

1988

Intermountain Power Agency, State of Utah v.
Bowers-Irons Recreation Land and Cattle
Company, George H. Park, Marida G. Park, Edwin
D. Park Land and Cattle Co. : Reply Brief

Utah Court of Appeals

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Don R. Petersen and Leslie W. Slaugh; Attorneys for Appellant.

M. Byron Fisher and Randy K. Johnson; Attorneys for Respondent.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 88-0002

IN THE SUPREME COURT
OF THE STATE OF UTAH

INTERMOUNTAIN POWER
AGENCY, a political sub-
division of the STATE OF
UTAH,

Plaintiff-
Respondent,

vs.

BOWERS-IRONS RECREATION
LAND AND CATTLE COMPANY,
a partnership, GEORGE
H. PARK, MARIDA G. PARK,
and EDWIN D. PARK LAND
AND CATTLE CO., a Utah
corporation,

Defendants-
Appellant.

Case No. 880002

Category 14b

88 0410-CA

APPELLANT'S REPLY BRIEF

APPEAL FROM THE JUDGMENT AND ORDER
ENTERED BY THE FOURTH JUDICIAL DISTRICT COURT
OF JUAB COUNTY, STATE OF UTAH, THE HONORABLE
CULLEN Y. CHRISTENSEN, PRESIDING

DON R. PETERSEN and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84601

ATTORNEYS FOR APPELLANT

M. BYRON FISHER and
RANDY K. JOHNSON, for:
FABIAN & CLENDENIN
215 South State, 12th Floor
Salt Lake City, UT 84111

ATTORNEYS FOR RESPONDENT

FILED
DEC 23 1988

Clerk, Supreme Court, Utah

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ATTORNEYS FOR APPELLANT

M. BYRON FISHER and
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FABIAN & CLENDENIN
215 South State, 12th Floor
Salt Lake City, UT 84111

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	1
ARGUMENT	2
POINT I	
BOWERS-IRONS IS ENTITLED TO RECOVER FOR CONSTRUCTION DAMAGES WITHIN THE EASEMENT.	2
A. <u>The Condemnation Award Did Not Include Construction Damages.</u>	2
B. <u>IPA Implicitly Consented to the Trial of the Construction Damage Issues in this Lawsuit.</u>	4
POINT II	
FAILURE TO RESTORE THE FENCES TO THEIR ORIGINAL CONDITION WAS A SEPARABLY COMPENSABLE ITEM.	8
CONCLUSION	8

TABLE OF AUTHORITIES

Cases Cited:

<u>Board of Education of Logan City School District v. Croft,</u> 13 Utah 2d 310, 373 P.2d 697 (1962).	5, 6
<u>State v. Peterson,</u> 12 Utah 2d 317, 366 P.2d 76 (1961). . .	5, 6
<u>Thomas E. Jeremy Estate v. Salt Lake City,</u> 87 Utah 370, 49 P.2d 405 (1935).	7
<u>Western Slope Gas Co. v. Lake Eldora Corp.,</u> 521 P.2d 641 (Colo. App. 1973).	3, 4
<u>Southern Pacific Co. v. Arthur,</u> 10 Utah 2d 306, 352 P.2d 693 (1960).	5, 6

Statutes and Rules Cited:

Utah Code Ann. § 78-34-10(2) (1987).	5
Utah Code Ann. § 78-34-10(3) (1987).	5-7

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	:	
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	:	
	:	Category 14b
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<u>LAND AND CATTLE COMPANY,</u>	:	
a partnership, GEORGE	:	
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and EDWIN D. PARK LAND	:	
AND CATTLE CO., a Utah	:	
corporation,	:	
	:	
Defendants-	:	
Appellant.	:	

APPELLANT'S REPLY BRIEF

SUMMARY OF ARGUMENT

Bowers-Irons asserts that the trial court erred in dismissing its claim for construction damages within the easement, and its claim that cattle guards were necessary to restore the fences as close as reasonably possible to their original condition. These claims are for breach of IPA's obligation to cause as least damage to the burdened property as possible, and to restore the property to its original condition so far as reasonably possible. Although these claims normally would not be part of a condemnation suit, IPA implicitly consented to the trial of those issues in this case.

ARGUMENT

POINT I

BOWERS-IRONS IS ENTITLED TO RECOVER FOR CONSTRUCTION DAMAGES WITHIN THE EASEMENT.

Two sub-issues are presented by this appeal concerning the issue of whether Bowers-Irons was entitled to recover for construction damages within the easement: (1) Were construction damages within the easement included within by the condemnation award, and (2) if not, was Bowers-Irons entitled to recover those construction damages in this action. The argument below and in appellant's opening brief demonstrates that Utah cases establish that construction damages are not contemplated by nor included in a condemnation award. Although an action for recovery of construction damages may be brought as a separate action, IPA implicitly consented to the issue being tried in this action.

A. The Condemnation Award Did Not Include Construction Damages.

IPA asserts in its Summary of Argument that allowing Bowers-Irons to recover for construction damages would result in a double recovery. The cases and argument cited in Point I of IPA's brief, however, with one exception, establish only that recovery for construction damages is not generally part of a condemnation proceeding and is not part of the condemnation award. Logic compels this conclusion. The purpose of a condemnation award is to compensate the land owner for the fair market value of the land as of the date of the taking. The

construction damages usually do not come into existence until after the taking, and clearly cannot be included as part of the condemnation award. To hold otherwise would be to hold that an owner of an easement has no restriction whatsoever on the amount of damage which can be done to the burdened property and has no obligation to restore the burdened property to its original condition. The effect of such a holding would be to grant the easement owner the equivalent of fee simple title while only requiring payment for an easement.

The cases cited by appellant in its opening brief establish that an easement owner has an obligation to cause the least possible damage and to return the premises to its original condition so far as reasonably possible. An easement owner which fails to do so may be held liable for damages. An award of such damages does not result in a double recovery.

None of the Utah cases cited by IPA refute this rule, and in fact support it. IPA claims, however, that the Colorado case of Western Slope Gas Co. v. Lake Eldora Corp., 521 P.2d 641 (Colo. App. 1973), holds that construction damage to the land within the right of way is not separately compensable but is a factor taken into account in the initial determination of the value of the right of way. A careful reading of that case indicates that it does not hold that recovery cannot be had for construction damages, but only holds that the initial condemnation award is not based on the cost of restoring the land to its

initial condition, but rather on the diminution in market value by reason of the taking.

As set forth above, to hold that the anticipated construction damages are included within the initial condemnation award is contrary to reason, because the extent of those damages cannot be known as of the date of the taking and frequently will not be known as of the date the award is made. To the extent that Western Slope does support a rule as advocated by IPA, it should be rejected by this Court. This Court should not espouse a rule which holds that an owner of an easement has no obligation to cause the least possible damage to the property nor to return the property to its original condition so far as reasonably possible.

B. IPA Implicitly Consented to the Trial of the Construction Damage Issues in this Lawsuit.

The discussion above establishes that an easement owner has an obligation to restore the land to its original condition insofar as reasonably possible, and may be held liable for damages if it fails to do so. Although such an action for damages is normally separate from the condemnation action, the record in this case establishes that IPA implicitly consented that those issues be tried in this action. Indeed, the parties stipulated to a settlement of the condemnation portion of the action and reserved for trial only the issue of "incidental" damages.

The fact that IPA implicitly consented to trial, in this case, of the issue of construction damages is evidenced by IPA's stipulation to an award of construction damages outside the easement. No logical or statutory distinction exists between construction damages within the easement or without the easement, as is established below. The distinction between the two was raised for the first time at the trial of this matter.

IPA claims that recovery for construction damages outside the easement is included under Utah Code Ann. § 78-34-10(3) (1987). That section holds that the fact finder in a condemnation proceeding must ascertain and assess "if the property, though no part thereof is taken, will be damaged by the construction of the proposed improvement, the amount of such damages." Although this section authorizes compensation for damages caused by construction, those damages are not the same as the "construction damages" as used by the parties in this action.

Appellant has discovered only three Utah cases which specifically cite section 78-34-10(3). Board of Education of Logan City School District v. Croft, 13 Utah 2d 310, 373 P.2d 697 (1962); State v. Peterson, 12 Utah 2d 317, 366 P.2d 76 (1961); Southern Pacific Co. v. Arthur, 10 Utah 2d 306, 352 P.2d 693 (1960). It is clear from a reading of these cases that Section 78-34-10(3) refers to a type of severance damages caused by a taking. "Typical" severance damages are provided for in Section 78-34-10(2), which provides for severance damages where

"the property sought to be condemned constitutes only a part of a larger parcel." The severance damages contemplated by 78-34-10(3), in contrast, are those which occurred to other lands owned by the property owner. In Southern Pacific Co., for example, the Court found that other parcels of property owned by the defendants were less useful as range land as a result of the taking of the condemned parcel of land. 352 P.2d at 697. In State v. Peterson, the Court made an award of severance damages to the remainder of the defendant's property and cited as support Section 78-34-10(3). 366 P.2d at 79 n. 5. In Croft, the Court describes the types of damages which may be covered under Section 78-34-10(3) as follows:

Damages to land, by the construction of a public or industrial improvement, though no part thereof is taken as provided for under 78-34-10(3), contrary to the rule for severance damages, is limited to injuries that would be actionable at common law, or where there has been some physical disturbance of a right, either public or private, which the owner enjoys in connection with his property and which gives it additional value, and which causes him to sustain a special damage with respect to his property in excess of that sustained by the public generally. It requires a definite physical injury cognizable to the senses with a perceptible effect on the present market value: such as drying up wells and springs, destroying lateral supports, preventing surface waters from running off adjacent lands or running surface waters onto adjacent lands, or the depositing of cinders and other foreign materials on neighboring lands by the permanent operation of the business or improvement established on the adjoining lands.

373 P.2d at 699-700 (citations omitted).

As set forth in this example, the types of damages contemplated by subsection 78-34-10(3) are those injuries to adjoining property which are unavoidably caused by the taking of the condemned property. The list of examples does not include construction damages, either within or without the easement, caused by the easement owner's negligence.

The Utah case of Thomas E. Jeremy Estate v. Salt Lake City, 87 Utah 370, 49 P.2d 405 (1935), illustrates the principle that construction damages outside the easement are not normally compensable in a condemnation proceeding. The land owner in that case sued the easement owner to recover damages because of excavated material left on the land outside the easement. The issue presented was whether the case was one in contract or negligence, as opposed to a case for wrongful taking of land. The Court held that the case was not one for wrongful taking, because the damages claimed were not part of a condemnation case. Implicit in the decision is the holding that the damages would be compensable under a breach of contract or a negligence theory.

In the instant case, therefore, there was no legal reason to distinguish between damages to Bowers-Iron's land outside the easement from the damages to the land within the easement. None of those damages were included within the condemnation award. Where IPA consented to the trial in the condemnation action of those negligence and breach of contract issues, it was error for the Court to distinguish between the damages which occurred

within the easement from those which occurred without the easement. The case should be remanded for the taking of evidence and the entry of judgment for the damages within the easement.

POINT II

FAILURE TO RESTORE THE FENCES TO THEIR ORIGINAL CONDITION WAS A SEPARABLY COMPENSABLE ITEM.

The trial court also excluded evidence concerning Bowers-Irons' claim that cattle guards were necessary to restore the fences to their original condition. As set forth above, IPA had an obligation to restore the land to its original condition so far as reasonably possible. The evidence at trial would have supported a jury finding that a wire gate was not adequate to restore the fences to their original condition, and that a cattle guard was required.

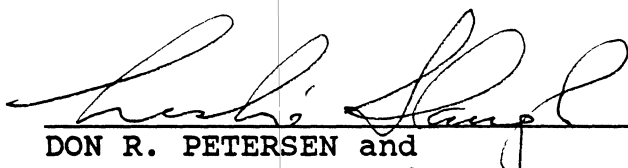
For the same reasons as set forth above in Point I, Bowers-Irons was entitled to recover for IPA's breach of its obligation to restore the land to its original condition, including the failure to restore the fences by installing cattle guards.

CONCLUSION

No serious contention can be made that IPA did not have an obligation to cause as least damage to the property as possible, and to return the land to its original condition so far as reasonably possible, and that Bowers-Irons did not have a right to recover damages by reason of IPA's failure to do so. Although the action for damages would normally be separate from a condemnation action, IPA consented to the trial of those

issues in this lawsuit. The Court erred in distinguishing between the construction damages within the easement from those without the easement. The case should be remanded to the trial court for the taking of evidence and the entry of judgment for damages within the easement.

DATED this 21st day of December, 1988.


DON R. PETERSEN and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Appellant

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing were mailed to the following, postage prepaid, this 21st day of December, 1988.

M. Byron Fisher
FABIAN & CLENDENIN
215 South State, 12th Floor
Salt Lake City, Utah 84111

