each actually began making use of the resource, all users are protected to some extent.

The back-dating of water priorities, moreover, is not without legal and historical precedent. With the passage of the Irrigation Act of 1895, Nebraska entered the prior appropriation system of water administration. Under the Act, all rights to water which had vested prior to its passage were required to be adjudicated by the state, by quantifying the water right and by the assignment of a priority date relating back to the time the right had vested. The Nebraska Supreme Court in ***Enterprise Irrigation District v. Willis***, 135 Neb. 827, 831, 284 N.W. 326 (1939) noted: "Such provisions have generally been sustained as part of the police power of the state."

The ***Enterprise*** case is also significant because the court addressed the issue of whether state legislation can reduce an appropriation that vested prior to enactment of that legislation. The court held:

> While vested water rights may be interfered with within reasonable limits under the police power of the state to secure a proper regulation and supervision of them for the public good, any interference that limits the quantity of water or changes the date of its priority to the material inquiry of its holder is more than regulation and supervision and extends into the field generally referred to as a deprivation of vested right.

135 Neb. at 834. Some may argue that pursuant to LB 301, existing surface water appropriations would not expressly be reduced by the legislation because appropriators would retain their specific priority dates and specified rates of low.

However, we note that as a consequence of granting back-dated priorities to public water suppliers, some existing surface water appropriators would be displaced in their priority ranking, resulting in less water available to them in times of shortage. Furthermore, the plan approved in ***Enterprise*** to back-date water rights is distinguishable from LB 301. In the former case, the state simply sought to integrate water appropriators into the prior appropriation system who had already obtained vested water rights. In contrast, the public water suppliers benefited by LB 301 have no recognizable vested interest in surface flows for purposes of groundwater recharge. We also believe that by granting only public water suppliers the opportunity to obtain a back-dated priority, the governmental enterprise function is predominant. There is no question that the use of water by a municipality or other public water supplier for human needs is a "public use." ***Metropolitan Utilities Dist. v. Merritt Beach Co.***, 179 Neb. 783, 740 N.W.2d 626 (1966).

For these reasons, and as previously stated, in our opinion, the back-dating of water priorities for instream flow appropriation for public water supplies is an unconstitutional taking of private property for public use unless provision is made for just compensation to those existing users who are deprived of water under this bill. Even if the back-dating of water priorities were

not an unconstitutional taking without just compensation under the Fifth Amendment to the U.S. Constitution and Article I, 21 of the Nebraska Constitution, it would violate Article XV, 6 of the Nebraska Constitution which provides that, "No inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user."

In ***Loop River Public Power District v. North Loop Public Power and Irrigation District,*** 147 Neb. 949, 25 N.W.2d 813 (1942), the defendant district contended that it had a right to take water for irrigation ahead of the plaintiff's right to use the water for power production even though the plaintiff district had an earlier appropriation date.

The Nebraska Supreme Court examined this contention in light of Article XV, 6 of the Nebraska Constitution which provides as follows:

> The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. Provided, no inferior right to use the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user.

The Court interpreted this provision of the Constitution as follows:

> It was clearly the intention of the framers of our Constitution to provide that water previously appropriated for power purposes may be taken and appropriated for irrigation use upon the payment of just compensation

> therefor. It never was the intention of the framers of the Constitution to provide that water appropriated for power purposes could thereafter arbitrarily be appropriated for irrigation without the payment of compensation. Historically the purpose for which an appropriation was obtained had no bearing upon its priority. Until the advent of the constitutional provision and statutory law, priority of appropriation conferred superiority of right without regard to the character of the use. The maxim, "He who is first in time is first in right," thus became fundamental doctrine in determining the priorities of appropriators, irrespective of use. A right of appropriation, under our Constitution, whether for irrigation or for power purposes, is a property right which is entitled to the same protection as any other property right. The right of property therein cannot be violated with impunity anymore than that in any other type of property.

142 Neb. at 152-53.

Sincerely,

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APPROVED BY:

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