Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs

2001

Great Salt Lake Authority v. Island Ranching Company : Petition for Rehearing

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2

 Part of the Law Commons

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
Phil L Hanson; Attorney General; Attorneys for Respondent.
George W Latimer; Robert S Campbell; Parsons, Behle, Evans & Latimer; Attorney for Appellant.

Recommended Citation
Legal Brief, *Great Salt Lake Authority v. Island Ranching Company*, No. 10395.00 (Utah Supreme Court, 2001).
https://digitalcommons.law.byu.edu/byu_sc2/679

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

MENT UTAH SUPREME COURT
BRIEF
T NO. 10395 A-PR

SUPREME COURT
OF THE
STATE OF UTAH

GREAT SALT LAKE AUTHORITY,
Plaintiff and Respondent,

v.

ISLAND RANCHING COMPANY,
Defendant and Appellant.

Case No. 10395

APPELLANT'S PETITION FOR REHEARING AND BRIEF IN SUPPORT

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

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

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

TABLE OF CONTENTS

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

TABLE OF CONTENTS—Continued

INDEX OF CASES AND AUTHORITIES

CONSTITUTION CITED

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

TABLE OF CONTENTS—Continued

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

TABLE OF CONTENTS—Continued

TEXT CITED

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

GREAT SALT LAKE AUTHORITY,
Plaintiff and Respondent,

v.

ISLAND RANCHING COMPANY,
Defendant and Appellant.

Case No. 10395

APPELLANT'S PETITION FOR REHEARING

ISLAND RANCHING COMPANY, Appellant, herewith petitions this Court pursuant to Rule 76(e), U.R.C.P., for a rehearing on the merits of several issues raised in Points II, III, and IV of this Appeal.

This Petition for Rehearing is founded upon the following grounds:*

Parenthetically, it is noted in this Petition that the parties have been, at several points in the majority opinion, mistakenly designated. At least, the context of the sentence structure would suggest a term having reference to the opposite party mentioned. Thus, on page 1 of the Advanced Opinion, paragraph 4, line 1, the word "Defendant" should be substituted in place of "Plaintiff". On page 2, paragraph 5, line 1, the word "Defendant" should be altered to read "Plaintiff", and on the last line of page 2 of the majority opinion, the word "Defendant" should be inserted in place of "Plaintiff" so that the sentence would read " * * of the Defendant or others[5]".

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

(1) *Grant of Eminent Domain Power.*

(a) The majority opinion, in determining that GSLA has been granted the power to condemn Antelope Island, property of Appellant, has failed to consider the universal presumption that the eminent domain power is construed strictly against the party seeking its exercise and that the power cannot be sustained when dependent on mere argument, innuendos or implication.

(b) The interpretation given by the majority opinion to the phrase, "by donation, purchase agreement, lease or other lawful means" (65-8-6(10) U.C.A.), in holding that the same bestows the eminent domain power as to Antelope Island, is patently in error and without judicial precedent. It ignores the fundamental proposition of law that in our society, a man's property shall not be taken from him involuntarily by government action, unless that "taking" is supported by the clearest statutory declaration.

(2) *Territorial Limitation Issue.* The majority opinion, to determine and find the territorial limits of GSLA, has erroneously relied exclusively upon the *title* to the GSLA Law rather than the *enacted law* itself.

(3) *Delegation of Legislative Authority Issue.* The majority opinion, in determining that the GSLA Law is not unconstitutional due to the lack of legislative standards, has totally failed to consider the fact that the Law does not specify or delegate performance of the public *objectives* to be achieved.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

(4) *Due Process of Law Issue.* The infirmities of the GSLA Law, both constitutional and statutory, raised in this Appeal, but now made operative as against the owner of Antelope Island by the majority opinion, clearly violate the sanctuaries of Amendment XIV of the United States Constitution.

> "* * * nor shall any State deprive any person of life, liberty, or *property,* without due process of law, * * *."

and Article I, Section 7 of the Utah State Constitution:

> "No person shall be deprived of life, liberty, or *property,* without due process of law,"

both guaranteed to Appellant.

In presenting this Petition, Appellant is full aware of the precedent established by this Court to the effect that a Petition for Rehearing must properly evidence a failure of the majority opinion to consider a material argument or factor in the appeal, or that the conclusions reached in the majority opinion are erroneous as a matter of law. *In re McKnight,* 4 Utah 237, 9 Pac. 299 (1886). Also, the basis for the Petition must be one which would be likely to result in an alteration of the original opinion. *Utah Savings and Loan Assoc.* v. *Mecham,* 12 U. 2d 335, 366 P. 2d 598 (1961); *Salt Lake City* v. *Telluride Power Company,* 82 Utah 622, 26 P. 2d 822 (1933); *Brown* v. *Pickard,* 4 Utah 292, 9 Pac. 573 (1886).

The Court, based upon the grounds set forth in this Petition and the accompanying Brief, as well as other

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

grounds of which the Court may, on its own motion, take cognizance, *Metropolitan Water District of Southern California* v. *Adams,* 19 Cal. 2d 463, 122 P. 2d 257 (1942), should order a rehearing of this case on its merits.

The gravity and consequences of this Appeal warrant and justify oral argument in connection with this Petition for Rehearing. Appellant respectfully requests the same.

Respectfully submitted,

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

Attorneys for Appellant.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

GREAT SALT LAKE AUTHORITY,
Plaintiff and Respondent,

v.

ISLAND RANCHING COMPANY,
Defendant and Appellant.

Case No. 10395

BRIEF IN SUPPORT OF PETITION FOR REHEARING

It would serve little purpose to state in this supporting Brief the facts underlying this Appeal. They are not in contest and are already set out in paragraph 1 of the majority opinion and in the appeal briefs of the parties. The full set of legal issues framed by the pleadings and presented in the Appeal has also been outlined in paragraph 2 of the majority opinion and paragraph 1 of the dissent of the Chief Justice. They will not be again recited in this Brief, except as they may relate to the grounds for Appellant's Petition for Rehearing.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

This Brief will, accordingly, focus upon the particular grounds, defined in the foregoing Petition, upon which ISLAND RANCHING COMPANY urges that a rehearing of the case on its merits be ordered and undertaken by the Court.

GROUND I.

Grant of Eminent Domain Power Issue

a. THE MAJORITY OPINION, IN DETERMINING THAT GSLA HAS BEEN GRANTED THE POWER TO CONDEMN ANTELOPE ISLAND, HAS ERRONEOUSLY IGNORED THE RULE OF CONSTRUCTION THAT THE EMINENT DOMAIN POWER IS STRICTLY CONSTRUED AGAINST THE PARTY SEEKING ITS EXERCISE.

The eminent domain power is not granted when its existence is dependent upon implied construction.

In the ninety years this Court has decided controversies, it has not faced a more fundamental and substantial question than the "grant of eminent domain power" issue presented in this Appeal. Only eight times in that ninety-year span has a question of similar import been raised.[1]

---

[1] *Bertagnole* V. *Baker*, supra; *Barnes* V. *Wade*, 90 Utah 1, 58 P. 2d 297 1936); *Utah Copper Co.* V. *Stephen Hayes Estate*, 83 Utah 545, 31 P. 2d 624 (1934); *Town of Perry* V. *Thomas*, 82 Utah 159, 22 P. 2d 343 (1933); *Alcorn* V. *Reading*, 66 Utah 509, 243 Pac. 922 (1926); *Monclair Mining Co.* V. *Columbus Rexall Consol. Mines Co.*, 53 Utah 413, 174 Pac. 172 (1918); *Ketchum Coal Co. v. Pleasant Valley Coal Co.*, 50 Utah 390, 168 Pac. 86 (1917); *Tanner* V. *Provo Bench Canal & Irrigation Co.*, 40 Utah 105, 121 Pac. 584 (1911).

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

The last time was sixteen years ago in *Bertagnole* v. *Baker, et al.*, 117 Utah 348, 215 P. 2d 626 (1950). With footings cemented in basic concepts of constitutional law, the issue centers upon the relationship of government to the property rights of the citizen. Its consideration and resolution in this case, by definition, will affect the posture of ninety years of judicial precedent in this State as to that relationship.

Generically, the question is:

> To meet the demands of constitutional due process of law, what is the character of legislative power that must be granted to an administrative agency in order for it to take, by eminent domain, a man's property against his will?

The issue presented, as applied to the facts of this case, is:

> Is the GSLA law, in providing that the property of Island Ranching Company shall be acquired by "donation, purchase agreement, lease, *or other lawful means*" a constitutionally adequate grant of the eminent domain power when measured by the requirements that the legislative delegation be specific, and the guarantee of the citizen that his property shall not be "taken" without due process of law?

The keys to this question lie in the roots and morals of our society, and involve the very essence of the democratic order as we now know it. They have been encased in the annals of legislative thought and the inviolate core of

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

judicial opinion in this country for almost two centuries of time. The principle fashioned of these times is simple: A man's property shall not be taken from him against his will by the government, unless through the legislative exercise of the power of eminent domain. There is an equally simple corollary: The eminent domain power shall not be exercised by a government agency of limited jurisdiction *unless it is in strict compliance with a plain and unequivcal statutory grant.* This principle and its corollary have their origin in the beginnings of this country. "The preservation of property is a primary object of the social compact," wrote the United States Supreme Court in *Van-Horne's Lessee* v. *Dorrance*, 2 Dall. 304 (1795). "Property must be secured," wrote John Adams, "or liberty cannot exist."[2] And Justice Field in the *Sinking Fund Cases,* 99 U. S. 700 (1879) said:

> "All history shows that rights of person are unsafe where property is unsecure. Protection to one goes with protection to the other; and there can be neither prosperity nor progress where this foundation of all just government is unsettled."

And so it was that the right to hold property against unlawful government expropriation was secured in the Fifth and Fourteenth Amendments of the United States Constitution and Section 7 of Article 1, Constitution of Utah:

> "No person should be deprived of life, liberty, or *property* without due process of law."

---

[2] The Works of John Adams, Vol. 6, p. 280 (C. F. Adams, Ed. 1851)

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

To insure that the right to hold property free of unauthorized government action is afforded co-existent protection with the guaranties of life and liberty under the Due Process Clause, the courts have been consistent in their vigil that in determining whether the eminent domain power has been granted to an administrative agency, it is *presumptively construed strictly* against the party in quest of its exercise, and where the power can be made out only through argument, construction, or implication (i.e., where it is not delegated as to particular property in the clearest of language) *the attempted exercise will be denied.* The Supreme Court of Washington, in *State of Washington* v. *Superior Court, et al.,* 19 Wash. 2d 791, 144 P. 2d 916, 920 (1944), states the rule:

> "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."'"* (Emphasis added.)

The great Justice Wolfe was fully aware of this cardinal rule when he wrote for a unanimous court in *Bertagnole* v. *Baker, et al.,* 117 Utah 348, 215 P. 2d 626 (1950):

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

> "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.)

Although the Salt Lake City Board of Education, in *Bertagnole,* made its showing that the attempted condemnation was for a school use, that public necessity existed, and that there was a *general* legislative grant of eminent domain power, it was denied the power to condemn outside of its boundaries because the statute did not specifically authorize such:

> "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.) (Emphasis added.)

The Bertagnole case is the last word spoken by this Court on the constitutional necessity of a clear, precise and unequivocal statutory grant of the eminent domain power to condemn particular property. The last word, that is, until the majority opinion in this case. That opinion is written as though *Bertagnole* v. *Baker* had never been decided,[3] as though the strong precedent of this Court and the legions of cases throughout the Country which affirm *Bertagnole,* did not exist.

---

[3] The main opinion does not cite or refer to the *Bertagnole* case in the two paragraphs it devotes to the eminent domain issue.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

The majority opinion, while quick to refer *to the presumption* favoring the constitutionality of legislative enactments in discussing other issues in the case, *fails totally to note or even observe the presumption that a grant of eminent domain is strictly construed against the condemnor and that it will not be upheld where its validity is in doubt or sustained only through argument.* It treats the eminent domain question in this case as one of typical statutory construction, without apparent consideration of the long-established respect for the basic and natural right of man to own and hold property as against an unauthorized government expropriation. *The opinion gives no attention to the claims of Appellant that the attempted "taking" is violative of the "property" section of the Due Process Clause of both Federal and State Constitutions,* and as stated, it completely ignores the time-honored presumption of strict construction against the legislative grant of eminent domain.

We view this omission in the majority opinion as critical in this Petition for Rehearing. This is not a case where Appellant simply is out of harmony with the conclusion of the majority opinion. *Rather, it is a case where the main opinion has overlooked, ignored, or failed to consider a substantive, material and vital point of the Appeal.*

Such omission makes it proper that this case be reheard and decided, taking stock of the property, due process and construction arguments raised in the Appeal and re-urged in this Petition. *Utah Savings & Loan Assn.* v.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Mecham, 12 U. 2d 335, 366 P. 2d 598 (1961); *Brown* v. *Pickard,* 4 Utah 292, 9 Pac. 573 (1886).

b. THE INTERPRETATION GIVEN BY THE MAJORITY OPINION TO THE PHRASE "BY DONATION, PURCHASE AGREEMENT, LEASE OR OTHER LAWFUL MEANS" IN THE STATUTE, IN HOLDING THAT THE SAME BESTOWS THE EMINENT DOMAIN POWER AS TO ANTELOPE ISLAND, IS ERRONEOUS, WITHOUT JUDICIAL PRECEDENT, AND FAILS TO CONSIDER A MATERIAL ELEMENT.

The majority opinion acknowledges that the authority of Plaintiff to condemn Antelope Island stems from 65-8-6(10), which provides in part:

> "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 * * *."

This is the only section of the Law wherein the manner of acquiring Antelope Island is specified by the Legislature. Clearly, the means of acquisition set out therein are voluntary and exclusive of eminent domain. *Donation, purchase agreement* and *lease* all require the consent of the

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Island owner. To gain its meaning of the phrase "or other lawful means" in Section (10), the majority opinion chooses not to refer to two principles of statutory construction, ejusdem generis and expressio unius est exclusio alterius, both of which restrict the mode of acquiring Antelope Island to consensual and non-forceful means. Instead it prefers to rely on a different Section, 65-8-6(1)[4] which delineates the manner of acquiring unspecified property by Plaintiff.

From this process, the majority opinion concludes that it is "clearly apparent" that the eminent domain power was delegated as to Antelope Island because without the power, "it is *obvious* that the purposes of the act could not be carried out". (Majority Opn. P. 3, Para. 3).

To begin with, it is error to interpret a Statute in the context of what the Legislature should *obviously* have done to implement and make effective the Law. The question is, rather, what did the Legislature actually say on the matter.

The majority opinion, in rejecting the rule of construction, ejusdem generis, does an about face from the position taken by this Court just six months ago in *State Land Board* v. *State Dept. of Fish and Game,* 17 U. 2d 237, 408 P. 2d 707 (Dec. 1965). In that case, the Court was called upon to determine whether a statute which reserved "coal *and other minerals*", included sand and gravel. This Court held that under the "universally recognized rule" of ejusdem

---

[4] This Section provides that eminent domain may be employed to acquire non-specific real property. It makes no mention, however, of Antelope Island, as does 65-8-6(10).

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

generis, a general term following a specific term is interpreted to mean things of like kind or character. Ergo, sand and gravel, although otherwise a mineral, were not encompassed within the statutory phrase "coal and other minerals". The stand taken in the *Land Board* case is clear precedent for the same approach in the case at bar. The application of ejusdem generis together with the presumption of strict construction against statutes allegedly granting the power of eminent domain (the latter, the main opinion ignores altogether), would dictate a result drastically different from that reached by the majority opinion in this case. And that is without referring at all to the principle, expressio unius est exclusio alterius, which this Court has seen fit to adopt in times past.[5]

The majority opinion makes a break with judicial precedent that is patently in error when it looks to the general clause 65-8-6(1) (granting eminent domain as to non-particular property) as controlling the specific clause in 65-8-6(10), which instructs as to the manner of acquiring Antelope Island. Precedent and the warranted rationale support the holding that the *special* clause ("donation, purchase agreement, lease, or other lawful means") in its independent and particular reference to Antelope Island, *controls* and is an exception to the *general* clause which makes no reference to the Island. For as this Court said in *Salt Lake City* v. *Salt Lake County*, 60 Utah 423, 209 Pac. 207 (1922):

---

[5] *Rapid Transit Co.* v. *Ogden City, et al.*, 89 Utah 546, 58 P. 2d 1 (1936).

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

> "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 provision controls the general."

Although the majority opinion turns away the doctrine of ejusdem generis, it significantly fails to discuss or even mention the principle that where two sections of a statute treat the same subject matter, one of general and the other of special import, the special controls the general.

But there is another material element of this issue which the majority opinion fails to pass upon. If, as the main opinion concludes, the legislative intent was that the special means of acquiring Antelope Island in 65-8-6(10) "donation, purchase agreement, lease, or other lawful means" refers to and is controlled by the general grant in 65-8-6(1), why then was the special means as to Antelope Island inserted in subsection (10) at all? In such event, why didn't the Legislature merely rely upon the general clause in subsection (1) since that covers adequately the eminent domain power. Both questions are relevant, well-taken, and follow logically in response to the position announced by the main opinion. The Legislature provides its own answer to these questions which answer is inconsistent with the majority opinion. After finishing the general clause as to non-specific property, it went on to spell out the precise manner in which Antelope Island was to be acquired, to the precise exclusion of the eminent domain power. Unless we assume that the Legislature was involved in a handwriting exercise, that it did not know what it was doing, and that it did not mean what it said, the ordinary meaning and intent of 65-8-6(10) as to Antelope Island must be

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

given effect. The majority opinion has failed to treat this question or to supply an answer to it.

It should consider the question by granting a rehearing of the eminent domain issue on its merits.

GROUND II.

Territorial Limitation Issue

THE MAJORITY OPINION, TO DETERMINE AND FIND THE TERRITORIAL LIMITS OF GSLA, HAS ERRONEOUSLY RELIED EXCLUSIVELY UPON THE *TITLE* TO THE GSLA LAW RATHER THAN THE *ENACTED LAW* ITSELF.

The majority opinion finds that the *Great Salt Lake and its environs* is the territorial boundary of the Great Salt Lake Authority:

> "* * * Applying that principle here leaves no doubt that the phrase, 'Great Salt Lake and its environs,' *even though appearing in sections not specifically delineating boundaries,* was intended to describe the area over which Plaintiff was to have jurisdiction. * * *" (Emphasis ours) Majority Opn., p. 1.

The search for authority to support this finding is not easy. Under any rule of statutory construction, including in pari materia which the majority opinion invokes, the Statute does not yield such result. No section of the Statute declares the territorial limitation of Plaintiff to be "the Great Salt Lake and its environs." Nor does the Statute when considered in its entirety "so as to produce an harmonious whole and . . . give effect to the intent and purpose

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

to be devined from the entire act," define the boundaries as such. (Quotation from Majority Opn. p. 1, para. 4).

The only possible basis for the majority opinion's finding is the assumption that the Legislature, in its great wisdom, must have intended that some boundary line be established, and if the term "Great Salt Lake and its environs" in the Statute is not grasped as the boundary line, there is nothing else in the enacted Law which remotely lends itself to a territorial description. In other words, the gist of the main opinion's argument is that while the "Great Salt Lake and its environs" is not a good boundary definition, it is the closest the Act comes to such a definition, and because of the presumption favoring constitutionality[6], close is better than nothing at all.

The argument, the same as the State made in the Appeal, is fallacious. *Close* has never been nor is it now, a satisfactory test when this Court has before it for constitutional interpretation the geographical boundaries of an agency of limited jurisdiction. The natural right of man to hold property which may or may not be affected by that limited jurisdiction is at stake in such interpretation. The assumption that the Legislature must have intended a territorial boundary in the Statute is erroneous and unfounded both in law and the facts of this case. The Statute, itself, gives every evidence of the fact that the territorial boundary

---

[6] The Majority Opinion prefaces its discussion of the constitutional issues in this case with the statement that the Court will strike down an act with reluctance and only where clearly necessary and that the act will be construed as constitutional whenever reasonable. *P. 1, para. 3 of Majority Opn.*

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

was entirely omitted by the Legislature. The omission may have been unintentional, but the hard fact is nonetheless, that no boundary was described.

The main opinion suggests that this Defendant acknowledges that the Statute describes the boundary as the "Lake and its environs" and argues that the term is merely indefinite and uncertain. (Majority Opn., p. 1, para. 4). This statement does not represent the position of ISLAND RANCHING COMPANY in this Appeal. Our position has been and is now, that the law is utterly void of a declaration of territorial boundaries. There is no line of limitation within which GSLA jurisdiction is fixed. Appellant assessed in its appeal brief the term "Great Salt Lake and its environs" as a boundary definition, only because of the argument advanced by the State in that regard before the trial court. To conclude that the established boundary is the "Lake and its environs" is not to construe the Statute. It is to improvise upon and enlarge it.

Nevertheless, the main opinion, having found that the boundary is the "Great Salt Lake and its environs," takes note that the meaning of the term gives "rise to some uncertainty." (Majority Opn., p. 2, line 3). There can be no quarrel with that observation. The term, in the very nature of things, is not susceptible to objective measurement. One does as well by saying the boundary is the "Great Salt Lake *and other reasonable areas*". To overcome this obscurity, the main opinion turns to the title of the Statute, which in turn refers to the "meander line established by the United States Surveyer General." The legal relevancy

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

of the *title* and the judicial framework within which the title is to be examined is laid down preliminarily in the main opinion:

> "* * * We are aware that in many decisions, including our own, it has been stated that the title is not part of the act. This is true in the sense that it is not integrated into the operating portion of the legislation; and that it will not be permitted to contradict nor defeat a plainly expressed intent; nor can it be used to create an ambiguity or uncertainty when the language of the body of the act is clear. But where such clarity is lacking, it is permissible to look to the title of the enactment to shed light on and clarify the meaning." *Majority Opn., p.* 2, *para.* 1.

The meaning of this statement is plain — the title to a law has no statutory rank, it cannot be employed as such, and it will not be permitted to introduce into a statute a substantive factor not already a part of the enactment.

Having thus recorded the prevailing rule of law, the majority opinion proceeds to immediately violate it by employing the title in such manner that it, and not the Statute, fixes the jurisdictional boundary of the Great Salt Lake Authority. Whereas, the title refers to "the meander line established by the . . . Surveyer General", it is crystal clear from the Statute that there is no correlation, association, nor relationship whatsoever, between the meander line and the "Great Salt Lake and its environs." The main opinion does not refer to one section of the Statute wherein the two terms would begin to complement each other. In the only section of the Statute (65-8-6(8)) in which the "me-

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

ander line" phrase is used, the term "Great Salt Lake and its environs" is also found. It is manifest from that section that the two terms are not interchangeable, that they do not speak of the same area, and that the meander line does not amplify or explain the meaning of the Great Salt Lake and its environs. They are at separate stations on the spectrum with no connecting linkage.

There is only one reason why, to use the language of the main opinion, the meander line in the *title* "gives a sufficiently clear and satisfactory indication of what is meant by the 'Great Salt Lake and its environs' ". (Majority Opn., p. 2, para. 1). *That is because the main opinion says so.* The upshot of this judicial innovation is that the title, not the Statute, supplies and is the territorial boundary, since it carries the only term that is reasonably the subject of ascertainment. Such result is not only against the sound precedent of this Court; it permits an otherwise invalid statute to be upheld by furnishing to it a constitutional requirement from a source outside of the enactment.

A rehearing should be granted to correct this erroneous holding.

GROUND III.

Delegation of Legislative Authority Issue

THE MAJORITY OPINION, IN DETERMINING THAT THE GSLA LAW IS NOT UNCONSTITUTIONAL BECAUSE OF THE LACK OF LEGISLATIVE STANDARDS, HAS TOTALLY

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

FAILED TO CONSIDER THAT THE LAW DOES NOT SPECIFY OR DELEGATE PERFORMANCE OF THE LEGISLATIVE *OBJECTIVES* TO BE ACHIEVED.

In discussing this issue, the majority opinion states:

> "We offer no defense of the Act as a model of legislative draftsmanship."

Nonetheless, the majority opinion finds that the Act contains an adequate constitutional basis, against the attack that it is vague, ambiguous, and lacks legislative objectives, said basis being that the agency is required to adopt reasonable regulations, that it is prohibited from lending the credit of the State to private purposes, that it exercise the condemnation power in accordance with the general law, and that:

> "The Authority shall have power to determine the policies and develop the program best designated to accomplish the objectives and purposes set out in this Act." 65-8-4.

In so concluding, the majority opinion has by-passed or failed to consider the leading point in this issue. That is, that the Act is in default in stating what the legislative *objectives* of the Statute are. It leaves to the administrative body not only the power to determine what policies are best designed to accomplish an objective, but it leaves as well the determination of the objective.[7] It is in this calling

[7] 65-8-6(5) is not, as the main opinion would indicate, declarative of the legislative objective. It simply suggests one of several administrative policies which the agency may or may not employ to accomplish an undetermined legislative objective.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

that the Law is constitutionally deficient. To the agency is left the decision of what is to be accomplished and the method of accomplishment. The latter is legally permissible; the former constitutes an unconstitutional delegation of legislative power. This Court has heretofore placed the issue at rest:

> "That the legislature may not surrender or delegate its legislative power is elemental . . . 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." *Rowell* v. *State Board of Agriculture,* 98 Utah 353, 99 P. 2d 1 (1940).

The Act standing by itself is of slim and frail existence. When it is measured, however, in the light of Appellant's constitutional guarantee to due process of law and its right to statutory notice of how its property will be affected, altered, or disrupted by action of the administrative agency, the Statute is intolerable and should be stricken down.

A rehearing of this issue by the Court should be ordered.

GROUND IV & CONCLUSION

Due Process of Law Issue

THE CONSTITUTIONAL AND STATUTORY INFIRMITIES OF THE STATUTE, AS MADE OPERATIVE AGAINST THE OWNER OF ANTELOPE ISLAND BY THE MAJORITY

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

OPINION, VIOLATES THE GUARANTEES OF APPELLANT TO DUE PROCESS OF LAW.

The handwriting is clear in this case, as the Statute is not, that the treatment accorded by the majority opinion to the three issues raised in the Appeal and urged in this Petition for Rehearing, operate to deprive Appellant of its property, held for better than eighty years, without due process of law.

The great Ordinance of the 14th Amendment of the National Constitution and Section 7 of Article I of the Utah Charter, declaring that:

> "No person shall be deprived of life, liberty, or property without due process of law,"

makes it mandatory that in the field of eminent domain, a statute appear in black and white and that we know of its import beyond equivocation and reasonable argument. The very freedom of man and our social order hang in the balance of that mandate. If private property can be expropriated by a government agency under the auspices of an ambiguous and argumentative statute, democracy, as well as this individual Appellant, is the loser.

The whole trouble with the majority opinion in the major issues set forth in this Petition is that the issue is determined not upon the basis of what the legislature, in fact, did, but upon what the majority opinion believes it should have done. Admittedly, the Statute creates a maze of uncertainty, ambiguity and argument. To sustain the grant of eminent domain power and uphold the constitu-

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

tionality of the Law, the majority opinion is required to employ construction technique upon technique, with the result dependent upon that technique which is utilized and that which is discarded.

The time has come for this Court to say to the Legislature that if it is going to enact laws which substantially affect the lives and property of man in this day, it will have to state its intentions clearly and unequivocally, so that men of ordinary intellect can understand its meaning. And further, if it does not, and if it passes legislation wherein the eminent domain power as to a landowner's property is placed in doubt, the statute will be stricken down and the condemnation power will be denied.

The failure of the majority opinion to consider the factors set out in the accompanying Petition for Rehearing and this Brief, are material to and dispositive of this case. To consider those factors and accord Appellant due process of law, a rehearing of the case should be ordered.

Respectfully submitted,

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

Attorneys for Appellant.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.