2001

Great Salt Lake Authority v. Island Ranching Company : Brief of Appellant

Utah Supreme Court

Phil L Hanson; Attorney General; Richard L Dewsnup; Deputy Attorney General; Attorneys for Respondent.
Robert S Campbell; Parsons, Behle, Evans & Latimer; Attorney for Appellant.

SUPREME COURT
OF THE
STATE OF UTAH

GREAT SALT LAKE AUTHORITY,
Plaintiff and Respondent,

- vs -

ISLAND RANCHING COMPANY,
Defendant and Appellant.

Case No. 10395

BRIEF OF APPELLANT

Interlocutory Appeal from Order of Second District Court for Davis County
Honorable Thornley K. Swan, *District Judge*

ROBERT S. CAMPBELL, JR.
of and for
PARSONS, BEHLE, EVANS & LATIMER
520 Kearns Building
Salt Lake City, Utah
Attorneys for Appellant

PHIL L. HANSON
Attorney General
RICHARD L. DEWSNUP
Deputy Attorney General
State Capitol Building
Salt Lake City, Utah
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS — Continued

INDEX OF CASES AND AUTHORITIES

AUTHORITIES CITED

CASES CITED

TABLE OF CONTENTS — Continued

Page

TABLE OF CONTENTS — Continued

TABLE OF CONTENTS — Continued

CONSTITUTION CITED

STATUTES AND RULES CITED

TABLE OF CONTENTS — Continued

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

GREAT SALT LAKE AUTHORITY,
Plaintiff and Respondent,

- vs -

ISLAND RANCHING COMPANY,
Defendant and Appellant.

Case No. 10395

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This case is brought before the Court on Interlocutory Appeal under the provisions of Rule 72 (b), Utah Rules of Civil Procedure. The nature of the action is one in eminent domain, commenced by the Respondent to acquire properties of the Appellant. Issues of law relating to the constitutional validity of the legislation establishing the Great Salt Lake Authority and the power of that Agency to condemn the lands of Appellant are raised in this Appeal.

DISPOSITION OF CASE BY LOWER COURT

On May 26, 1965, the trial Court entered an Order denying the Motion of Island Ranching Company to dismiss the Complaint in condemnation of the Respondent for failure to state a claim upon which relief could be granted. On the same date, the lower Court also ordered that the time in which Island Ranching Company was otherwise required to respond to the Complaint, be extended so as to permit the Company to file with this Court a petition for interlocutory appeal.

RELIEF SOUGHT ON APPEAL

It is submitted in this Appeal that the Order of the trial Court denying Appellant's Motion to dismiss should be reversed for errors of law and, that the case be remanded to the District Court with directions to dismiss the Complaint of Respondent for its failure to state a claim as a matter of law, upon which relief can be granted.

STATEMENT OF FACTS

The facts underlying this Appeal may be readily capsulized. The Appellant, Island Ranching Company, has been for many years last past and is now the owner in fee simple of substantially all of that property known as Antelope Island in the western section of Davis County, Utah. In November of 1964, Respondent, Great Salt Lake Authority (referred to in this Brief as "GSLA"), filed a Complaint in the District Court for Davis County to expropriate, by eminent domain, some

4,198 acres of the Island, all of which property was owned by the Appellant. (R. 1-3). Within the time permitted by Rule 12, U.R.C.P., Appellant filed a Motion to dismiss (R. 4-5) the Complaint for failure to state a claim upon which relief could be granted. As a basis for the Motion, it was specifically urged that:

1. The Enabling Act of GSLA (65-8-1 through 8, U.C.A. 1953, as amended) is constitutionally invalid and unenforceable for its failure to define the territorial limits of the Agency's jurisdiction.

2. The GSLA Act is constitutionally invalid for vagueness, lack of legslative standards and declared public purpose.

3. Notwithstanding a finding of constitutional enforceability of the Act, the Statute did not grant to GSLA the power to acquire Antelope Island or any part thereof by eminent domain.

4. That by reason of all or any of the foregoing, the condemnation of the Company's property by GSLA would result in an unlawful expropriation of the same in violation of Appellant's right to be secure therefrom, and without due process of law, contrary to Article I, Section VII, Utah State Constitution and Amendment XIV, United States Constitution.

Oral argument of counsel for the parties on these issues was taken by the trial Court on the 8th day of

February, 1965. Memoranda on the applicable law were also submitted by counsel, respectively.

On May 25, 1965, the trial Court entered an Order denying the Company's Motion to dismiss on all counts. (R. 8-9). Appellant's Petition to this Court for interlocutory appeal and review of the lower Court's order denying the Motion to dismiss followed in June, 1965. (R. 15-28). This Court, under Order dated June 29, 1965, granted the Petition for interlocutory appeal and accepted jurisdiction to review the issues of law raised by Appellant's Motion and set out in said Petition.

ARGUMENT

POINT I

THE LEGAL SUFFICIENCY OF THE COMPLAINT OF GSLA IS PROPERLY TESTED BY APPELLANT'S MOTION TO DISMISS.

It was before the trial Court and is the position of Island Ranching Company herein that the Complaint of GSLA fails, as a matter of law, to state a claim upon which relief may be granted as against the Appellant. Such Plea in Bar is properly raised by Motion under Rule 12(b), Utah Rules of Civil Procedure. That Rule, in part, provides:

> "The following defense may at the option of the pleader be made by motion: * * * (6) Failure to state a claim upon which relief can be granted * * *."

The Company, by the Motion, admits only the well-pleaded allegations of fact in the Complaint. *Clark v.*

Nebersee Finanz Korporation, 332 U.S. 480, 68 S.Ct. 174, 92 L.Ed. 148; *Chicago Metallic Manufacturing Company v. Edward Katzinger Co.,* 123 F.2d 518 (7 Cir. 1941). Neither conclusions of law nor mixed statements of law and fact set forth in the Complaint are, by Appellant's Motion to dismiss, acknowledged or admitted. *Newport News Shipbuilding and Dry Dock Co. v. Schauffler,* 303 U.S. 54, 58 S.Ct. 466, 82 L.Ed. 546; *Hess v. Petrillo,* 259 F.2d 735 (7 Cir. 1958). *Moore,* in his work on *Federal Practice,* Vol. II, Section 12.08, page 2244, outlines the effect of a motion under Rule 12(b)(6):

> "A motion to dismiss is the usual and proper method of testing the legal sufficiency of the complaint. For the purposes of the motion, the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted."

Accordingly, only the material assertions of fact under Paragraphs 2, 5, 6, 7 and 8 of GSLA's Complaint are admitted by the Company under the Motion to dismiss. Conclusions embodied in the Complaint, for the purposes of the Motion, are denied.

POINT II

THE GSLA ACT IS CONSTITUTIONALLY INVALID AND UNENFORCEABLE FOR ITS FAILURE TO DEFINE OR DELIMIT THE TERRITORIAL BOUNDARIES OF THE AGENCY'S JURISDICTION.

(1) Island Ranching Company has standing to raise the constitutional invalidity of the GSLA Act.

The rule is well settled that a private individual, who is injuriously affected by an enactment of the legislature, may directly attack its constitutionality. *Weber v. Palmer Bros.,* 270 U.S. 402, 46 S.Ct. 320, 70 L.Ed. 654. That is so because a legislative act which transcends constitutional limitations is void ab initio. As stated by this Court in *State ex rel Univ. of Utah v. Candland et al,* 36 Utah 406, 104 Pac. 285 (1909):

> "A legislative act which is in conflict with the Constitution is stillborn and of no force or effect — impotent alike to confer rights or to afford protection. This general doctrine is adopted by the courts generally and is the doctrine promulgated by the Supreme Court of the United States, as appears from the case of Norton v. Shelby County, 118 U.S. 442, 6 Sup. Ct. 1125 (30 L. Ed. 178), where Mr. Justice Field, in speaking for the court, says: 'An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.'"

While the interest of the individual litigant must be directly infringed by the statute in order that a constitutional attack upon it be justiciable, *Jackson v. City and County of Denver,* 109 Colo. 196, 124 P.2d 240 (1942), it is not open to question that the estate of a landowner whose property is sought to be condemned, satisfies that standard. *Illinois Dept. of Public Works v. Butler Co.,* 13 Ill. 2d 537, 150 N.E. 2d 124 (1958). In the nature of things, the condemnation action results in the devestiture of rights in rem held by the individual in the land.

The warranties of the due process clauses require not less than that such devestiture occur only if the statute, which sanctions the expropriation, is constitutionally adequate. Article I, Sec. VII, Utah Constitution; Amendment XIV, United States Constitution; *Dartmouth College v. Woodward,* 4 Wheat (U.S.) 518, 4 L.Ed. 629 (1819); *Hayes v. Port of Seattle,* 251 U.S. 233, 40 S.Ct. 125, 64 L. Ed. 234; *People of Cal. v. Skinner,* 18 Cal. 2d 349, 115 P.2d 488; *Nichols on Eminent Domain,* Vol. I, Page 442, Sec. 3.5. Accordingly, a landowner in eminent domain may attack the validity of the Act establishing the condemnor-agency. *Miller v. City of Tacoma,* 378 P.2d 464 (Wash. 1963).

Since the rights of the Appellant in its property have been placed in jeopardy by the Complaint of GSLA to condemn part of Antelope Island, the standing of Appellant to challenge the constitutionality of the Enabling Statute, 65-8-1 through 8, U.C.A. 1953, as amended, should be uncontested.

(2) **The Legislature did not specify the jurisdictional boundaries of GSLA under the Act.**

GSLA is a creature of the Legislature. Its power to act is one of delegation and limitation. Delegation in the sense that the responsibilities, assignments and functions stem from the Legislature. Limitation to the extent that the power of the Agency is confined to and restricted by the proscribed and enacted law. Its facilities are of a strictly derivative and not inherent or self-styled nature. *Piercy v. Civil Service Comm. of Salt*

Lake City, 116 Utah 135, 208 P.2d 1123 (1949). The principle is recorded in *Gouge v. David,* 185 Or. 437, 202 P.2d 489 (1949):

> "* * * A statute which creates an administrative agency and invests it with its power restricts it to the powers granted. The agency has no powers except those mentioned in the statute. It is the statute, not the agency, which directs what shall be done. That statute is not a mere outline of policy which the agency is at liberty to disregard or put into effect according to its own ideas of the public welfare. * * *". P. 498 of 202 P.2d.

Corollary to the doctrine that an administrative agency's power to act is measured by positive delegation from the legislature, is the rule that the statute under which the delegation is made, must particularly define the geographical limits of the agency's jurisdiction. *Konold v. Rio Grande W. Ry. Co.,* 16 Utah 151, 51 Pac. 256 (1897); *Rowell v. State Board of Agriculture,* 98 Utah 353, 99 P.2d 1 (1940). As an agency may not exercise substantive powers it does not possess, in parallel fashion it may not function extraterritorially beyond the reach of its land boundaries, *Pennsylvania Railroad Co. v. Board of Public Utility Commissioners,* 11 N.J. 43, 93 A. 2d 339 (1952), *Knight v. Younkin,* 61 Ida. 612, 105 P.2d 456, and an attempt to do otherwise is void from the beginning. *McGarry v. Industrial Comm. of Utah,* 64 Utah 592, 232 Pac. 1090, 39 A.L.R. 306 (1925).

The requirement that the territorial boundaries of the Agency's jurisdiction be charted, is satisfied only if

such specification is a product of statutory definition and not administrative assertion by the Agency, itself.

In *De Loutch v. Scheper,* 188 So. Car. 21, 198 S.E. 409 (1938) it was held:

> "Concededly, the Legislature cannot delegate to some administrative board the right to say what territory shall be included within a political subdivision, for this is a duty which is devolved by law upon it and one which it, and it alone, must exercise."

So vital to the core of the Enabling Statute is the requirement of territorial delimitation, that an Act which fails such requirement is constitutionally unenforceable. *De Loutch v. Scheper,* supra. In *Revne v. Utah Trading Comm.,* 113 Utah 155, 192 P. 2d 563 (1948), this Court struck down the Barber Control Act as an unconstitutional delegation of legislative power. One of the obstacles in the Act (the lack of territorial boundaries) was pointed out by the concurring opinion:

> "Another reason affecting the validity of the Act is that the Legislature has also failed to furnish adequate territorial limits or guides. * * *" (P. 176 of 113 Utah.)

An enabling statute which is not declarative of the agency's territorial boundaries is unconstitutional not only because of the uncertainty of the public body to act, but also because the individual is left guessing as to the nature of his rights under the enactment and its effect upon his property. Such lack of notice is violative of due process of law requirements. *State of Utah v. Packard,* 122 Utah 369, 250 P.2d 561 (1952). Thus, the Illinois

Supreme Court, in *McDougall v. Lueder,* 389 Ill. 141, 58 N.E. 2d 899 (1945), said:

> "We have repeatedly held that, to be valid, an Act may not be vague, indefinite and uncertain, but must be complete when it leaves the Legislature and be sufficiently explicit to advise everyone what his rights are under it and how he will be affected by its operation. * * *" (P. 906 of 58 N. E. 2d.)

So the question put to the Court in this Appeal is — whether the territorial boundaries of GSLA are adequately defined by the Act, 65-8-1 et seq., U.C.A. 1953, as amended.

At the outset, the obvious conclusion drawn from this legislation is that it does not have state-wide significance. Throughout the 9 Sections of the Act, the focus is somewhere near the geographical regions of Great Salt Lake, far short of state boundaries. But apart from that fact, a reading of the Act makes it crystal clear that the territorial boundaries of GSLA are totally absent. There is no declaration by meets and bounds, no established markers, monuments or geographical limits set out in any part of the Statute. The singular reference to territorial area in the Act is found in 65-8-1 and 6 of the Act. The former Section, having to do with membership of GSLA, provides that appointment shall be predicated upon "understanding of and interest in the Great Salt Lake and its environs." Under 65-8-6, Paragraph 8, it is provided that GSLA shall reserve revenues for the development and administration of "the Great Salt Lake and its environs." Neither of the Sections is of assistance

in determining the jurisdictional boundaries of GSLA. The phrase, "Great Salt Lake and its environs" appears but in connection with specific subject-matter, the first with GSLA membership and the latter with administration of revenues. The phrase is given a generic and indeterminant usage and is not a declaration of territorial limits.

Whether the coined phrase "Great Salt Lake and its environs" includes exposed but former lake bed lands, *islands,* beaches, tourist areas, arterial highways and the like is uncertain. The word "environs" is no litmus since that word implies only a meaning of surrounding influence and conditions. *U. S. v. Amadio,* 215 F. 2d 605 (7 Cir. 1954). Not once in the Statute has the Legislature come close to a definitive statement of the boundaries of GSLA. The latter is as wide or as narrow as the whims of the members of the Authority dictate from time to time.

(3) The jurisdictional boundaries of GSLA cannot, under the facts of this case, be resolved by reference to the title of the Act.

It was argued by GSLA before the trial Court that the defect in the Statute to define the geographical boundaries of GSLA was really no defect at all, because it was said, the title to the Act clearly describes the territorial limits and for constitutional purposes, supplies any statutory deficiency.

That Title, as found in the Laws of Utah 1963, provides:

"GREAT SALT LAKE AUTHORITY

An Act Relating to the Development of All of the Mainland, Islands, Minerals and Water

> Within the Great Salt Lake Meander Line Established by the United States Surveyor General; Providing for the Creation of the Great Salt Lake Authority to Formulate and Execute a Program for Such Development and Appropriating $200,000 from the General Fund to the Great Salt Lake Authority." Laws of Utah 1963, Ch. 161, P. 566.

It was thus claimed that the territorial boundary of the Agency was the meander line as established by the U.S. Surveyor General.

There are several reasons why the contention of GSLA in this regard cannot stand. Foremost, is the fact that the meander line is mentioned in the body of the Statute but once, and only then in connection with the division of operational revenues. 65-8-6, Paragraph 8. The thrust of that Paragraph relates wholly to intramural activities of the Agency. Its use in the Statute is plainly non-jurisdictional.

Secondly, is the fact that Section 65-8-6 of the Act makes it quite clear that the meander line was not intended as a boundary line. Rather, as set forth in Paragraph 8 thereof, it is merely a reference point, within or without which "the Great Salt Lake and its environs" might fluctuate:

> "The Authority shall not receive revenues which accrue * * * from mineral leases * * * within the Great Salt Lake Meander Line established by the United States Surveyor General. All other revenues, including such amounts as may be made available by the legislature shall be reserved and used in the development and administration *of the*

> *Great Salt Lake and its environs by the Authority.*" 65-8-6, Para. 8. (Emphasis ours)

The Paragraph, in its larger context, indicates that the meander line is but a part of the "Great Salt Lake and its environs." If it were the legislative intent that the meander line, so-called, was to be the jurisdictional boundary, specific reference to it in Paragraph 8 above was completely unnecessary. In that event, the Paragraph, as in other segments of the Act, would have provided that mineral revenues, from lands within the "boundaries of jurisdiction," would accrue to the State Land Board.

Thirdly, is the long accepted rule that jurisdictional and constitutional requirements of a statute must be found in the substantive legislation and not in the title. *Chabre v. Page,* 298 Mich. 278, 299 N.W. 82 (1941); *King v. King,* 193 Misc. 750, 85 N.Y.S. 2d 563 (1948); *Donahue v. Warner Bros. Picture Dist. Corp.,* 2 U. 2d 256, 272 P. 2d 177 (1954). The latter is but a prologue, an expression of purpose, an accessory to the Act. As declared by the Arizona Court in *Maricopa Co. v. La Prade,* 45 Ariz. 61, 40 P. 2d 94 (1945):

> "* * * It is the body, and not the title, which determines whether the act is within the call for, after all, the body is the true legislation; the title and enacting clause being merely necessary accessories thereto. * * *" (P. 98 of 40 P. 2d.)

Reference to a title may be made only to remove a latent ambiguity in the statute, itself. *Donahue v. Warner Bros. Picture Dist. Corp.,* 2 U. 2d 256, 272 P. 2d 177

(1954); *Brotherhood of R. R. Trainmen v. G. & O. R. Co.,* 331 U. S. 519, 91 L. Ed. 1646 (1946). It cannot be used to supply constitutional vitality to a Statute which is otherwise deficient. A contrary conclusion would entail a finding that the title is a part of the statutory law, a result which is clearly not the rule of the case.

Even were it concluded that resort may be had to the title of the GSLA Act to determine the territorial boundaries, it is patent under the facts of this suit, that such does not cure the constitutional inadequacy. The title of the GSLA Act refers to the development of properties and water "within the Great Salt Lake *meander line* established by the United States Surveyor General". This Court may and will take judicial notice of official acts of the U. S. Surveyor General in the establishment of a meander line on the Great Salt Lake. 75-25-1 (3), U.C.A. 1953. It is an established fact that the United States Surveyor had not, at the date of passage of the GSLA Act or has he since, made a final or completed survey or meander of the Great Salt Lake. The Attorney General of Utah himself, has acknowledged the accuracy of the point. *Statement of Attorney General,* Hearing of U. S. Senate Committee on Interior and Insular Affairs, Subcommittee on Public Lands, March 17, 1965, Page 20. Since the survey is not final or completed, there can be no final or complete territorial boundaries of GSLA under the Act, even with resort to the title.

Under the limits of the Statute, the scope of activity of this Agency could run to Cache County on the north,

Uintah Basin on the east, and St. George City on the south, just as well as to Antelope Island, all dependent upon how large a circle was selected by the Authority as its measuring stick. Because of that fact and the inability of Appellant to determine the nature of its rights under the Statute, 65-8-1 et seq. is constitutionally unenforceable.

POINT III

THE GSLA ACT IS CONSTITUTIONALLY INVALID BECAUSE OF UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY AND STANDARDS.

The decisional law of this Court is firm that an administrative statute, to be constitutionally sustained, must reasonably identify and circumscribe the powers, duties, and responsibilities of the government agency, as well as the regulatory standards under which it is to operate. *Nowers v. Oakden,* 110 Utah 25, 169 P. 2d 108 (1946); *McGrew v. Industrial Commission of Utah,* 96 Utah 203, 85 P. 2d 608 (1938). In *State of Utah v. Packard,* 122 Utah 369, 250 P. 2d 561 (1952), this court quoted with approval *Connally v. General Construction Co.,* 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322, wherein it was said:

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." (P. 374 of 122 Utah.)

The determined powers, functions and standards must be those of the legislature and not the administrative body. The latter may do only what the statute authorizes be done. *Piercey v. Civil Service Comm. of Salt Lake City,* 116 Utah 135, 208 P. 2d 1123 (1949). If the statute is uncertain in the regulatory standards to be employed or in the powers granted and leaves to the Agency the determination of the same, the statute must fall, for it is settled beyond argument that the legislature may not delegate to an administrative body authority to determine either the powers to be exercised or the standard of operation. As stated by this Court in *Rowell v. State Board of Agriculture,* 98 Utah 353, 99 P. 2d 1 (1940):

> "That the legislature may not surrender or delegate its legislative power is elemental. * * * But in the delegation of such authority, the legislature must clearly mark the course to be pursued, and the principles, facts, and purposes to serve as guide posts to enable the officer to *carry out, not his own will or judgment but that of the legislature."* (P. 358 of 98 Utah.)

The law does not require that the legislative act define in infinite detail the agency's power and regulatory criteria. *McGrew v. Industrial Comm. of Utah,* supra. What is necessary is that there be in the enactment a statement of functions having ascertainable limitations and bounds, so that the statute does not become a mere expression of desirable legislative policy. As set forth in *State of Kansas v. Hines,* 163 Kan. 300, 182 P. 2d 865 (1947):

> "Mr. Chief Justice Hughes has stated that the power must be limited by boundaries, circumscribing the limitation upon that power. Standards are difficult to define because of the variable nature thereof. They have been referred to as conditions, restrictions, limitations, yardsticks, guides, rules, broad outlines and similar synonymous expressions hereinafter set forth. It has been held that in the creation of administrative tribunals the power given them must be "canalized" so that the exercise of the delegated power must be restrained by banks in a definitely defined channel. Ordinarily the standards must be sufficiently fixed and determined so that in considering whether a section of a statute is complete or incomplete the test is whether the provision is sufficiently definite and certain to enable one reading it to know his rights, obligations and limitations thereunder. For present purposes it may be said that a standard is a definite plan or pattern into which the essential facts must be found to fit before specified section is authorized." (P. 872 of 182 P. 2d.)

The GSLA Act is a legislative hodge-podge, a Statute whose disciplines are dependent largely upon the Agency's own notions of the public welfare and of its periphery of operation. As already noted in Point II of this Brief (Pages 5-15), the Act is deficient in a primary requirement, the declaration of territorial boundaries of GSLA.

There is more to the argument of unconstitutional delegation. Under Paragraph 3 of 65-8-6, GSLA is given authority to define, by regulation, its power and jurisdiction over fish and game as between it and the State

Department of Fish and Game. In part, Paragraph 3 provides:

> "The state department of fish and game shall retain the power and jurisdiction conferred upon it within the boundaries of jurisdiction of the Authority with reference to fish and game, *subject to such reasonable rules and regulations as the Authority may make* to insure the accomplishment of the objectives and purposes of this act." (65-8-6, Para. 3). (Emphasis added.)

Under this Section, GSLA may, by unilateral action, fix, prescribe or change its powers and responsibilities (and parenthetically, the powers of the Department of Fish and Game) on fish and game matters, to the detriment and uncertainty of Appellant in its property and surrounding waters.

Paragraph 4 of 65-8-6 presents a pitfall of the same nature. Therein, the State Land Board retains "authority to manage state lands *subject to reasonable rules and regulations* as the Authority may make to insure the objectives and purposes" of the Act. Under this Paragraph, GSLA may, at its pleasure, administratively extend or contract its jurisdiction over the management of state lands, vis-a-vis the functions of the State Land Board and private parties under license, lease or contract with the Land Board. The Appellant is never safe in its dealings with the Land Board for the lease, occupancy or use of state land, because under Paragraph 4 of 65-8-6, it is eternally subject to a shifting set of rules and regulations issued by an independent agency, GSLA.

The delegations of authority conferred under both Paragraphs 3 and 4 of the Section are void, for they leave to the Agency the definition of its jurisdiction as to which a particular set of facts may fit. *Krebs v. Thompson, Director,* 387 Ill. 471, 56 N. E. 2d 761 (1944).

The Act delegates to GSLA power to "determine the policies and develop the program * * * to accomplish the objective and purposes" of the Law. 65-8-4 & 5, U.C.A. 1953, as amended. The latitude of operation permitted under this statement is carte blanche. Such delegation is invalid, for although the Agency is to have some discretion in the execution of statutory standards, those standards are of a legislative and not an administrative character. *County of Alpine v. County of Tuolumne,* 49 C. 2d 787, 322 P. 2d 449 (1958).

Furthermore, while the Act, in several parts, makes reference to its "objectives and purposes," it is, in fact, silent as to what those objectives and purposes are. Viewed in its best light, the Act is merely suggestive of the objectives which might be obtained. Under 65-8-6, Paragraph 5, the Agency is to coordinate multiple use of property "for such purposes" as grazing, fish and game, mineral removal, development of water, industrial resources and "other uses". In no sense is the Statute directive. It provides only a cue as to several of many courses of action which the Agency may or may not pursue. Under the Rule in *State v. Hines,* 163 Kan. 300, 182 P. 2d 865 (1947), such uncontrolled power cannot be constitutionally vested in an administrative board:

> "We can be certain of one test — a legislative fiat which provides that an administrative agency shall consider the elements which might affect legislation and then act as it sees fit — does not fix a standard." (P. 872 of 182 P. 2d.)

In contrast, a review of the enabling statutes of other administrative agencies of Utah pointedly illustrates the delegation problem inherent in the GSLA Act. See duties and powers of Utah State Road Commission, 27-12-8, U.C.A. 1953, as amended; Utah Fish and Game Department, 23-1-1- and 14, U.C.A., 1953; and State Land Board, 65-1-14, U.C.A. 1953. The powers and responsibilities of those agencies are precisely defined.

Island Ranching Company is unable to ascertain its rights and those of GSLA under the Act.

The nature of Appellant's objection to the GSLA Act is not academic. It rests, as in Point II herein, on the ground that the lack of standards (jurisdictional, territorial, and regulatory) in the Law affords no notice and renders ISLAND RANCHING COMPANY incapable of determining its rights as a property owner thereunder or the power of GSLA to affect those rights. Does Antelope Island lie within the territorial boundaries of GSLA? Is GSLA lawfully empowered to condemn the Island, or parts of it? Does GSLA or the State Land Board have the power to control state lands adjunct to Antelope Island, and the lease, use and development thereof by Appellant? The answers to these questions are open game under the Statute. They are not in the GSLA Law as they necessarily must be. The Act should accordingly

be declared unconstitutional as in violation of Appellant's right to due process of law as guaranteed by Article I, Section VII, Utah Constitution and Amendments XIV, United States Constitution.

POINT IV

THE ENABLING ACT DOES NOT GRANT TO GSLA POWER TO ACQUIRE ANTELOPE ISLAND (or any part thereof) BY EMINENT DOMAIN.

(1) The Statute empowers GSLA to acquire the Island by voluntary and consensual means only.

If this Court upholds the GSLA Act as constitutionally enforceable, against the arguments advanced by Appellant in Points II and III herein, the issue whether the Agency has been granted the power to condemn the Company's property, Antelope Island, must yet be resolved. The key to that question lies in the Act, itself. 65-8-6, Paragraph 10, U.C.A. 1953, as amended, is specific as to the manner in which GSLA may acquire or obtain Antelope Island:

> "The Authority is authorized to take any steps that are necessary to secure such part of Antelope Island by donation, purchase agreement, lease, or other lawful means * * *." (Paragraph 10 of 65-8-6.)

The phrase "donation, purchase agreement, lease or other lawful means" is decisive for it sets the sole standard by which GSLA's power to acquire Antelope Island is measured. Several methods are prescribed to obtain the land. The Agency may accept a *donation,* either inter vivos or testamentary. The Island, or parts,

may be obtained through *purchase agreement* which conceivably would encompass a contract sale, a land exchange or a combination thereof. A possessory estate may be acquired by *lease,* inferentially, under mutually acceptable terms and conditions.*

The means of acquisition are common in one regard. Each and all require a voluntary transfer from the property owner to GSLA, a transfer which is based upon an agreement of the parties and in all respects demands acquiescence and consent of Island Ranching Company. By definition, the power to condemn Antelope Island has not been granted, for a taking through involuntary means is excluded. Paragraph 10 of 65-8-6 is the only segment of the law specifically concerned with the acquisition of Antelope Island.

Nor does GSLA have a natural right or power to condemn the Island. As to the State of Utah, eminent domain is a right inherent in sovereignty, the exercise of which is not dependent upon constitutional grace. *Bauer v. County of Ventura,* 45 C. 2d 276, 289 P. 2d 1 (1955); *Liddick v. City of Council Bluffs,* 232 Iowa 197, 5 N. W. 2d 361 (1942). The capacity of GSLA, as an administrative arm of the State to condemn private property rests, however, on far different grounds. Its authority to condemn is not a matter of right, but a power which is operative only through a specific delegation and grant from the legislature. *Nichols on Eminent Domain,* Vol. I, Page 314, Section 3.2 states the rule:

*The words "or other lawful means" in Paragraph 10 will be treated in Sub-paragraph 2 of this Point.

> "The right to authorize the exercise of eminent domain is legislative, and there can be no taking of private property for public use without the consent of the owner and in the absence of direct authority from the Legislature. The power of eminent domain lies dormant until legislative action is had, pointing out the occasions, modes, agencies, and conditions for its exercise." (P. 314 of 1 Nichols on Eminent Domain.)

The rule that the powers, functions, and jurisdiction of an administrative agency are confined to and limited by statutory grant, *Piercey v. Civil Service Comm. of Salt Lake City,* 116 Utah 135, 208 P. 2d 1123 (1949), is of particular significance in the delegation of eminent domain power. That is so because the power requires an express grant of the legislature, is never implied, and is strictly construed against the agency seeking to exercise the same. *Bertagnoli v. Baker,* et al., 117 Utah 348, 215 P. 2d 626 (1950); *Moyle et al v. Salt Lake City,* 111 Utah 201, 176 P. 2d 882 (1947). In *Bertagnoli,* the Salt Lake City Board of Education sought to condemn property, a part of which was contiguous to but without the Board's territorial limits. The Board had been granted, by statute, power to condemn for school building sites, but the law was silent on the matter of extra-territorial condenmation. The Board argued that the power of eminent domain had been granted expressly, and that together with its implied powers, gave to it a constructive right to condemn extraterritorially. In rejecting the claim of the Board to condemn, this Court recognized the Board was of limited authority:

> "In previous decisions of this court we have recognized that boards of education are public municipal corporations; that their powers are purely statutory; * * * Also, that the boards of education have only such powers as are expressly conferred upon them and such implied powers as are necessary to execute and carry into effect their express powers. Chamberlain v. Watters, 10 Utah 298, 37 P. 566; Beard v. Board of Education, 81 Utah 51, 16 P. 2d 900. Thus we must examine the statutes of this state to determine the extent of the authority given to boards of education to condemn land for proper purposes." (P. 627 of 215 P. 2d.)

This Court went on to say that the power of eminent domain is antithetic to private ownership of property and consequently, is exercisable only when expressly authorized by Statute:

> "When the power of eminent domain is given by statute, it is a well settled principle of law amply supported by cases from many jurisdictions in this country, that the extent to which the power may be exercised is limited to the express terms and clear implication of the statute. (Citing authorities) * * * The right of eminent domain, being in derogation of the rights of individual ownership in property, has been strictly construed by the courts so that no person will be wrongfully deprived of the use and enjoyment of his property. (Citing authorities) * * * " (P. 628 of 215 P. 2d.)

The decision of the Court dismissed the suggestion that eminent domain could be constructively implied from general legislation:

> "Thus it follows that the authority contended for by the School Board not having been expressly given and not being clearly inferable from our statutes, must be denied it. Under the authorities on this subject, power cannot be derived from the doubtful inferences which support the School Board's claim of authority." (P. 630 of 215 P. 2d.)

The concurring opinion in *Bertagnoli* emphasizes the harshness of eminent domain and that its employment is to be narrowly limited:

> "I believe it well to emphasize the concept that the right to condemn property is in derogation of common rights and permits the taking away from a land-owner the property he desires to retain. A man's home may be taken by the state or one of its political subdivisions if the governing body believes it necessary for a public purpose. This is a drastic method of taking when considered from the viewpoint of the person whose property is condemned. Accordingly, we must jealously guard the individual's rights and not infer the authority unless the express purpose of the legislation demands that the power be vested in the school board." (P. 630 of 215 P. 2d.)

In *Moyle et al v. Salt Lake City,* 111 Utah 201, 176 P. 2d 882 (1947), the eminent domain power was described as arbitrary, the application of which should be guarded. This Court remarked:

> "The right of eminent domain is an arbitrary power and so the construction has limited, confined and guarded the exercise of the right. * * *" (P. 206 of 11 Utah.)

The doctrine of strict construction is established as the rule of law throughout the several states. In *Beth Medrosh Hagodol v. City of Aurora,* 126 Colo. 267, 248 P. 2d 732 (1952), it was held that the power to expropriate private property must clearly appear by legislative grant:

> "By necessary implication, above mentioned, vague or doubtful language must be excluded. It follows that if there is doubt, then there has been no grant of such power by the State. . . . The power is specifically and unequivocally granted, or it is withheld." (P. 735 of 248 P. 2d.)

The Washington Supreme Court in *State of Washington v. Superior Court, et al.,* 19 Wash. 2d 791, 144 P. 2d 916 (1944), was of the same judgment:

> "The right to exercise the power of eminent domain is one of the highest powers exercised by the sovereign. This right will not be implied, nor will it be extended beyond express statutory authority. The law is clearly stated in 1 Lewis on Eminent Domain, 3d Ed., p. 679, §371, as follows: 'The exercise of the power being against common right, it cannot be implied or inferred from vague or doubtful language, but must be given in express terms or by necessary implication. *When the right to exercise the power can only be made out by argument and inference, it does not exist. "There must be no effort to prove the existence of such high corporate right, else it is in doubt, and, if so, the state has not granted it."* If the act is silent on the subject, and the powers given by it can be exercised without resort to condemnation, it is presumed that the legislature intended that the necessary property should be acquired by con-

> tract.' And p. 708, §388: 'All grants of power by the government are to be strictly construed, and this is especially true with respect to the power of eminent domain, which is more harsh and peremptory in its exercise and operation than any other.'" (P. 920 of 144 P. 2d.) (Emphasis ours.)

If, under the statute, doubt exists as to the power to condemn, the finding must be against the agency seeking its use. As applied in the immediate case, the foregoing authorities hold that since Paragraph 10 of 65-8-6 fails to specifically grant to GSLA the power to condemn Antelope Island, the acquisition of Appellant's property is limited to donation, purchase agreement and lease, modes all requiring the acquiescence of the property owner. This is the net result unless the Court determines that the phrase "or other lawful means," as used in Paragraph 10 constitutes an adequate grant of eminent domain power.

(2) The words "or other lawful means" following the phrase "by donation, purchase agreement, lease" in Paragraph 10 of 65-8-6 do not constitute a grant of eminent domain power to GSLA.

The modifying clause "or other lawful means" in Paragraph 10 cannot bestow upon GSLA the power to condemn Antelope Island. Since eminent domain requires a specific commission from the legislature, and since that has not been granted GSLA herein, the phrase contains no formula for an exercise of the power. To hold otherwise is to advocate a rule of "condemnation by statutory

implication," an argument thoroughly repudiated in *Bertagnoli v. Baker,* (Utah) supra.

The true meaning of the phrase "or other lawful means" in Paragraph 10, is not clear. Whether standing alone or as a part of the larger paragraph, its use is both ambiguous and indeterminate. Under such conditions, it is necessary as well as appropriate that resort be had to accepted canons of statutory construction to remove the ambiguity and uncertainty. *In Re Stevens' Estate,* 102 Utah 255, 130 P. 2d 85 (1942); *Salt Lake Union Stockyards v. State Tax Comm. et al.,* 93 Utah 166, 71 P. 2d 538 (1937).

Ejusdum Generis — Thing of Same Kind or Class.

This Court has employed ejusdum generis in a host of cases to resolve legislative uncertainty. *Memorial Gardens of the Valley v. Love,* 5 U. 2d 270, 300 P. 2d 628 (1956); *Donahue v. Warner Bros. Picture Distributing Co.,* 2 U. 2d 256, 272 P. 2d 177 (1954); *Hansen v. Board of Education of Emery County School District,* 100 Utah 15, 116 P. 2d 936 (1941). Typical is the statement in *Stone v. Salt Lake City,* 11 U. 2d 196, 356 P. 2d 631 (1960) wherein this Court said:

> "The familiar and universally recognized rule is that general terms following specific terms are interpreted to mean things of like character." (P. 204 of 11 U. 2d.)

As applied herein, the phrase "or other lawful means" refers to methods of acquiring Antelope Island of like stature and rank as those set out immediately

preceding in Paragraph 10 of 65-8-6, i.e., *donation, purchase agreement,* and *lease.* It complements the existent means of voluntary acquisition but does not add a new class permitting an involuntary appropriation.

The use of this constructive aid is sound. If the Legislature had intended that the words "or other lawful means" should be interpreted in an unlimited sense (to include eminent domain), it would have provided that: [* * * The Authority is authorized to secure such part of Antelope Island by all lawful means.] As it stands, no function is served by the words "donation, purchase agreement, and lease" in Paragraph 10, unless by such, the legislative intent was to establish a particular type or class of acquisition procedures. Thus, in the case of *In Re Bush Terminal Co.,* 93 F. 2d 659 (2 C. A. 1938), wherein the clause "oil, gas, gasoline and other combustibles" was under examination, it was determined that the phrase did not include coal because:

> "* * * if the Legislature had intended the general words to be used in their unrestricted sense, it would have made no mention of the particular classes." (P. 606 of 93 F. 2d.)

See also *Southern Ry. Co. v. Columbia Congress* Co., 280 Fed. 344 (4 C.A. 1922) where it was said:

> "The words 'other or any other,' following an enumeration of particular classes, are therefore to be read as 'other such like,' and to include only others of like kind of character." (P. 348 of 280. Fed.)

A case, whose facts are closely allied to those before this Court is *Lorenz, et al., v. Campbell, et al.,* 110 Vt. ....., 3 A. 2d 548 (1939). There, the Vermont Court had before it for interpretation a statute authorizing plaintiff to condemn property for the "erection of a soldier's monument or for other public purpose." The Town Authority, under such enactment, attempted to condemn land for a public park. Applying ejusdum generis, it was held that the phrase "other public purpose" was restricted to the acquisition of property approximating the same size as that to be used for a soldier's monument.

> "In P. L. Section 3562, the statute which we are considering, the words 'for the erection of a soldier's monument' are followed by words of a more general meaning, namely, 'or for other public purpose.'
>
> "It is a rule of construction that when words of a particular description are followed by words of general import the latter can be held to include only things similar in character to those specially named."

Expressio unius est exclusio alterius — to enumerate is to exclude.

Equally approved in this jurisdiction is the construction maxim that a specification of things or powers in a statute eliminates all other things or powers not so specified. This Court relied on the canon in *Rapid Transit Co. v. Ogden City, et al.,* 89 Utah 546, 58 P. 2d. 1 (1936). The question before the Court was whether Ogden City had been granted, by statute, power to op-

erate a bus system. The statute under reading gave the City authority to maintain a street railway. Noting that both street railways and motor buses were in common usage at the time the law was enacted, this Court found the power to be lacking and in so doing stated:

> "Many reasons might be suggested why the Legislature confined the grant of power to the use and operation of street railways, but to do so would be mere speculation. Whatever reasons the lawmaking power my have had in mind is no concern to the courts whose duty it is to give effect to the language used according to its fair import. It is one of the well recognized canons of statutory construction that when a statute directs a thing may be done by a specified means or in a particular manner it may not be done by other means or in a different manner. The familiar maxim *expressio unius est exclusio alterius* is especially applicable in the construction of a statute." (P. 551 of 89 Utah.)

The case of *Village of Walthill v. Iowa Electric Light and Power Co.*, 125 F. Supp. 859 (D. Neb. 1954) is of value because of its likeness of facts and rationale. Therein, the Village attempted to condemn defendant's gas distribution system for municipal use. The law of Nebraska empowered the Village to condemn for a gas plant and also provided that the Village should have power to take private property "for any other public purpose." It was decisioned that eminent domain is strictly construed against the condemnor, that a gas plant was not within the framework of a gas distribution system, that the statute by enumerating a gas plant, excluded therefrom

the power to condemn for other gas facilities and lastly, that the phrase, "any other public purpose" was limited to the class particularly set out. It was said:

> "The power of eminent domain is conferred by statute in derogation of the common law, and the statutes conferring the power should be construed strictly in favor of the landowner. (P. 863 of 125 F. Supp.)
>
> * * * *
>
> "It is true that the words 'for any other public purpose' appearing in the above statute are broad enough to encompass the purpose of distributing gas. However, these general terms are preceded by a specific enumeration of public purpose property, namely, market houses, market places and parks. Under the doctrine of ejusdum generis, the general term 'any other public purpose' must be limited to those purposes of the same general nature or class as the ones enumerated, to wit, market houses, market places and parks. * * * A gas distribution system would not seem to be the same general nature as a market place or park.
>
> "It is interesting to note that the legislature, by the same statute quoted above, vested the villages with power to condemn for the purpose of 'establishing or operating *power plants*' to supply the villages with public utility service. *However, no express authority is given to condemn for the purpose of operating a distributing system only; and under the doctrine of expressio unius est exclusio alterius, no such authority should be implied.*"

The particular methods of acquisition having been enumerated in Paragraph 10 of 65-8-6, the rule of con-

struction, expressio unius est exclusio alterius, excludes other methods (eminent domain).

Admittedly, the canons of construction discussed in this Point are not indelible. They are, rather, tools of construction to aid in the interpretation of ambiguous legislation. Mr. Justice Holmes referred to them as "axioms of experience." *Boston Sand & Gravel Co. v. United States,* 278 U. S. 41, 49 S. Ct. 52, 73 L. Ed. 170 (1928). However, both axioms are logical and conventional, are accepted at the common law, 68-3-1, U.C.A. 1953, and by this Court, and both have application to the Statute under consideration. Simply put, they warrant a finding that the Statute empowers GSLA to acquire Antelope Island by donation, purchase agreement, lease or by any other means of like class and nature, none of which encompasses eminent domain.

(3) The "special" paragraph (10) in 65-8-6, U.C.A. pertaining to Antelope Island, takes precedence over and controls the "general" paragraph (1) of that Section respecting the power of eminent domain.

There is no contest that under Paragraph 1 of 65-8-6, U.C.A. 1953, as amended, GSLA is accorded the power to condemn property, in general. That Paragraph provides in part:

> "The Authority shall have power * * * to acquire real and personal property * * * by all legal and proper means, including purchases, gifts, devise, eminent domain, lease, exchange * * *."

It is the contention of GSLA that such grant is adequate for the condemnation of Antelope Island — the argument being that since all parts of a statute should be read in pari materia, the delegation of eminent domain power in the general paragraph (1) has application to and invades the language of the special paragraph (10), the latter particularly touching upon the means of acquiring Appellant's land, Antelope Island. The issue thus drawn is whether a general grant of eminent domain power in a statute is controlled and limited by a subsequent or later reference in the same act to special powers and means of acquiring particular property. The question is to be answered in the affirmative.

That a general power in an act is controlled and limited by a subsequent reference to special powers affecting particular subject matter is supported by the great weight of authority. In *State ex rel. Public Service Comm. v. Southern Pacific R. R. Co.,* 95 Utah 84, 79 P. 2d 25 (1938), this Court, mindful that all parts of a statute are to be interpreted in relation to each other, determined that a special provision in an enactment was restrictive of a general power otherwise given therein. This Court, through Folland C. J., said:

> "Counsel for the State Tax Commission argues that we should read together and harmonize Section 3 and 11 of article 13 of the Constitution, amended in 1930, and that by so doing we can sustain the constitutionality of chapters 87 and 100, Laws of Utah 1937, on the theory that the State Tax Commission may exercise the power to assess until the Legislature prescribes regula-

tions which shall control the commision's discretion in the matter. Of course the two sections must be read together and a definite meaning attached to each. *The rule, however, is that, where there is a general provision and a specific one, the specific must be given full effect.* 11 Am. Jur. 663. This rule of statutory construction was upheld in Salt Lake City v. Salt Lake County, 60 Utah 423, 209 P. 207, wherein it was said (page 208):

> *'Further, it is an elementary doctrine that,* where two statutes treat of the same subject-matter, the one general and the other special in its provisions, *the special provisions control the general.* State ex rel. Morck v. White, 41 Utah 480, 126 P. 330; Nelden v. Clark, 20 Utah 382, 59 P. 524, 77 Am. St. Rep. 917; University of Utah v. Richards, 20 Utah 457, 59 P. 96, 77 Am. St. Rep. 928; Crane vs. Reeder, 22 Mich. 322.'" (P. 111 of 95 Utah.)

In *Rolls v. State of California,* 19 C. 2d 713, 123 P. 2d 505, (1942), the California Supreme Court stated the doctrine well:

> "It is well settled, also, that a general provision is controlled by one that is special, the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject, as against the general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates." (P. 512 of 123 P. 2d.)

To the same effect, see also *Bilyeu v. State Employees Retirement System,* 58 C. 2d 618, 25 Cal. Rptr.

562 (1962); *Sakrison v. Pierce,* 66 Ariz. 162, 185 P. 2d 528 (1947); *Woods v. Spoturno,* 183 Atl. 319 (Del. 1936).

While GSLA has, therefore, the power to condemn under the general Paragraph 65-8-6 (1), it does not have the power with respect to Antelope Island, because the special Paragraph, 65-8-6 (10) excludes eminent domain as a means of acquisition. The two Paragraphs, when read together, are productive of no other construction. Both are saved and neither is rendered meaningless.

If the Legislature had intended that GSLA was to have the power to condemn Antelope Island, it would have provided so in one of two ways:

> 1. Paragraph 10 of 65-8-6 would have stated that [The Authority is authorized * * * to secure * * * Antelope Island by donation, purchase agreement, lease, eminent domain, etc.]; or
>
> 2. Paragraph 10 would have omitted all reference to means of acquiring Antelope Island. In such event, the manner of acquisition would have been determined by the general clause in Paragraph 1 of 65-8-6.

The fact is that the Legislature failed to adopt either alternative although both were obvious. What was provided is that GSLA may acquire Antelope Island by donation, purchase agreement, lease and other lawful means requiring a voluntary and consensual transaction. To read the general language in Paragraph 1 of 65-8-6 into the specific clause in Paragraph 10 dealing with Antelope Island is to emasculate the latter along with most canons of statutory construction.

POINT V

THE JUDICIAL FUNCTION IS TO INTERPRET THE STATUTE, AS IS, AND NOT TO ENLARGE UPON IT.

The difficulties with the GSLA Act are neither fanciful nor illusory. They are inherent in the very essence of the Statute. The Act is without a pronouncement of territorial boundaries. There is a substantial dearth of legislative standards, of proscribed responsibilities and regulatory guides. GSLA may pretty well do as it desires, for its authority is undefined. The trouble with that is that under such an Act, Appellant is denied notice as to its rights and liabilities and in that regard, whether attempted conduct of GSLA is statutorily licensed. While the powers and standards of the Agency under the Statute must necessarily allow for discretionary and administrative action, they must have their limits or the due process clause is gone. Those limits have been far exceeded in this Act.

The constituitional rights of Appellant to be secure in its property against unlawful expropriation is on the line in Paragraph 10 of 65-8-6. The import of that Section is plain — the means of acquiring Antelope Island are voluntary and consensual and are exclusive of the power of eminent domain.

In determining the questions thus posed, the processes of this Court are interpretative, not legislative. The constitutionality of the Act and the power of GSLA to condemn Antelope Island are judged not by those

policies which now seem wise, not by the factors which should have been but were not placed in the Law, and not by what the Legislature could have done but did not do; but upon, what, in fact, the Statute says. To explore the latter is the task of this Court. On the subject of judicial restraint, the late Mr. Justice Frankfurter had a few words of caution for the bench and bar:

> "Even within their area of choice, the courts are not at large. They are confined by the nature and scope of the judicial function in its particular exercise in the field of interpretation. * * * As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethern of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation.
>
> * * * *
>
> "This duty of restraint, this humility of function as merely the translator of another's command, is a constant theme of our Justices. It is on the lips of all judges, but seldom, I venture to believe, has the restraint which it expresses, or the duty which it enjoins, been observed with so consistent a realization that its observance depends on self-conscious discipline. Cardozo put it this way: 'We do not pause to consider whether a

statute differently conceived and framed would yield results more consonant with fairness and reason. We take this statute as we find it.' It was expressed more fully by Mr. Justice Brandeis when the temptation to give what might be called a more liberal interpretation could not have been wanting. 'The particularization and detail with which the scope of each provision, the amount of the tax thereby imposed, and the incidence of the tax, were specified, preclude an extension of any provision by implication to any other subject. . . . What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertance, may be included within its scope.' An omission at the time of enactment, whether careless or calculated, cannot be judicially supplied however much later wisdom may recommend the inclusion.

* * * *

"The difficulty in many instances where a problem of meaning arises is that the enactment was not directed towards the troubling question. The problem might then be stated, as once it was by Mr. Justice Cardozo, 'which choice is it the more likely that Congress would have made?' While in its context the significance and limitations of this question are clear, thus to frame the question too often tempts inquiry into the subjective and might seem to warrant the court in giving answers based on an unmanifested legislative state of mind. But the purpose which a court must effectuate is not that which Congress should have enacted, or would have. It is that which it did enact, however inaptly, because it may fairly be said to be imbedded in the statute, even if a specific manifestation was not thought of, as

is often the very reason for casting a statute in very general terms." Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. Law Rev. 527 (1947).

The jurist finished by saying:

> "But there are more fundamental objections to loose judicial reading. In a democracy the legislative impulse and its expression should come from those popularly chosen to legislate, and equipped to devise policy, as courts are not. The pressure on legislatures is to discharge their responsibility with care, understanding and imagination should be stiffened, not relaxed. Above all, they must not be encouraged in irresponsible or undisciplined use of language. * * * Their responsibility is discharged ultimately by words. They are under a special duty therefore to observe that 'Exactness in the use of words is the basis of all serious thinking. You will get nowhere without it. * * * You must master the use of them, or you will wander forever guessing at the mercy of mere impulse and unrecognized assumptions and arbitrary associations, carried away with every wind of doctrine.'" Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. Law Rev. 527 (1947); Allen, *Essay on Jeremy Bentham,* The Social and Political Ideas of the Revolutionary Era, 181, 199 (Hearnshaw Ed. 1931).

Frankfurter's reflections are in point in the consideration of the Act herein.

CONCLUSION

The GSLA Act is constitutionally unenforceable for its failure to define the jurisdictional boundaries. It denies to Appellant due process of law as secured by State and Federal Constitution. In all events, the Act does not grant to GSLA the power to condemn Antelope Island or its parts.

The Order of the trial Court denying Appellant's Motion to dismiss should be reversed and the case remanded with instructions to dismiss the Respondent's Complaint.

Respectfully Submitted,

ROBERT S. CAMPBELL, JR.
of and for
PARSONS, BEHLE, EVANS & LATIMER
520 Kearns Building
Salt Lake City, Utah
Attorneys for Appellants