

1970

# State of Utah, By And Through Its Road Commission v. (David Douglas Hooper) And South Slaterville Irrigation Company : Brief of Respondent

Utah Supreme Court

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# In The Supreme Court of the State of Utah

STATE OF UTAH, by and through its  
ROAD COMMISSION,

Plaintiff,

-v-

(DAVID DOUGLAS HOOPER, et al.)  
SLATERVILLE WATER COMPANY,

Defendant.

## BRIEF OF PLAINTIFF

Appeal from a Judgment of the  
The Water Commission  
Honorable Chief Justice

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Ogden, Utah

Attorney for Appellant

## TABLE OF CONTENTS

	Page
NATURE OF CASE .....	1
DISPOSITION OF CASE .....	1
RELIEF SOUGHT ON APPEAL .....	2
STATEMENT OF FACTS .....	2
POINT I .....	3
CONCLUSION .....	11

## CASES CITED

State of Utah, by and through its Road Commission -v- Stanger, 21 Utah 2d 185, 442 P.2d 941 (1968) ....	4
State Road Commission -v- Utah Sugar Company, 22 Utah 2d 77, 448 P.2d 901 (1968) .....	5, 6, 9
State of Utah, by and through its Road Commission -v- Williams, 22 Utah 2d 331 452 P.2d 881 (1969) ....	5

## STATUTES CITED

78-34-10 (2) Utah Code Annotated (as amended) 1969	10
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# In The Supreme Court of the State of Utah

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STATE OF UTAH, by and through its  
ROAD COMMISSION,

Plaintiff-Respondent,

-v-

(DAVID DOUGLAS HOOPER) and SOUTH  
SLATERVILLE WATER COMPANY,

Defendant-Appellant.

} Case No.  
11580

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## BRIEF OF RESPONDENT

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### NATURE OF THE CASE

Respondent commenced a condemnation action against appellant to acquire .25 acres of land which constituted a part of an irrigation facility owned and operated by appellant in Weber County, Utah.

### DISPOSITION OF CASE

The matter was tried before the Honorable Charles G. Cowley, sitting without a jury, on the 18th and 19th days of December, 1968. The trial court awarded appellant the amount of \$450.00 as the value of the .25 acres actually taken. The trial court further

found that no compensable item of severance damage existed.

### RELIEF SOUGHT ON APPEAL

Respondent respectfully submits that the judgment of the trial court should be affirmed.

### STATEMENT OF FACTS

Appellant owns and operates an irrigation canal system in Weber County, Utah. In the specific area wherein the .25 acres of land was appropriated by respondent, the canal runs in an easterly-westerly direction and the highway improvement dissects the canal at right angles in a northerly-southerly direction. (Ex. A2) The highway facility is part of the interstate project and is identified as Project No. 1-15-8 (7) 338. As it relates to appellant's property, a large overpass structure was constructed spanning both the canal of appellant and the Southern Pacific Railroad right-of-way which is located directly north and parallel to appellant's property. (Ex. A2)

The trial court awarded appellant the amount of \$450.00 for the land actually appropriated. This award was pursuant to a stipulation of the parties that the land value was \$1,800.00 per acre. (T. 55)

The take consisted of an area 332 feet in width and 36 feet in depth. A 12 foot maintenance road abutting the south boundary of the canal remained but for a length of 270 feet directly below the overpass structure. In this area, the maintenance road was reduced to a width of 4½ feet. (Ex. A2) There is no dispute between the parties as to the existence

of this 4½ foot access to the banks of the canal immediately below the structure. (T. 36) Appellant recognizes the availability of the remaining 4½ foot access but complains that such access does not permit the utilization of mechanized equipment in the area directly beneath the structure.

The Willard Canal runs in a northerly-southerly direction parallel to appellant's canal and is located approximately 300 feet east of the interstate highway right-of-way line. Appellant's point of diversion is located on the Willard Canal. (Ex. 2)

Appellant, in the statement of facts set forth in its brief, recites conclusive statements with respect to its inability to gain access to its maintenance road from the Willard Canal and also the method of construction utilized by respondent. However, these statements are properly elements of argument and will be treated as such by respondent.

It may be noted, however, that the trial court specifically found that appellant has full access to the banks of its canal at every point and has sustained no severance damage to its remaining property. (R. 13, 14)

## POINT I

### THE TRIAL COURT DID NOT ERR IN REFUSING TO AWARD APPELLANT SEVERANCE DAMAGES.

Appellant does not challenge the basic proposition that the judgment of a trial court will not be disturbed on appeal if there is evidence to support

such a judgment. Therefore, the only consideration presented to this court is whether the record supports a conclusion that severance damage does not exist.

The evidence submitted by appellant to justify its claim of severance damage was all related to the increased costs to be anticipated in the future maintenance of the canal system in the area of the highway facility. The question of access to the banks of the canal was not seriously questioned in that appellant continues to enjoy full-length access even under the overpass structure. As noted above, appellant's complaint is predicated on the fact that mechanized equipment may not be operated under the structure and that a circuitous route must be pursued to allow mechanized equipment access to the canal area east of the structure.

The court specifically found that appellant enjoys a perpetual easement within the interstate right-of-way for the purpose of maintaining its canal. Therefore, appellant does not trespass on State owned property in performing maintenance duties and has the physical ability to approach and maintain the canal.

In *State of Utah, by and through its Road Commission -v- Stanger*, 21 Utah 2d 185, 442 P.2d 941 (1968), this court stated at 21 Utah 2d 186:

\* \* \* that severance damages were those suffered by a devaluation of the owner's property not taken, the causa causa causans of which was the actual taking of a part of a unit of



property, the whole of which he previously owned.

To constitute severance damage as against non-compensable consequential damage, the loss must be the diminishment in value to the remaining property by virtue of the loss of that appropriated and which is the direct result of the appropriation. As stated by this court in *State of Utah, by and through its Road Commission -v- Williams*, 22 Utah 2d 331, 452 P. 2d 881 (1969), at 22 Utah 2d 332, 333:

All damages not caused by the taking or the severing of the land or the manner of the construction of the improvement are consequential and not within the protection of the constitutional provision (Article 1, Section 22, of the Utah Constitution) unless they are such as would be actionable at common law or would affect the land physically. \* \* \*

The elements of that which appellant urges as severance damages are not such a causally connected diminishment of market value. This was recognized by this court in *State Road Commission -v- Utah Sugar Company*, 22 Utah 2d 77, 448 P. 2d 901 (1968). In a factual situation identical to that presented by the instant case, this court concluded that additional costs required by extra mileage and wages of inspectors or canal riders incurred through the imposition of a circuitous route could not be considered severance damage. This court stated at 22 Utah 2d 79:

Our own authorities clearly, or by analogy, substantiate the basic rule set out in Nichols,



supra, and the concept that to justify severance damages, the damage must be done to the land itself,—not to that on top of the land which is not a part of the realty, or what is done on top of the land, such as patrolling canals, as is the case here.

Respondent submits that the above case is controlling and is dispositive of the instant case.

Appellant attempts to distinguish the Utah Sugar Company case on several grounds. First, appellant contends that the Utah Sugar Company case dealt with the improvement of an existing facility while the instant case involves the establishment of a newly located facility. However, this argument ignores the basic fact that the improvement and resultant control of access present in the Utah Sugar Company case produced exactly the same result with respect to canal maintenance problems as is found in the instant case. It was the result that such increased maintenance costs were not compensable. That result should be equally applied in this matter.

Second, appellant states at page 6 of its brief that in the Utah Sugar Company case, the canal company had access to the banks of its canal at all points. However, this argument is incorrect for the reason that, in the Utah Sugar Company case, access adjacent to the canal under the overpass structure was not present. This court recognized at 22 Utah 2d 79:

\* \* \* it had access not only by this method but also at the side of the freeway, on both sides

*thereof and under the freeway itself,—the latter by boat, wadding, if the water were not too deep, or by other means. \* \* \* (Emphasis added)*

Appellant's attempts to factually distinguish the Utah Sugar Company case from the instant proceedings fail because of a basic misinterpretation of the facts of the cited case and also because of the existence of the 4½ foot area under the structure present in the instant case. Respondent submits that a careful consideration of the facts and legal doctrines set forth in the Utah Sugar Company case lead to the single conclusion that appellant's claim for severance damage on the basis therefore, must fail.

Appellant submits further that the access to the area adjacent to the canal east of the freeway is impaired because of the inability of appellant to bring motorized equipment off of the Willard Canal. The evidence with respect to this contention is somewhat confusing and not supported by the record as a whole. For example, Mr. Julian Powell, a director and secretary-treasurer of appellant, testified as follows:

Q You can still come off 12th North and cross the railroad tracks down to where the freeway is with the same full right you had before; can you not?

A That's right.

Q And the only problem with getting access to the banks of the canal east of the freeway is this circuitous route which you must now travel; is this correct?

A. That's the only way we have of getting to the eastern part.

Q But once you follow that route you do have access to the canal bank itself; do you not?

A We do until we get to the freeway, yes.  
(T. 53)

\* \* \*

Mr. Wilbur Cook, who testified as appellant's expert appraiser, also stated that a cul-de-sac area immediately adjacent to the structure on both the east and west side of the structure to permit the turning around of mechanized equipment would eliminate an element of severance damage. In Mr. Cook's opinion, the only remaining severance damage would be the increased maintenance cost by virtue of the circuity of travel. (T. 63)

Because of this testimony by Mr. Cook, respondent, through trial counsel, tendered to appellant a reasonable area to allow the turning around of mechanized equipment on both the east and west side of the structure. This, of course, would eliminate the technical trespass occurring during the turning around operation. In accepting this tender, counsel for appellant stated:

\* \* \*

"MR. RICHARDS: Yes. This canal bank is up some eight feet higher than the road, so if we'd either had some money to make that so it would be easy to go up and down there, or if the State did it, made a nice ramp down there, why then we could get in to everywhere

except under here. (indicating under structure)  
 This would have to be manually cleaned, but  
 then they could drive into there by driving  
 around to do it." (T. 65)

\* \* \*

Respondent recognizes that statements of counsel are not to be considered as evidence. However, this acceptance of the cul-de-sac offer reflects the inconsistent position assumed by appellant after being encountered by the Utah Sugar Company case, *supra*, and lends support to the trial court's finding that full access of even motorized equipment is available to appellant by merely pursuing the circuitous route.

In further support of the trial court's findings, respondent directs this court's attention to the testimony of Mr. Memory Cain, an expert fee appraiser who testified on behalf of respondent. Mr. Cain testified that his investigation revealed an ability on the part of appellant to transport mechanized equipment down the Willard Canal to its maintenance road. Mr. Cain's investigation was further substantiated by the existence of a 16 foot gate in the fence separating the properties of appellant and the Willard Canal. This gate indicates a willingness on the part of the Willard Canal owners to allow appellant access to its maintenance road of not only personnel but also equipment. (T. 161)

Appellant devotes a good portion of its brief to criticism of the manner of construction of the overpass structure employed by respondent. However,

respondent submits that this appeal is not the proper procedural arena in which to contest such an issue.

An order of immediate occupancy was obtained by respondent on the 10th day of January, 1966. In the interim between the granting of the order and the trial, appellant failed to pursue any type of injunctive relief that may have been predicated on a claim of arbitrary and capricious action.

A further inconsistency exists in appellant's value approach. A cost-of-cure figure was submitted on the basis of an adoption of one of two alternative proposals submitted by a witness for appellant. This evidence was submitted to allow the court to consider the damages sustained by appellant by virtue of the manner of construction. However, the court properly recognized that the cost-of-cure approach was directed at a noncompensable element of damage and refused to adopt such an approach. The elimination of the circuitry of travel was not compensable and the cost-of-cure directed at eliminating such an element is also noncompensable.

Respondent recognizes that under 78-34-10 (2) Utah Code Annotated (as amended 1969), certain damages resulting from the manner of construction proposed by a condemnor are to be allowed. However, in the instant case the damages resulting from the construction of the improvement are noncompensable by their very nature.

It is respectfully submitted that evidence of alternative methods of construction is not evidence

of arbitrary or capricious action on the part of the respondent. By virtue of the Constitution of the State of Utah and the statutes pertaining thereto, respondent stands ready and able to compensate a land owner for certain damages accruing by virtue of the construction. This is limited only by the consideration that such damages must be compensable under the constitution and statutes relating thereto. In the instant case, it is obvious that such compensable damages do not exist.

## CONCLUSION

Respondent submits that the judgment of the trial court is amply supported by the record and should be affirmed.

Respectfully submitted,

GARY A. FRANK

Special Assistant Attorney  
General