REGULATORY TAKINGS OF WATER RIGHTS

Presented By:

Denise A. Dragoo

with contributions by Brad Cahoon

WATER LAW & POLICY SEMINAR

St. George, Utah

March 11, 1996

INTRODUCTION

This paper addresses regulatory takings of water rights. We examine the fundamental constitutional principle that the government must not take private property for a public use without paying the owner just compensation. In this regard, we first review decisions from the United States Supreme Court under the Fifth Amendment to the United States Constitution. These decisions establish the legal framework for establishing a taking of property, including water rights. The paper then summarizes decisions from the Utah Supreme Court under article I, section 22 of the Utah Constitution. We next define the nature of a water right and its relation to real property under Utah law. Finally, the paper analyzes the following two circumstances in which a regulatory taking of water rights may occur: (1) when waterusers are required to restrict the diversion of all or a portion of their water for instream flow preservation or water quality and (2) when local government requires waterusers to transfer water rights into a public water system as a condition of development approval.

I. FIFTH AMENDMENT TAKINGS UNDER THE UNITED STATES CONSTITUTION

The United States Supreme Court has provided a legal framework under which property owners may be awarded just compensation for their property interests taken by the government for some public use. The Takings Clause of the Fifth Amendment of the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation" (hereinafter "Federal Taking Clause" or "Taking Clause").[1] The United States Supreme Court has recognized primarily three circumstances in which government action without question results in a taking for which just compensation must be paid: The action (i.e. regulation) (1) results in a "physical invasion" of private property;[2] and (2) "does not substantially advance legitimate government interests;"[3] or (3) "denies all economically beneficial or productive use" of property.[4]

A. Taking by Physical Invasion

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[1] U.S. Const. amend. V. The Fifth Amendment is made applicable to state and local governments through the Fourteenth Amendment. *See, e.g., Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

[2] *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-440 (1982) (law resulted in a taking because it required property owners to allow cable television companies to install facilities on only approximately 12 cubic feet of buildings); *United States v. Causby*, 328 U.S. 256, 265 & n.10 (1946) (physical invasion of air space constituted taking); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (navigational servitude imposed on private marina was a taking).

[3] *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *see also Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 839, 837-41 (1987) (adopting reasoning of Utah Supreme Court in *Call v. West Jordan*, 614 P.2d 1257, 1258-59 (Utah 1980), among other state court decisions, that condition must be reasonably related to alleged government purpose).

[4] *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992).

A physical invasion of property by the government is perhaps the easiest taking claim to establish. The United States Supreme Court has observed that "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation."[5]

Takings have been established following a physical invasion of water rights by the government. The Supreme Court found a taking of water rights in *United States v. Cress*,[6] a case involving physical invasion. The government constructed and maintained locks and dams on a river that depreciated the value of the property owner's lands and water rights. The government action, however, did not destroy the entire value of the property and water rights. The Court stated that "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines whether it is a taking."[7] Because there was a direct invasion of the property and water rights and "inevitably recurring" flooding, a taking was established.[8]

The Supreme Court also found a taking of water rights in *International Paper Company v. United States*.[9] In this case, a company had a right to divert water for use in its business. New York law recognized this right as a corporeal hereditament and real property. Under the guise of protecting national security, the government withdrew and directed a portion of the water for other companies to use for producing power. The Supreme Court held that the government had taken the company's right to use water and must pay just compensation to the wateruser under the Federal Taking Clause.[10] Although not stated specifically in the opinion, this taking appears to have resulted from the physical invasion of water rights. This decision raises the question whether a requirement to direct water to support instream flows or some other environmental requirement would also be a taking of water rights.

Another important Supreme Court decision involving a physical invasion is *Kaiser Aetna v. United States*.[11] In this case, a property owner developed a land-locked pond into a private marina in the Hawaiian Islands. The federal government claimed the marina was subject to a navigational servitude, and, therefore, the public acquired a right of free access to the marina. The Supreme Court characterized this as a "physical invasion" of property and a denial of reasonable investment-backed expectations for which just compensation must be paid the marina owner.[12]

The United States District Court for the District of Nevada found a taking of water rights in *Fallini v. Hodel*.[13] In this case, the Bureau of Land Management ("BLM") ordered a cattle rancher to disassemble guardrails installed to discourage wild horses from accessing water appropriated by the rancher under Nevada law and under a permit issued by the BLM. Wild horses prevented the rancher's cattle from drinking the water and injured the rancher's calves.

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[5] *Lucas*, 112 S. Ct. at 2892.
[6] 243 U.S. 316 (1917).
[7] *Id.* at 328.
[8] *Id.*
[9] 282 U.S. 399 (1931).
[10] *See id.* at 407-08. Shutting off the water cost the company $304,685.36 in 1918 money.
[11] 444 U.S. 177 (1979).
[12] *Id.* at 180.
[13] 725 F. Supp. 1113 (D. Nev. 1989), *aff'd* 963 F.2d 275 (9th Cir. 1992).

The court reasoned, "There remains practically no economically viable use to the water right for the [rancher] if its use is, in effect, limited to wild horse use."[14] The Court further found that the order interfered with the rancher's "distinct investment-backed expectations resulting from the government granting . . . permission to develop" the water.[15] The court in *Fallini* followed the *Kaiser Aetna* decision. The *Fallini* court reasoned that the rancher lost the right to exclude others from using their water rights.[16] The court also stated that the government consented to allow the rancher to incur extensive costs in developing his water rights. Based on this consent, the rancher expected that certain requirements related to wildlife preservation "would not lead to the almost complete deprivation of water access for stockwatering purposes."[17] The court concluded that the BLM's actions constituted a "regulatory taking" of water rights.[18]

B. Taking By Failure to Substantially Advance Legitimate Government Interest

The United States Supreme Court requires that regulations substantially advance legitimate government interests. In two recent decisions, the Court found a taking because the regulations did not substantially advance legitimate government interests in *Nollan v. California Coastal Commission*[19] and *Dolan v. City of Tigard*.[20] Two separate analytical tests determine whether a regulation substantially advances legitimate government interests.

1. Nexus Test

In the *Nollan* decision, the Supreme Court established that a condition imposed or exacted by a regulation must have a "nexus" with the "original purpose" (i.e., legitimate government interest).[21] In the *Nollan* case, a California regulation required as a condition to approval of a rebuilding permit that the owners allow the public access over their property to and from a public beach and recreation area. The Court initially observed that had California simply required the property owners to grant an easement to the public to cross their beachfront on a permanent basis in order to increase access to the beach, as opposed to conditioning their permit, there clearly would have been a taking."[22]

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[14] *Id.* at 1123.

[15] *Id.*

[16] *See Fallini*, 725 F. Supp. at 1123.

[17] *Id.* But *see Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1431 (10th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987) (holding that damage to private property caused by federally protected wild horses and burros did not constitute taking under Federal Taking Clause because owners were not deprived of all economically viable use of their lands).

[18] *Fallini*, 725 F. Supp. at 1124.

[19] 483 U.S. 839 (1987.

[20] 114 S. Ct. 2309 (1994).

[21] *Nollan*, 483 U.S. at 837. In the *Dolan* decision, the Supreme Court described the *Nollan* test as the first step in the analysis for determining whether a regulation substantially advances a legitimate state interest. The Court stated that the test is whether an "'essential nexus"' exists between the "'legitimate state interest"' and the condition exacted. *Dolan* 114 S. Ct. at 2317 (citations omitted).

[22] *Nollan*, 483 U.S. at 831.

The Court reasoned that the easement condition had no nexus to the purported government interests of protecting visual access to the beach and removing a "psychological" barrier to access.[23] The Court concluded that if California wants access across the owner's property, "it must pay for it."[24]

2. Rough Proportionality Test

In the *Dolan* decision, the Supreme Court established the second test that the government must overcome to avoid a taking resulting from a condition or exaction. In *Dolan*, a city planning commission granted a landowner a permit to expand and intensify the use of her property. The approval, however, was conditioned on her conveying to the City approximately 10% of her property situated in a floodplain to be used for an open space greenway and pedestrian/bicycle pathway. The Court first applied the *Nollan* test and found that the condition had a nexus to (i) preventing flooding and (ii) limiting development within the flood plain and to reduce traffic congestion by providing an alternative transportation route for pedestrians and bicyclists.[25]

The Court then developed a second test to be applied to the condition to determine whether it substantially advanced a government interest. The Supreme Court stated that a regulatory condition placed on the use of property must satisfy a "rough proportionality" test or standard.[26] The Court explained that "precise mathematical calculation" is unnecessary.[27] However, the government must establish that the required condition is "related both in nature and extent to the impact of the proposed development."[28] In applying the test, the Court stated that the "City has never said why a public greenway, as opposed to a private one, was required in the interest of flood control."[29] In addressing the pathway condition, the Court reasoned that the "City has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the [owner's] development reasonably relate to the City's requirement for a dedication of the pedestrian/bicycle pathway easement."[30] In this connection, the Court concluded that the "City must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated."[31] The Court remanded the case back to the Oregon Supreme Court for additional proceedings consistent with its decision.[32]

C. Taking Resulting from Denial of all Economical Use of Property

The more difficult taking claim to establish does not involve a physical invasion of

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[23] *See id*. at 838.

[24] *Id*. at 841.

[25] *See id*. at 2317-18; *cf*. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978) (recognizing that "a use restriction may constitute a taking if not reasonably necessary to the effectuation of a substantial government purpose").

[26] *See id*. at 2319.

[27] *Id.*

[28] *Id.* at 2320.

[29] *Id.*

[30] *Id.* at 2321.

[31] *Id.* at 2322.

[32] *See id.*

property but a denial of all economically viable use of property. In these cases, a regulation restricts or limits the use to which property owners can use their property. Unlike the conditions imposed in the *Nollan* and *Dolan* cases, regulations also can be used to restrict the use of property to allegedly protect and benefit the public generally. A regulation restricting the use of property is a taking if it denies all economically viable use of property. If a regulation denies *all* economically viable use of the property, then the burden shifts to the government to prove, in order to avoid a taking, that the use restricted is prohibited under traditional nuisance or property law.

1. Interference with Investment-Backed Expectations

The Supreme Court requires property owners to prove that a regulation denies all economically viable use of their property.[33] The extent of the denial of economic use is necessarily one of degree. In *Keystone Bituminous Coal Ass'n v. DeBenedictus*,[34] the Court required the petitioners to establish that the language of the Pennsylvania Subsidence Act ("Act") made it impossible for them to "profitably engage in their business, or that there ha[d] been undue interference with their investment-backed expectations."[35] The Act required petitioners to leave in place 50% of coal beneath structures to provide surface support.[36] The Court held that the language of the Act did not take the petitioners property because they could still profitably mine the remaining coal reserves, and there was no evidence that the Act "materially affected" their "reasonable investment-backed expectations."[37] Hence, there was no denial of all economically viable use of property and, therefore, no taking.[38]

2. Background Principles Analysis

When regulation denies all economically viable use of property, the burden shifts to the government to avoid a taking. In *Lucas v. South Carolina Coastal Council*,[39] the Court observed

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[33] *See Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 468, 485 (1987); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 124 (1978).

[34] 480 U.S. 468 (1987).

[35] *Id.* at 485.

[36] Petitioners argued that the 27 million tons of coal left in place clearly was taken because they could no longer mine it. The Court rejected this argument by citing *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) ("Where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety."). The Supreme Court held that because petitioners could still profitably mine the remaining coal reserves there was no denial of all economically viable use of the property considered in its entirety. *Keystone*, 480 U.S. at 498-99.

[37] *Keystone*, 480 U.S. at 499.

[38] *But see Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) (holding that Kohler Act was a taking because it (i) made coal mining "commercially impracticable" by prohibiting mining of anthracite coal in manner that would cause subsidence of land on which structures were located and (ii) served only private interests).

[39] 112 S. Ct. 2886 (1992).

that "good reasons" support the "frequently expressed belief" that when property owners are required to "sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave [their] property economically idle," they have "suffered a taking."[40]

As to regulation that deprives property of *all* economically beneficial use, the government has the burden to demonstrate that the property interests alleged to have been taken were not valid property interests under state law.[41] For example, in the *Lucas* case, a regulation barred the property owner from erecting any permanent habitable structures on his beachfront property. The Supreme Court remanded the case back to the South Carolina Supreme Court to determine whether South Carolina nuisance and property law prohibits the property owner from constructing the homes under the "circumstances in which the property is presently found."[42] In other words, if the common law of the state does not prohibit the property owner from constructing the homes, then the state cannot prohibit the construction of the homes without taking the property and paying for it. The Court coined this analysis "identify[ing] background principles of nuisance and property that prohibit the [restricted] uses."[43]

D. Temporary Takings

The Supreme Court also recognizes that a temporary taking of private property must be compensated. Even if the invading regulation is rescinded, if such regulation has "already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[44] In *First English Evangelical Lutheran Church*, the Court recognized that even temporary takings require "payment of fair value for the use of the property during the temporary period of time."[45]

II. TAKINGS UNDER THE UTAH CONSTITUTION

A taking also can be established under the Utah Constitution. Article I, section 22 of the Utah Constitution provides, "Private property shall not be taken or damaged for public use without just compensation" (hereinafter "Utah's Taking Clause").[46] Utah's Taking Clause requires compensation when private property is taken or damaged for public use. Its plain language appears to be much broader than the language of the Federal Taking Clause of the United States Constitution, which is limited to "taking" and does not include "damage." The analysis of the court decisions applying the Utah Taking Clause is quite different from that of the United States Supreme Court decisions applying the Federal Taking Clause.

A. General Utah Taking Law

The Utah Supreme Court requires generally that three elements be satisfied to establish

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[40] *Id.* at 2895 (emphasis in original).

[41] *See id.* at 2899-2902.

[42] *Id.* at 2902.

[43] *Id.* at 2901-02.

[44] *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 332 (1987).

[45] *See id.*

[46] Utah Const. art. I, ' 22.

a taking under the Utah Taking Clause: (1) "some protectable interest in property;"[47] (2) "physical and permanent, continuous, or recurring" interference with property rights;[48] and (3) the presence of a public use.[49]

It appears uncertain whether the court would find a taking under the Utah Constitution resulting from a regulatory restriction on the use of property. In *State v. District Court, Fourth Judicial District*,[50] the Utah Supreme Court stated that "a 'taking' may take place, although there is no physical trespass where the enjoyment of property is so impaired as to make it useless."[51] However,

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[47] *Colman v. Utah State Land Bd*., 795 P.2d 622, 625 (Utah 1990) (holding that express easements, and recognizing that implied easements, are protectable under the Utah Taking Clause); *Lund v. Salt Lake County*, 200 P. 510, 512 (Utah 1921) ("The kinds of property subject to [a taking or damage] is practically unlimited.").

[48] *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241, 1244 (Utah 1990); *Colman*, 795 P.2d at 626-27. To recover damages, the Utah Supreme Court requires "some physical interference with the property" that results in a "definite physical injury cognizable to the senses with a perceptible effect on the present market value." *Board of Education of Logan City School District v. Croft*, 373 P.2d 697, 699 (Utah 1962); *Twenty-Second Corporation of Church of Jesus Christ of Latter-Day Saints v. Oregon Short Line R.R.*, 103 P. 243, 246 (Utah 1909).

The Court in *Croft* listed the following as examples of cognizable physical injuries:

> [D]rying up wells and springs, destroying lateral supports, preventing surface waters from running off adjacent lands or running surface waters onto adjacent lands, or the depositing of cinders and other foreign materials on neighboring lands by the permanent operation of the business or improvement established on the adjoining lands.

373 P.2d at 699-700.

[49] *Farmers New World Life*, 803 P.2d at 1244-45; *Colman*, 795 P.2d at 627. The Utah Supreme Court limits damages recoverable under the Utah Taking Clause to "those injuries which are the direct and unavoidable consequence" of the government action. *Farmers New World Life*, 803 P.2d at 1245. Hence, injuries sustained from negligent or avoidable government action are not incurred for a "public use" and are not recoverable under the Utah Taking Clause. *Id.* at 1245-46.

[50] 78 P.2d 502 (Utah 1937).

[51] *Id.* at 509. The Utah Supreme Court also observed:

> The Constitution clearly does not require compensation for damages not recognized as actionable at common law, but for a damaging of property 'to the actionable degree,' the Constitution makers intended the landowner to have just compensation equally with the landowner whose property was physically taken.

the Utah Supreme Court has limited taking claims to cases involving physical invasion.

B. Utah Water Rights Taking Law

The Utah Supreme Court has decided cases involving the taking of water rights under the Utah Constitution. In these cases a few general principles emerge. Waterusers do not own the actual water taken for public use. They merely own the "right to use such waters" that have been "put to beneficial use."[52] Waterusers are "entitled to compensation for the full volume and amount of water of which they are deprived" by government action, "even though a portion of such waters are not actually taken into possession by the government."[53] For a taking to be established, "[a]ll that is necessary is that the [wateruser] be deprived of the use of such waters by some action of the [government]."[54] The government has the burden to show "by clear and convincing evidence" that a wateruser was not deprived of the use of as much water as the government takes into its possession.[55]

The Utah Supreme found a temporary taking of the use of water in *Moyle v. Salt Lake City*.[56] The Court awarded damages to a wateruser for the loss of the use of water during a period of

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Id. at 510. However, the Utah Supreme Court recently stated:

> Many statutes and ordinances regulate what a property owner can do with and on the owner's property. Those regulations may have a significant impact on the utility or value of the property, yet they generally do not require compensation under article I, section 22. Only when governmental action rises to the level of a taking or damage under article I, section 22 is the State required to pay compensation.

Colman, 795 P.2d at 627.

[52] *Sigurd City v. State*, 142 P.2d 154, 157 (Utah 1943); *see also Weber Basin Water Conserv. Dist. v. Gailey*, 303 P.2d 271 (Utah 1956); *Shurtleff v. Salt Lake City*, 82 P.2d 561 (Utah 1938).

[53] *Sigurd*, 142 P.2d at 157; *see also Salt Lake City Corp. v. Utah Wool Pulling Co.*, 566 P.2d 1240, 1242-44 (Utah 1977).

[54] *Sigurd*, 142 P.2d at 157; *see also Moyle v. Salt Lake City*, 176 P.2d 882, 885-88 (Utah 1947).

[55] *Sigurd*, 142 P.2d at 158; *cf. Moyle*, 176 P.2d at 886-87 (order granting city immediate possession of water was sufficient to demonstrate city took water).

In *State v. Tanner*, 512 P.2d 1022 (Utah 1973), the Utah Supreme Court held that the State in a condemnation action did not take or damage waste water that the property owner drained and sold for use by others. The court held that the damages were speculative and consequential and subject to the defense of sovereign immunity. *See id*. at 1023.

[56] 176 P.2d 882 (Utah 1947). In *Moyle*, Salt Lake City commenced a condemnation action to acquire from a wateruser potable waters from Big Cottonwood Creek in which the wateruser had water rights for irrigation. The city exchanged the potable water with waters from Utah Lake which were polluted but suitable for irrigation. In 1926, the court issued an order authorizing the City to take immediate possession of the potable water. However, the City did not complete the condemnation

approximately 12 years in which Salt Lake City was awarded immediate possession of such water. The court held that the "City should respond in damages under our statutes for all damages caused by the taking and holding possession."[57] However, the court limited recovery to the losses sustained during the period of possession.[58] The measure of damages for this temporary taking was the reasonable rental value of the water rights "for the highest and best use to which it could be put at the time of the taking and is not limited to the use then actually made of it."[59]

In *Weber Basin Water Conservancy District v. Gailey*,[60] the Utah Supreme Court held that after a canal was constructed, a property owner could bring a claim alleging a taking or damage to his right to use subirrigation water.[61] In his concurring opinion, Justice Wade stated that a compensable damage claim under the Utah Taking Clause could be sustained if a public water project deprived a property owner of the use of subirrigation water on adjoining land.[62]

C. Utah Private Property Protection Act

In 1994, the Utah Legislature enacted the Private Property Protection Act[63] and Utah Code Ann. '' 63-90a-1 to -4 (collectively "Act"). The Act requires each state agency and political subdivision to promulgate guidelines to assist them in identifying actions that have constitutional taking implications under the Federal and Utah Taking Clauses. Section 63-90a-3(1) narrows the Act's application to only actions of political subdivisions to "the physical taking or exaction of private real property."[64] Section 63-90-4(4) requires state agencies to submit to the governor and the Legislative Management Committee a copy of an assessment addressing any action that has taking implications. Section 63-90-4(2) sets forth minimum requirements that must be followed by state agencies that reflect the standards set down by the Unites States Supreme Court in the *Nollan* and *Dolan* decisions.

Section 63-90a-3 provides that the takings ordinances enacted by political subdivisions are merely advisory guidelines which do not expand or limit the scope of any local entity's liability for a taking. Section 63-90a-4 establishes an appeals procedure by which the property owner can request review of takings actions. This statute raises serious questions when a claim made under the Federal and Utah Taking Clauses which is self-executing has not been the subject of local government review prior to a lawsuit being filed in court. It is doubtful that failure to exhaust this remedy would bar judicial review of a taking action. However, the statute may help to avoid a lawsuit by providing the local entity an opportunity to reexamine its position.

Under the Act the Utah Division of Water Rights, as a state agency, must promulgate taking guidelines and satisfy the minimum requirements to assess action relating to water rights that involve constitutional taking questions. Local entities also must enact ordinances to incorporate takings guidelines and use the same in assessing taking issues involving real property. The local entities'

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action, and its action was dismissed in 1938.

[57] *Id.* at 887.

[58] *See id.* at 887-88.

[59] *Id*. at 888.

[60] 303 P.2d 271 (Utah 1956).

[61] *See id.* at 272.

[62] *See id*. at 274-75.

[63] Utah Code Ann. '' 63-90-1 to -4 (Supp. 1995).

[64] *Id.* ' 63-90a-3(1).

assessment should also include the impact of the taking on water rights. Attached hereto as Exhibit A is a model local ordinance setting forth guidelines for a taking assessment. This ordinance has been used by several political subdivisions, cities and towns throughout the State of Utah.

III. THE PROPERTY CHARACTERISTICS OF A WATER RIGHT

A fundamental issue in establishing a taking is whether a "water right" is a property interest under Utah law. The term "water right" refers to a "court-protected right to, both now and in the future, use water directly from a natural source" or from a man-made source such as a reservoir or canal.[65] "The water right defines how, when, and in what amount the water may be withdrawn, as well as what can be done with the withdrawn water."[66] As court-mandated constraints and regulatory programs develop with regard to water rights, "it must be recognized that the scope of the property right has become and is becoming progressively smaller."[67]

All water in Utah has been declared to be the property of the public.[68] The Utah Supreme Court has observed: "No one owns or can own water in this state."[69] The holder of a water right has only the right to *use* the water that is included in the water right.[70] (A right to the use of property in this manner is sometimes referred to as a "usufruct" right.) Moreover, in Utah a wateruser has a right to only that water which is put to a beneficial use.[71] "Beneficial use is the basis, the measure, and the limit" of water rights in Utah.[72] A water right is not simply a function of ownership of land but is a legal entitlement established through various legal and administrative processes that the Utah State Engineer's office oversees. The Utah Supreme Court has defined the elements of a water rights as the:

> (a) Quantity of water appropriated; (b) time, period, or season when the right to the use exists; (c) the place upon the stream at which the right of diversion attaches; (d) the nature of the use or the purpose to which the right of use applies, such as irrigation, domestic use, culinary use, commercial use, or otherwise; (e) the place where the right of use may be applied; (f) the priority date of appropriation or right as related to other rights and priorities.[73]

Speaking generally, under Utah law a water right is in the nature of a real property interest and is protected under the law much the same as other types of real property.[74] As a real property interest, water rights are transferred by deed in the same way as other real property.[75] In contrast, shares of stock in an irrigation company or some similar organization are treated in a unique

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[65] *Waters and Water Rights* ' 4.01 (2d ed. 1991).
[66] *Waters and Water Rights* ' 4.01 (2d ed. 1991).
[67] *Waters and Water Rights* ' 4.01 (2d ed. 1991).
[68] *J.J.N.P. Company v. State of Utah*, 655 P.2d 1133, 1136 (Utah 1982).
[69] *Melville v. Salt Lake County*, 570 P.2d 687, 688 (Utah 1977).
[70] Utah Code Ann. ' 73-1-1, *Melville v. Salt Lake County*, 570 P.2d 687, 688 (Utah 1977), *Adams v. Portage Irrigation*, 72 P.2d 648, 652 (Utah 1937).
[71] *Melville v. Salt Lake County*, 570 P.2d 687, 688 (Utah 1977).
[72] Utah Code Ann. ' 73-1-3.
[73] *Rocky Ford Canal Co. v. Cox*, 59 P.2d 935, 939 (Utah 1936).
[74] *In Re Bear River Drainage Area*, 271 P.2d 846, 848 (Utah 1954).
[75] Utah Code Ann. ' 73-1-10.

manner under Utah law and have their own distinct considerations with regard to protection and transfer.[76]

A. Perfected Rights

Perfected rights are those water rights that are vested in the holder. There are four basic categories of perfected water rights: (1) certificated rights, which are evidenced by a certificate of appropriation that has been issued after an approved appropriation application has been proven;[77] (2) judicially decreed rights, which are previously created rights that are established and recognized in a court of law; (3) diligence claims, which are those rights established by putting water to beneficial use prior to 1903 for surface water and 1935 for ground water; and (4) adjudicated water users claims, which are claims that have been recognized by a general adjudication of a watershed area. Perfected water rights are considered vested rights in real property.[78] Perfected water rights which are appurtenant to land are conveyed with the land, unless otherwise reserved.[79]

B. Unperfected Rights

Unperfected rights are those water rights which represent something less than an actual vested appropriation.[80] Approved or unapproved applications to appropriate and change applications and nonadjudicated water users claims are examples of unperfected rights. Until the state engineer issues a certificate of appropriation, the owner of an approved application holds something less than a perfected water right.[81] Unperfected water rights which are appurtenant are not automatically conveyed with the land unless they are specifically included.[82] Unperfected water rights are not automatically conveyed with the land but are typically conveyed by assignment.[83]

IV. POTENTIAL LIMITATIONS ON WATER RIGHTS

The State Engineer has the responsibility for the "general administrative supervision of the waters of the state and the measurement, appropriation, apportionment and distribution of those waters."[84] The State Engineer's office is involved whenever a wateruser desires some modification of the existing water right or use; such as a change application, an exchange application or a stream alteration permit. The State Engineer must approve these types of modifications.[85] The involvement of the State Engineer in allowing, modifying, regulating, or denying an application for some type of modification is a limitation upon the holder's water right. Further, when a water right holder applies for

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[76] *Salt Lake City v. Cahoon & Maxfield Irrigation Co.*, 879 P.2d 248 (Utah 1994); *East Jordan Irrigation Company v. Morgan*, 860 P.2d 310 (Utah 1993).

[77] Utah Code Ann. ' 73-3-16.

[78] *See Loosle v. First National Savings & Loan*, 858 P.2d 999, 1002 (Utah 1993).

[79] Utah Code Ann. ' 73-1-11; *Little v. Green & Weed Investment*, 839 P.2d 791, 795 (Utah 1992).

[80] *See Loosle v. First National Savings & Loan*, 858 P.2d 999, 1002 (Utah 1993).

[81] *See Loosle v. First National Savings & Loan*, 858 P.2d 999, 1002 (Utah 1993); *Little v. Green & Weed Investment*, 839 P.2d 791, 794 (Utah 1992).

[82] *See Loosle v. First National Savings & Loan*, 858 P.2d 999, 1002 (Utah 1993).

[83] *Little v. Green & Weed Investment*, 839 P.2d 791, 796 (Utah 1992).

[84] Utah Code Ann. ' 73-2-1.

[85] *See, e.g.*, Utah Code Ann. ' 73-3-3.

some type of modification, the State Engineer may undertake a review of the underlying water right itself and will sometimes impose new restrictions on that right.

There are other limitations on water rights. For example, the Utah Constitution limits the power of a municipality with regard to water rights by requiring that "No municipal corporation, shall directly or indirectly, lease, sell, alien or dispose of any waterworks, water rights, or sources of water supply."[86]

V. INSTREAM FLOW RIGHTS AND LOCAL EXACTIONS AS TAKINGS

Predicting the circumstances that may result in a regulatory taking of water rights is undeniably difficult, if not impossible, to predict. However, there are at least two possible scenarios in which a taking of water rights may arise. First, the government could require waterusers not to divert a portion or all of their water rights to maintain instream flows[87] and protect environmental conditions for fish, wildlife or public health and recreation. Second, a local government could require a wateruser to transfer water for use in a public water system as a condition to development approval.

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[86] Utah Const., art. XI, Sec. 6.

[87] The Utah Division of Wildlife Resources and the Utah Division of Parks and Recreation (collectively "Divisions") are authorized to file change applications to preserve instream flows for the propagation of fish, for public recreation, or for the preservation of the natural stream environment. Utah Code Ann. ' 73-3-3(11), (12). These Divisions may only change perfected water rights presently owned, purchased, or appurtenant to acquired real property of the Divisions. The Divisions cannot appropriate unappropriated waters or acquire water by eminent domain for purposes of instream flow preservation. It is unlikely that this Section could result in a taking of water rights because of these restraints placed on the Divisions. Nevertheless, the Divisions' instream flow diversions could interfere with existing water rights to create a conflict that could result in a taking claim.

A. Instream Flow Restrictions Takings

Instream flow restrictions could arise under state or federal statutes, including without limitation, the Federal Water Pollution Control Act (i.e., Clean Water Act),[88] or the Endangered Species Act.[89]

1. Endangered Species Act.

The United States District Court for the Eastern District of California addressed a conflict between water rights and the Endangered Species Act. In this case an irrigation district had a right to divert 720,000 acre-feet of water from the natural flow of the Sacramento River. During the irrigation season from April to October, the district diverted from between 300 to 2,900 cubic feet per second with an average rate of 2,000 cubic feet per second. The water was diverted into the district's pumping facility. When the district pumped more than 1,100 feet per second, winter-run salmon would become pinned or battered against screens installed to prevent the fish from being drawn into the district's pumps. The salmon were listed as threatened under the emergency provisions of the Endangered Species Act.

The district applied for a dredge and fill permit from the United States Army Corp of Engineers. The National Marine Fishery Service issued an opinion stating that an incidental take permit should be issued to the district to allow them to continue pumping, if an effective new fish screen were installed. An incidental take permit would have allowed the district to take salmon, incidentally to their pumping operation. The district never applied for an incidental take permit. In 1991, the United States filed an action and was granted a temporary restraining order against the district.

The Court held that the district was taking winter-run salmon in violation of ' 9 of the Endangered Species Act.[90] The Court enjoined the District from pumping water from the Sacramento River during the period from July 15 through November 30 of each year.[91]

Under the Federal Taking Clause, an instream flow condition could result in the denial of all economically viable use of water rights. Moreover, instream flow protection is a concept of recent origin and deprivation of instream conditions arguably would not be prohibited under traditional nuisance and property laws. A condition requiring waterusers to leave in a stream a portion or all of their water for which they have a right to divert amounts to a physical invasion. Under both the Federal and Utah Taking Clauses, such a physical invasion could be a taking requiring payment of just compensation to the wateruser. Finally, an instream flow restriction also could result in an interference with reasonable investment-backed expectations and could make the use to which the remaining water is put commercially impracticable.

2. Clean Water Act and Water Quality Requirements

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[88] 33 U.S.C.A. '' 1251-1387 (Supp. 1995).
[89] 16 U.S.C.A. '' 1531-1544 (Supp. 1995).
[90] 16 U.S.C.A. ' 1583.
[91] *See id.* at 1135.

Recently, the United States Supreme Court considered in *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*,[92] the authority of a state agency, under the Clean Water Act, to impose minimum stream flow rates in connection with its certification of a hydroelectric power plant. The Supreme Court held that the Clean Water Act authorizes the regulation of water "quantity" because it is closely related to water "quality."[93] The petitioners apparently did not claim, and the Supreme Court did not address, whether the minimum stream flow rates constituted a taking under the Federal Taking Clause. The *PUD No. 1* case certainly raises the question whether minimum stream flow rates imposed under the Clean Water Act may be a taking for which government must pay just compensation for the quantity of water left in the stream. The stream flow restrictions arguably amount to a physical invasion of the water rights, and the right to exclude others from using the same and could deny all economically viable use of the water rights.

Another situation in which a taking could arise is a requirement imposed to reduce the quantity of water drawn from an underground source to improve water quality. As the quantity of water in an aquifer is drawn down, the water removed from the aquifer may not satisfy primary and secondary drinking water standards. In order to increase the quality of such water, a restriction could be imposed on users to limit the quantity of water that can be drawn from the aquifer. Such a restriction arguably could result in a taking of the water required to be left in the aquifer for which a wateruser has an established right to divert.

B. City and County Water Rights Exactions

Another situation in which a taking of water rights could arise is a condition imposed by a municipality or county for approval of a building or other development permit. For instance, a city could condition its approval of a development permit on the permittee's conveying to the city water rights to supplement the city's culinary water system. Under the Federal Taking Clause, such a condition must have a nexus to the purported legitimate governmental interest to satisfy the test applied in the *Nollan* decision. In addition, the condition must satisfy the "rough proportionality" test applied in the *Dolan* decision. The city must establish that the condition is related both in nature and extent to the impact of the proposed development. The city also would have to quantify its findings in support of the condition beyond a conclusory statement that the additional water could offset increased demand generated by the development.

Even if the city were able to establish that the condition requiring conveyance of water rights substantially advanced legitimate government interests, the condition arguably would physically invade the water rights. Such a condition is no different from the government in *Kaiser Aetna* imposing a navigationable servitude granting the public free access to the private marina. The water user would no longer be able to exclude others from using the water. The exaction also could deny all economically viable use of the water rights.

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[92] 114 S. Ct. 1900 (1994).

[93] *Id.* at 1912-13.

Under the Utah Taking Clause, the condition requiring conveyance of water rights is indistinguishable from the order granting Salt Lake City immediate possession of water in the *Moyle v. Salt Lake City* decision. Further, the *Gailey*, *Moyle* and *Sigurd* decisions would support a finding of taking because the condition would deprive the user of the use of the water. The condition unquestionably would constitute a physical and permanent interference with the user's water rights for which the city likely would have to pay just compensation.

CONCLUSION

As the demand for the quantity and quality of water in the arid appropriation states increases, government regulation could lead to restrictions and conditions being placed on water rights. These restrictions and conditions may result in the taking of water rights for which compensation must be paid to the wateruser. Taking claims may arise under both the United States Constitution and the Utah Constitution. How this conflict is resolved remains to be seen. Federal legislation similar to Utah's Private Property Protection Act may be necessary to resolve these water rights taking claims.

E X H I B I T " A "

ORDINANCE NO. _____

AN ORDINANCE ESTABLISHING A PROCEDURE FOR THE REVIEW OF ACTIONS BY THE (CITY/COUNTY) THAT MAY HAVE CONSTITUTIONAL TAKING ISSUES.

WHEREAS, recent changes in the State Code require local governments to consider and adopt guidelines relating to potential Constitutional Taking issues; and

WHEREAS, in light of these statutory requirements, the (City/County) deems it to be in the best interest of its citizens to adopt both guidelines and to establish a procedure for review of actions by its officers, employees, boards, commissions or councils that may involve the issue of a physical taking or exaction of private real property without just compensation; and

WHEREAS, said guidelines are meant to instruct and inform the (City/County), its officials, employees, boards, commissions and councils, of the standards for a Constitutional Taking and process for review of such actions; and

WHEREAS, the guidelines intended neither to expand nor limit the scope of any political subdivisions liability for a Constitutional Taking, nor impose any liability upon a political subdivision for failure to comply with the guidelines.

NOW, THEREFORE, BE IT ORDAINED BY THE (CITY COUNCIL/COUNTY COMMISSION) OF _____ AS FOLLOWS:

SECTION 1. REPEALER

SECTION 2. ENACTMENT

Section L. Policy Considerations. There is an underlying policy in the (City/County), strongly favoring the careful consideration of matters involving Constitutional Taking claims, in fairness to the owner of private property bringing the claim and in view of the uncertainty and expense involved in defending lawsuits alleging such issues. At the same time, the legitimate role of government in lawfully regulating real property must be preserved and the public's right to require the dedication or exaction of property consistent with the Constitution. Consistent with this policy, it is desired that a procedure be established for the review of actions that may involve the issue of a Constitutional Taking. These provisions are to assist governments in considering decisions that may involve Constitutional Takings. It is intended that a procedure for such a review be provided, as well as guidelines for such considerations. This ordinance is further intended and shall be construed to objectively and fairly review claims by citizens that a specific government action should require payment of just compensation, yet preserve the ability of the (City/County) to lawfully regulate real property and fulfill its other duties and functions.

Section II. Definitions.

1. "Constitutional Taking" means actions by the (City/County) involving the physical taking or exaction of private real property that might require compensation to a private real property owner because of:

a. The Fifth or Fourteenth Amendment to the Constitution of the United States;

b. Article I, Section 22, of the Utah Constitution;

c. Any Court ruling governing the physical taking or exaction of private real property by a government entity;

2. Actions by the (City/County) involving the physical taking or exaction of private real property is not a Constitutional Taking if the physical taking or exaction:

a. Bears an essential nexus to a;

b. Legitimate governmental interest; and

c. Is roughly proportionate and reasonably related, on an individualized property basis, both in nature and extent, to the impact of the proposed development on the legitimate government interest.

Section III: Guidelines Advisory. The guidelines adopted and decisions rendered pursuant to the provisions of this section are advisory, and shall not be construed to expand or limit the scope of the (City's/County's) liability for a Constitutional Taking. The reviewing body or person shall not be required to make any determination under this ordinance except pursuant to Section IV.

Section IV. Review of Decision. Any owner of private real property who claims there has been a Constitutional Taking of their private real property shall request a review of a final decision of any officer, employee, board, commission, or council. The following are specific procedures established for such a review:

1. The person requesting a review must have obtained a final and authoritative determination, internally, within the (City/County), relative to the decision from which they are requesting review.

2. Within thirty (30) days from the date of the final decision that gave rise to the concern that a Constitutional Taking has occurred, the person requesting the review shall file in writing, in the office of the (City Recorder/County Commission), a request for review of that decision. A copy shall also be filed with (City/County) attorney.

3. The (City Council/County Commission), or an individual, or body designated by the (City Council/County Commission) shall immediately set a time to review the decision that gave rise to the Constitutional Takings claim.

4. In addition to the written request for review, the applicant must submit, prior to the date of the review, the following:

a. Name of the applicant requesting review;

b. Name and business address of current owner of the property, form of ownership, whether sole proprietorship, for-profit or not-for-profit corporation, partnership, joint venture or other, and if owned by a corporation, partnership, or joint venture, name and address of all principal shareholders or partners;

c. A detailed description of the grounds for the claim that there has been a Constitutional Taking;

d. A detailed description of the property taken;

e. Evidence and documentation as to the value of the property taken, including the date and cost at the date the property was acquired. This should include any evidence of the value of that same property before and after the alleged Constitutional Taking, the name of the party from whom purchased, including the relationship, if any, between the person requesting a review and the party from whom the property was acquired;

f. Nature of the protectable interest claimed to be affected, such as, but not limited to, fee simple ownership, leasehold interest;

g. Terms (including sale price) of any previous purchase or sale of a full or partial interest in the property in the three years prior to the date of application;

h. All appraisals of the property prepared for any purpose, including financing, offering for sale, or ad valorem taxation, within the three years prior to the date of application;

i. The assessed value of and ad valorem taxes on the property for the previous three years;

j. All information concerning current mortgages or other loans secured by the property, including name of the mortgagee or lender, current interest rate, remaining loan balance and term of the loan and other significant provisions, including but not limited to, right of purchasers to assume the loan;

k. All listings of the property for sale or rent, price asked and offers received, if any, within the previous three years;

l. All studies commissioned by the petitioner or agents of the petitioner within the previous three years concerning feasibility of development or utilization of the property;

m. For income producing property, itemized income and expense statements from the property for the previous three years;

n. Information from a title policy or other source showing all recorded liens or encumbrances affecting the property; and

o. The (City Council/County Commission) or their designee may request additional information reasonably necessary, in their opinion, to arrive at a conclusion concerning whether there has been a Constitutional Taking.

5. An application shall not be deemed to be "complete" or "submitted" until the reviewing body/official certifies to the applicant, that all the materials and information required above, have been received by the (City/County). The reviewing body/official shall promptly notify the applicant of any incomplete application.

6. The (City Council/County Commission) or an individual or body designated by them, shall hear all the evidence related to and submitted by the applicant, (City/County), or any other interested party.

7. A final decision on the review shall be rendered within fourteen (14) days from the date the complete application for review has been received by the (City Recorder/County Commission). The decision of the (City Council/Commission or designee) regarding the results of the review shall be given in writing to the applicant and the officer, employee, board, commission or council that rendered the final decision that gave rise to the Constitutional Takings claim.

8. If the City Council fails to hear and decide the review within fourteen (14) days, the decision appealed from shall be presumed to be approved.

Section V. Reviewing Guidelines. The (City Council/County Commission) shall review the facts and information presented by the applicant to determine whether or not the action by the (City/County), constitutes a Constitutional Taking as defined in this chapter. In doing so, they shall consider:

1. Whether the physical taking or exaction of the private real property bears an essential nexus to a legitimate governmental interest.

2. Whether a legitimate governmental interest exists for the action taken by the (City/County).

3. Is the property and exaction taken, roughly proportionate or reasonably related, on an individual property basis, both in nature and extent, to the impact caused by the activities that are the subject of the decision being reviewed.

Section VI. Results of Review. After completing the review, the reviewing (person/body) shall make a determination regarding the above issues and where determined to be necessary and appropriate, shall make a recommendation to the officer, employee, board, commission or council that made the decision that gave rise to the Constitutional Takings claim.

SECTION 3. SEVERABILITY

SECTION 4. EFFECTIVE DATE

PASSED AND ADOPTED by the (City Council/County Commission) of _____ Utah, this _____ day of _____, 1994.

ATTEST: