

1970

State of Utah, By And Through Its Road Commission v. (David Douglas Hooper) And South Slaterville Irrigation Company : Petition For Rehearing

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 and Petitioner,

vs.

DAVID DOUGLAS HOOPER and ALICE
HOOPER, his wife; SOUTH SLATER
VILLE IRRIGATION COMPANY and
VIDA M. BLAKESLEY, a widow,

PLAINTIFF'S PETITION FOR AND BRIEF IN SUPPORT

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INDEX

	Page
PETITION FOR REHEARING	1
BRIEF IN SUPPORT OF PETITION FOR REHEARING	3
POINTS:	
I. THIS COURT IGNORED THE RECORD ON APPEAL BY CONCLUDING THAT THE REMAINING TWELVE-FOOT MAINTENANCE ROAD OF DEFENDANT IS RENDERED USE- LESS BY VIRTUE OF PETITIONERS ACQUI- SITION.	3
II. THIS COURTS RECITATION OF THE FACTUAL SITUATION AND REFUSAL TO APPLY THE PRINCIPLES ENUNCIATED IN STATE ROAD COMMISSION vs. UTAH SUGAR COMPANY, 22 UTAH 2nd 77, 448 P. 2nd 901 (1968), TO THE INSTANT MATTER, ARE CLEARLY ERRONEOUS AND CONTRARY TO ESTABLISHED AND ACCEPTED PRINCIPLES OF LAW.	4
III. THIS COURT HAS CREATED THE IN- TOLERABLE SITUATION OF RENDERING ANTITHETICAL CONCLUSIONS WHEN CON- FRONTED WITH TWO IDENTICAL FACTUAL AND LEGAL SITUATIONS.	6
IV. THE BASIS ON WHICH THE INSTANT MATTER WAS DECIDED BY THIS COURT WAS NEVER PRESENTED OR ARGUED BY DEFENDANT TO THE LOWER COURT OR TO THIS COURT ON APPEAL AND PETITIONER HAS NOT BEEN AFFORDED THE OPPORTUN- ITY OF REBUTTING THE CONTENTIONS	

INDEX—Continued

Page

**THIS COURT DETERMINED AS BEING DIS-
POSITIVE OF THE INSTANT MATTER. 7**

CONCLUSION 8

CASES CITED

**State Road Commission vs. Utah Sugar Company, 22
Utah 2nd 77, 448 P. 2nd 901 (1968)2, 4, 5, 6, 7**

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VIDA M. BLAKESLEY, a widow,

Defendants.

} Case No.
11580

PETITION FOR REHEARING

Petitioner, State of Utah, by and through its Road Commission, pursuant to Rule 76(e) of the Utah Rules of Civil Procedure, respectfully petitions this Court for a rehearing of the above entitled matter and asserts that in making its decision herein, this court erred in the following particulars:

1. This Court ignored the Record on Appeal by concluding that the remaining twelve-foot maintenance road of defendant is rendered useless by virtue of petitioner's acquisition.
2. This Courts recitation of the factual situation and refusal to apply the principles enunciated

in *State Road Commission vs. Utah Sugar Company*, 22 Utah 2nd 77, 448 P. 2nd 901(1968), to the instant matter, are clearly erroneous and contrary to established and accepted principals of law.

3. This Court has created the intolerable situation of rendering antithetical conclusions when confronted with two identical factual and legal situations.

4. The basis on which the instant matter was decided by this Court was never presented or argued by defendant to the lower court or to this Court on appeal and petitioner has not been afforded the opportunity of rebutting the contentions this Court determined as being dispositive of the instant matter.

Respectfully submitted:

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**BRIEF IN SUPPORT OF PETITION
FOR REHEARING****POINT 1**

THIS COURT IGNORED THE RECORD ON APPEAL BY CONCLUDING THAT THE REMAINING TWELVE-FOOT MAINTENANCE ROAD OF DEFENDANT IS RENDERED USELESS BY VIRTUE OF PETITIONERS ACQUISITION.

It is uncontested that defendant presently enjoys full and complete access to the banks of its canal system to the same extent as it did prior to the acquisition by petitioner. The only area affected by the take is within the interstate highway facility right-of-way and directly under the structure where the twelve-foot wide maintenance road is reduced to a width of four and one-half feet. Notwithstanding this physical limitation, defendants' access to its canal within this area is limited only by the exclusion of mechanical equipment. Maintenance personnel may enter upon the highway right-of-way and perform maintenance duties. Defendant is not deprived of access at any point along its canal system.

The right of defendant to enter the highway right-of-way for the purpose of maintenance together with the fact that the canal and the water rights of defendant have not been disturbed are not questioned. The only complaint of defendant and the sole basis on which severance damages are claimed is that defendant must, in the after condition, pursue a circuitous route to gain access to the

property located east and west of the right-of-way. Defendants contention recognizes the fact that the maintenance road east and west of the highway right-of-way exists in the same condition as before the take and is subject to the same use. In these areas, the road remains at the same width and in the same condition as it always did. It must be recognized that once defendant acquires access to these areas by the circuitous route available to defendant, the same conditions and utility of the maintenance road exists.

This Court clearly held in *State Road Commission vs. Utah Sugar Company*, 22 Utah 2nd 77, 448 P. 2nd 901 (1968), that damages predicated on circuitry of travel were not compensable and clearly consequential damages.

Circuitry of travel being the only basis on which defendant predicates its claim to damages, this Court clearly violated the principals enumerated in the State Road Commission case, supra., by reversing and remanding the instant matter for a determination of the severance damages to which defendant is entitled.

POINT 2

THIS COURTS RECITATION OF THE FACTUAL SITUATION AND REFUSAL TO APPLY THE PRINCIPLES ENUNCIATED IN *STATE ROAD COMMISSION vs. UTAH SUGAR COMPANY*, 22 UTAH 2nd 77, 448 P. 2nd 901 (1968), TO THE INSTANT MATTER, ARE CLEARLY ERRONEOUS AND CONTRARY TO ESTABLISHED AND ACCEPTED PRINCIPALS OF LAW.

In the instant matter, this Court attempted to distinguish the factual situation of *State Road Commission vs. Utah Sugar Company*, 22 Utah 2nd 77, 448 P. 2nd 901 (1968), by stating that in the Utah Sugar Company case, the State converted highway 91 into a non-access freeway. This is clearly an incorrect statement of the facts presented by the Utah Sugar Company case, *supra.*, in that the highway facility was an extension of the interstate program and dissected three canals of the Utah Sugar Company at points where there had previously been no highway or restriction of access. By virtue of the construction, maintenance personnel had to follow a circuitous route to gain access to the banks of the canal lying perpendicular to the highway right-of-way. Within the right-of-way and under the structure, the embankment came down to the very edge of the canal and the only access was by boat or wading. This Court clearly held that alleged damages by virtue of the imposition of the circuitous route were noncompensable.

In the instant case, this Court refused to apply the holding of the Utah Sugar Company case, *supra.*, on the basis that the case involved a conversion of the access rather than an actual taking. First, there was an actual taking of property in the Utah Sugar Company case, *supra.*, for the same purpose as that involved in the instant matter, i.e. the construction of an overpass structure. Secondly, even if the distinction could be predicated on a limitation of access in the Utah Sugar Company case, *supra.*, the distinction is frivolous and not of substance. The

method by which the circuitous route is imposed should not be dispositive of the issue of whether such resulting damages are compensable. The question should be, may damages be predicated on the imposition of a circuitous route. The answer, as clearly state in the Utah Sugar Company case, *supra.*, is no.

The failure of this Court to apply the principals enunciated in the Utah Sugar Company case, *supra.*, to the instant matter is clearly a violation of the law of precedents. The factual situation of the two cases are indistinguishable in substance and the holding of the prior case should be dispositive of the issues presented by the instant matter.

POINT 3

THIS COURT HAS CREATED THE INTOLERABLE SITUATION OF RENDERING ANTITHETICAL CONCLUSIONS WHEN CONFRONTED WITH TWO IDENTICAL FACTUAL AND LEGAL SITUATIONS.

As noted above, the factual substance of the instant matter and the Utah Sugar Company case, *supra.*, are identical. However, when confronted with the two identical situations, this Court rendered antithetical conclusions which completely confused the law with respect to the compensability of damages predicated on circuitous travel.

This Court should announce for the benefit of all concerned the applicable law with respect to compensability of circuitry damages. If the decision

in the instant matter is allowed to stand, the irreconcilable result is that circuitry damages are compensable in certain instances, while not in others, with no defineable guideline available to determine the holding that would apply.

This Court must determine once and for all the compensability of damages predicated on circuitry of travel. To allow the present situation to stand would be intolerable.

POINT 4

THE BASIS ON WHICH THE INSTANT MATTER WAS DECIDED BY THIS COURT WAS NEVER PRESENTED OR ARGUED BY DEFENDANT TO THE LOWER COURT OR TO THIS COURT ON APPEAL AND PETITIONER HAS NOT BEEN AFFORDED THE OPPORTUNITY OF REBUTTING THE CONTENTIONS THIS COURT DETERMINED AS BEING DISPOSITIVE OF THE INSTANT MATTER.

As presented to this Court on appeal, defendants sole claim to severence damages was predicated on the imposition of a circuitous route to gain access to the banks of its canal. Both measures of damages submitted to the trial court by defendant were predicated on an alleged cost of eliminating this circuitous travel. The purported distinction between the Utah Sugar Company case, *supra.*, and the instant case was never presented to this Court. Petitioner respectfully submits that the reason for this failure by defendant to present this distinction was that it does not exist. Therefore, the sole issue

on appeal was whether defendant could claim damages for the imposition of circuitous travel. This issue is clearly resolved in the negative by the Utah Sugar Company case, *supra*.

To now distinguish the cases on the basis utilized by this Court deprives petitioner of the right to counter and rebut the alleged distinction. Where diverse conclusions are urged in substantially similar cases, all parties should have the right to present their arguments and counter those of the opposition. By proceeding as it has done in the instant case, this Court has denied petitioner this basic and fundamental right. A rehearing should be allowed to permit petitioner the opportunity of illustrating the similarity of the two cases and the rationale for the application of the precedent establishing Utah Sugar Company case, *supra*.

CONCLUSION

For the reasons above stated, the Petition for Rehearing should be granted and the issue of compensability of severance damages by virtue of circuituity of travel clearly resolved.

Respectfully submitted:

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