

1987

Kennecott Copper Corporation, a New York Corporation v. Salt Lake County, a body corporate and politic; Arthur Monson, Treasurer of Salt Lake County; Milton Yorganson, Assessor of Salt Lake County : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 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.

James B. Lee; Kent W. Winterholler; David W. Wilkinson; Attorney General of Utah; Maxwell A. Miller; Assistant Attorney General; Attorneys for Respondent.

David E. Yocom; Salt Lake County Attorney; John G. Avery; Special Assistant/Legal Counsel; Bill Thomas Peters; Special Deputy County Attorney; Attorneys for Appellants.

Recommended Citation

Brief of Respondent, *Kennecott Copper Corporation v. Salt Lake County*, No. 870047.00 (Utah Supreme Court, 1987).
https://digitalcommons.law.byu.edu/byu_sc1/1595

This Brief of Respondent 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.

UTAH SUPREME COURT
BRIEF

UTAH
DOCC. DIV.
15 PM

IN THE SUPREME COURT OF THE
STATE OF UTAH

---oo0oo---

870047
SUBJECT NO. 870047
KENNECOTT COPPER CORPORATION,
a New York Corporation,

Respondent,

vs.

SALT LAKE COUNTY, a body
corporate and politic;
ARTHUR MONSON, Treasurer of
Salt Lake County; MILTON
YORGANSON, Assessor of Salt
Lake County,

Appellants,

and

UTAH STATE TAX COMMISSION,

Respondent.

Case No. 870047

---oo0oo---

BRIEF OF RESPONDENT

THE UTAH STATE TAX COMMISSION

APPEAL FROM THE TAX DIVISION OF THE THIRD JUDICIAL DISTRICT
COURT OF SALT LAKE COUNTY, STATE OF UTAH

HONORABLE TIMOTHY R. HANSON, JUDGE

DAVID E. YOCOM
Salt Lake County Attorney
JOHN G. AVERY
Special Assistant/Legal Counsel
BILL THOMAS PETERS
Special Deputy County Attorney
#9 Exchange Place, Suite 1000
Salt Lake City, UT 84111
Attorneys for Appellants

DAVID W. WILKINSON
Attorney General of Utah
MAXWELL A. MILLER
Assistant Attorney General
Attorneys for Respondent
State Tax Commission of Utah
130 State Capitol Building
Salt Lake City, UT 84114

JAMES B. LEE
KENT W. WINTERHOLLER
185 South State Street
Attorneys for Respondent

Kennecott Corporation
Salt Lake City, UT 84147-0898

SEP 21 1987

FILED

TABLE OF CONTENTS

	<u>Page</u>
JURISDICTION.....	2
NATURE OF PROCEEDINGS BELOW.....	2
STATEMENT OF ISSUES PRESENTED FOR REVIEW.....	3
STATEMENT OF THE CASE.....	4
INTRODUCTION AND SUMMARY OF ARGUMENT.....	7
ARGUMENT.....	8
I. THE COUNTY CANNOT FORCE THE TAX COMMISSION TO REASSESS KENNECOTT'S PROPERTY UNDER UTAH'S ESCAPED ASSESSMENT STATUTE.....	8
II. THE COUNTY IS NOT ENTITLED TO A REASSESSMENT OF KENNECOTT'S PROPERTY BECAUSE KENNECOTT ALLEGEDLY RECEIVED THE BENEFIT OF THE ROLLBACK INTENDED FOR LOCALLY ASSESSED PROPERTIES.....	14
III. THE COUNTY MAY NOT HAVE KENNECOTT'S PROPERTY REASSESSED IN DISREGARD OF THE NET PROCEEDS METHOD BECAUSE THE ORIGINALLY ASSESSED VALUE IS NOT HIGH ENOUGH.....	16
A. THE NET PROCEEDS FORMULA CODIFIED AT SECTION 59-5-57 IS CONSTITUTIONAL.....	16
B. THIS COURT SHOULD NOT PASS UPON THE CONSTITUTIONALITY OF SECTION 59-5-57.....	17
CONCLUSION.....	18
ADDENDUM I.....	20
ADDENDUM II.....	
ADDENDUM III.....	

TABLE OF AUTHORITIES

CASES

	<u>Page</u>
<u>Builders Component Supply Co. v. Cockayne,</u> 230 P. 1030 (Utah 1924).....	11
<u>Kennecott Corporation v. Salt Lake County,</u> 702 P.2d 451, 456 (Utah 1985).....	5, 11
<u>Lemback v. Cox,</u> 639 P.2d 197 <u>200,</u> (Utah 1981).....	18
<u>Nupetco Associates v. County Board of Equalization of</u> <u>Salt Lake County,</u> Appeal No. 84-18-1600.....	10
<u>Rio Algom Corporation v. San Juan County,</u> 681 P.2d 184 (Utah 1984).....	2
<u>Timpanogos Planning and Water Management Agency v.</u> <u>Central Utah Water Conservancy District,</u> 690 P.2d 562, 564 (Utah 1984).....	12
<u>Union Portland Cement Co. v. Morgan County,</u> 230 P. 1030 (Utah 1924).....	11, 12, 13

STATUTES

	<u>Page</u>
Utah Code Ann. § 59-1-608 (Supp. 1987).....	2
Utah Code Ann. § 59-2-309 (Supp. 1987).....	3, 10
Utah Code Ann. § 59-2-1411 (Supp. 1987).....	4
Utah Code Ann. § 59-5-4.5 (1953).....	4, 5
Utah Code Ann. § 59-5-17 (1953).....	3, 4, 7, 10, 11, 12, 13, 14, 17, 18
Utah Code Ann. § 59-5-57 (1953).....	3, 4, 7, 8, 9, 16, 17, 18
Utah Code Ann. § 59-11-11 (1953).....	2, 4

Utah Code Ann. § 78-2-2(3)(i) (1953)..... 2

OTHER

Page

Utah const. art. V. sec. 1..... 12

Utah const. art. XIII sec. 2, 3..... 3, 16

---oo0oo---

Respondent.

1
 2
 3
 4
 5
 6
 7
 8
 9
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25
 26
 27
 28
 29
 30
 31
 32
 33
 34
 35
 36
 37
 38
 39
 40
 41
 42
 43
 44
 45
 46
 47
 48
 49
 50
 51
 52
 53
 54
 55
 56
 57
 58
 59
 60
 61
 62
 63
 64
 65
 66
 67
 68
 69
 70
 71
 72
 73
 74
 75
 76
 77
 78
 79
 80
 81
 82
 83
 84
 85
 86
 87
 88
 89
 90
 91
 92
 93
 94
 95
 96
 97
 98
 99
 100
 101
 102
 103
 104
 105
 106
 107
 108
 109
 110
 111
 112
 113
 114
 115
 116
 117
 118
 119
 120
 121
 122
 123
 124
 125
 126
 127
 128
 129
 130
 131
 132
 133
 134
 135
 136
 137
 138
 139
 140
 141
 142
 143
 144
 145
 146
 147
 148
 149
 150
 151
 152
 153
 154
 155
 156
 157
 158
 159
 160
 161
 162
 163
 164
 165
 166
 167
 168
 169
 170
 171
 172
 173
 174
 175
 176
 177
 178
 179
 180
 181
 182
 183
 184
 185
 186
 187
 188
 189
 190
 191
 192
 193
 194
 195
 196
 197
 198
 199
 200
 201
 202
 203
 204
 205
 206
 207
 208
 209
 210
 211
 212
 213
 214
 215
 216
 217
 218
 219
 220
 221
 222
 223
 224
 225
 226
 227
 228
 229
 230
 231
 232
 233
 234
 235
 236
 237
 238
 239
 240
 241
 242
 243
 244
 245
 246
 247
 248
 249
 250
 251
 252
 253
 254
 255
 256
 257
 258
 259
 260
 261
 262
 263
 264
 265
 266
 267
 268
 269
 270
 271
 272
 273
 274
 275
 276
 277
 278
 279
 280
 281
 282
 283
 284
 285
 286
 287
 288
 289
 290
 291
 292
 293
 294
 295
 296
 297
 298
 299
 300
 301
 302
 303
 304
 305
 306
 307
 308
 309
 310
 311
 312
 313
 314
 315
 316
 317
 318
 319
 320
 321
 322
 323
 324
 325
 326
 327
 328
 329
 330
 331
 332
 333
 334
 335
 336
 337
 338
 339
 340
 341
 342
 343
 344
 345
 346
 347
 348
 349
 350
 351
 352
 353
 354
 355
 356
 357
 358
 359
 360
 361
 362
 363
 364
 365
 366
 367
 368
 369
 370
 371
 372
 373
 374
 375
 376
 377
 378
 379
 380
 381
 382
 383
 384
 385
 386
 387
 388
 389
 390
 391
 392
 393
 394
 395
 396
 397
 398
 399
 400
 401
 402
 403
 404
 405
 406
 407
 408
 409
 410
 411
 412
 413
 414
 415
 416
 417
 418
 419
 420
 421
 422
 423
 424
 425
 426
 427
 428
 429
 430
 431
 432
 433
 434
 435
 436
 437
 438
 439
 440
 441
 442
 443
 444
 445
 446
 447
 448
 449
 450
 451
 452
 453
 454
 455
 456
 457
 458
 459
 460
 461
 462
 463
 464
 465
 466
 467
 468
 469
 470
 471
 472
 473
 474
 475
 476
 477
 478
 479
 480
 481
 482
 483
 484
 485
 486
 487
 488
 489
 490
 491
 492
 493
 494
 495
 496
 497
 498
 499
 500
 501
 502
 503
 504
 505
 506
 507
 508
 509
 510
 511
 512
 513
 514
 515
 516
 517
 518
 519
 520
 521
 522
 523
 524
 525

Case No. 870047

--- 000 00 ---

JAMES B. LEE
KENT W. WINTERHOLLER
185 South State Street
Attorneys for Respondent
Kennecott Corporation
Salt Lake City, UT 84147-0898

JURISDICTION

The Utah Supreme Court has jurisdiction under Utah Code Ann. § 59-1-608 (Supp. 1987) to entertain this appeal from the Decision and Summary Judgment issued by the Tax Division of the Third Judicial District Court on December 23, 1986.¹

NATURE OF PROCEEDINGS BELOW

The Plaintiff-Appellant Kennecott Copper Corporation ("Kennecott") originally brought this case under Utah Code Ann. § 59-11-11 (1953), as amended to recover taxes paid under protest to Salt Lake County. The defendants in that action (presently the defendants-appellants) were Salt Lake County, Arthur L. Monson and Milton Yorgason (the "County") and the State Tax Commission of Utah ("Tax Commission") (presently a defendant-respondent).² In Rio Algom Corporation v. San Juan County, 681 P.2d 184 (Utah 1984), this Court resolved the underlying legal basis for Kennecott's claim against the plaintiff-Kennecott.

¹ The Appellant Salt Lake County states that this Court's jurisdiction is founded upon Utah Code Ann. § 78-2-2(3)(i) (1953), as amended. That section merely provides in part that the Supreme Court has jurisdiction "over any court of record over which the Court of Appeals does not have original appellate jurisdiction." Section 59-1-608 provides in part that "The sole and exclusive remedy for review of a decision or order of the tax division of any district court shall be by appeal to the Supreme Court. . . ."

² The County's opening brief lists the "State Tax Commission of Utah" as an appellant in the caption. That listing is incorrect since the County has appealed from a judgment granting the Tax Commission's Motion for Judgment on the Pleadings. In this appeal, the Tax Commission stands in the same position as Kennecott. It is a respondent.

Thereafter the County pursued its counterclaim against Kennecott and its crossclaim against the Tax Commission in the district court. Kennecott and the Tax Commission each filed a Motion for Judgment on the Pleadings in the district court, which the court granted.

The County has taken the present appeal from the district court's Order and Summary Judgment granting those motions.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Utah Code Ann. § 59-5-17 (1953), as amended, now codified at Utah Code Ann. § 59-2-309 (Supp. 1987), permits the County to force the Tax Commission to reassess Kennecott's property because it is allegedly underassessed.

2. Whether Utah Code Ann. § 59-5-57 (1953), as amended (the "net proceeds" formula by which the Tax Commission assessed Kennecott's mining claims) violates Article XIII, sections 2 and 3 of the Utah Constitution.³

³ The Tax Commission agrees with Kennecott's framing of the issues involved in this appeal, but has intentionally restricted the issues discussed in this brief to those facing the Tax Commission. As a Second Cause of Action in its crossclaim, the County asserted that the Tax Commission had failed to disclose to the County requested information about Kennecott's assessment. Although the district court granted the Tax Commission's Motion for Judgment on the Pleadings with respect to the County's Second Cause of Action in its crossclaim (Rec. 1012), the County does not raise the disclosure issue on appeal.

STATEMENT OF THE CASE

On May 19, 1982, Kennecott filed an action under Utah Code Ann. § 59-11-11 (1953), as amended, (now Utah Code Ann. § 59-2-1411 (Supp. 1987)) seeking recovery of property taxes it paid the County. Kennecott's complaint asked the court to declare that Utah Code Ann. § 59-5-4.5 (1953), as amended was unconstitutional because it afforded taxation relief to locally assessed property but not centrally or state assessed property.

On June 25, 1982, the County filed its Answer, counterclaimed against Kennecott and crossclaimed against the Tax Commission. The County alleged in its counterclaim that Kennecott's property had been undervalued by the Tax Commission, and that the County, pursuant to Utah Code Ann. § 59-5-17, should therefore be permitted to reassess the property for the immediately preceding five years and to collect taxes on the reassessed value. (Rec. 56-57).

The County's crossclaim against the Tax Commission incorporated the counterclaim against Kennecott. Presumably upon the same basis as its counterclaim, the County crossclaimed that the Tax Commission could be ordered to reassess Kennecott's property according to what the County called "assessment practices that will bring the Plaintiff's property . . . up to their full cash value . . ." (Rec. 60) The crossclaim did not specify what "assessment practices" were supposedly incorrect, except to allege that the "net proceeds" formula mandated under Utah Code Ann. § 59-5-57 (1953), as amended (by which the Tax Commission values "mining claims") was unconstitutional. Id.

This Court resolved the case-in-chief against Kennecott in Rio Algom Corporation v. San Juan County, 681 P.2d 184 (Utah 1984). Specifically, that case upheld the constitutionality of Utah Code Ann. § 59-5-4.5 against Kennecott's claim that the imposition of unequal tax rates on state and local assessed property, as authorized by that statute, violated the federal and state constitutions. The parties thereafter stipulated that the original action was no longer part of the proceeding.

The County's counterclaim and crossclaim then remained the outstanding matters for resolution before the district court. Both Kennecott and the Tax Commission thereafter challenged the County's standing to file its counterclaim and crossclaim. In Kennecott Corporation v. Salt Lake County, 702 P.2d 451, 456 (Utah 1985), this Court held that the County had standing to seek "judicial review" of its counterclaim against Kennecott and its crossclaim against the Tax Commission.

On September 18, 1986 Kennecott filed a Motion for Judgment on the Pleadings with respect to the County's counterclaim, and on September 26, 1986, the Tax Commission filed its own Motion for Judgment on the Pleadings with respect to the County's crossclaim. (Rec. 725-727, 742-744). The County followed with its Motion for Summary Judgment to which it had attached various affidavits and documents. (Rec. 771-867).

On November, 26, 1986, the district court heard oral argument on the foregoing motions and on Kennecott's Motion to Strike joined by the Tax Commission and on the Tax Commission's own Motion to Strike. (Rec. 1004).

After a two and one-half hour hearing, the district court ruled from the bench. The district court: (1) granted Kennecott's and the Tax Commission's respective Motions to Strike; (2) denied the County's Motion for Summary Judgment; (3) granted Kennecott's and the Tax Commission's respective Motions for Judgment on the Pleadings; and (4) dismissed the County's counterclaim and crossclaim with prejudice. (Rec. 1004, 1013).

In the subsequently issued Decision and Summary Judgment, the district court held with respect to the County's crossclaim against the Tax Commission that:

The Court rules that Salt Lake County's crossclaim First Cause of Action against the State Defendants is improper in that underassessment is not, and does not constitute grounds for, escaped assessment; and further, that the net proceeds method of assessing metalliferous mines and mining claims set out in Utah Code Ann. § 59-5-57, 1953, as amended, is constitutional

(Rec. 1012).⁴

The County then brought the present appeal. On August 17, 1987, Kennecott filed a Motion to Strike various addenda the County had included in its opening brief to this Court and upon which the County had constructed a substantial part of its argument. See, e.g. Brief of Appellant at 11-15. The Tax Commission joined Kennecott's motion.

On September 11, 1987 this Court granted the Respondent-Kennecott's Motion to Strike.

⁴ The district court's Decision and Summary Judgment with respect to the County's counterclaim against Kennecott is quoted in Kennecott's brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Tax Commission agrees with the arguments Kennecott advances in its brief. For that reason, it does not serve any useful purpose for the Tax Commission to duplicate those arguments here. Instead, this brief merely summarizes what the Tax Commission understands are the salient points of Kennecott's arguments and devotes the bulk of discussion to supplementary argument.

The County cannot recover additional taxes from Kennecott for 1981 and four years prior thereto under Utah Code Ann. § 59-5-17 (1953), as amended because the Tax Commission allegedly undervalued or underassessed Kennecott's taxable property. Neither can the County force the Tax Commission to reassess Kennecott's taxable property under Utah Code Ann. § 59-5-17 (1953), as amended because that statute affords a remedy only to property which has escaped assessment, not property that is allegedly underassessed; and because the statute, under any circumstance, applies only to the County Assessor, not the Tax Commission.

The County is not entitled to a declaration as to the constitutionality of Utah Code Ann. § 59-5-57 (the "net proceeds" statute) because it cannot force a reassessment of Kennecott's taxable property, and because, as a result, this Court should avoid passing upon constitutional questions that are unnecessary to a determination of the merits. In any event, Utah Code Ann. § 59-5-57 (1953), as amended is constitutional because the legislature has broad powers under the Utah Constitution to tax metalliferous minerals as it deems proper.

ARGUMENT

I

THE COUNTY CANNOT FORCE THE TAX COMMISSION TO REASSESS KENNECOTT'S PROPERTY UNDER UTAH'S ESCAPED ASSESSMENT STATUTE.

The County's opening brief does not directly address the crossclaim against the Tax Commission. Point I of the County's brief discusses the constitutionality of section 59-5-57 (the "net proceeds" statute). Points II and III of the County's brief are devoted to arguing that an alleged undervaluation is the statutory equivalent of an escaped assessment. Yet the brief concludes its discussion of these points with the statement that it was error for the trial court to dismiss Salt Lake County's counterclaim with prejudice. Brief of Appellant at 13 and 17. It is consequently difficult to understand upon what basis the County thinks the district court allegedly erred in dismissing the County's crossclaim if the County makes no mention of the crossclaim in its brief.⁵

The crossclaim incorporates by reference the first four paragraphs of the counterclaim against Kennecott. (Rec. 57). Paragraph four of the counterclaim alleges:

That the properties owned by the Plaintiff, both real and personal, located within Salt Lake County, have been underassessed by the State Tax Commission of Utah, thereby resulting in the Plaintiff's receiving a benefit at the expense of the other taxpayers

⁵ The basis of the County's crossclaim has always been somewhat vague. Kennecott states in its brief that "The County also crossclaimed against the Commission, asking that the Commission be required to value Kennecott's property in a fashion which was not pled or specified. . ." Brief of Respondent Kennecott at 2.

of Salt Lake County, which benefit is contrary to law and, in particular, a violation of Article 13, Section 3 of the Constitution of the State of Utah.

(Rec. 54) (emphasis added).

The County then continues in its crossclaim to allege that the Tax Commission has undervalued Kennecott's taxable property, including personal property and improvements (paragraph 6) and further alleges that the Tax Commission, by implementing section 59-5-57 has caused an undervaluation of Kennecott's mining claims (paragraph 8). (Rec. 57-59). It is not clear from the crossclaim upon what basis the County claims a cause of action against the Tax Commission.

Two theories are possible. First, the County alleges that the Tax Commission, by valuing Kennecott's mining claims according to section 59-5-57, has unconstitutionally undervalued those claims. Second, the County alleges that the Tax Commission's general valuation techniques have undervalued all of Kennecott's property, including improvements and personal property. The County's crossclaim does not clarify, even conceding that the County has standing to seek judicial review, how the County's claims for relief could be granted against the Tax Commission for such alleged undervaluation.⁶

⁶ This Court has previously characterized the County's crossclaim as alleging (1) that section 59-5-57 is unconstitutional and (2) that the Tax Commission's valuation methods in general do not reflect full cash value. 702 P. 2d at 456. The Court then held that the County was entitled to judicial review of those claims without intimating what the outcome of that review should be. Id.

The County's constitutional claims against the Tax Commission are discussed in the next section of this brief. The other aspect of the crossclaim, however, is presumably based upon the theory that undervaluation is the equivalent of "escaped assessment" as the latter term is used in section 59-5-17, and that the County Assessor can therefore perform the assessment the Utah Constitution and statutes specifically delegate to the Tax Commission.

This theory is without merit for the reasons explained in Kennecott's brief. Specifically, Kennecott is correct in arguing that the County Assessor cannot reassess allegedly undervalued property under section 59-5-17 now recodified at Utah Code Ann. § 59-2-309 (Supp. 1987). Kennecott points out that only property omitted from the tax rolls, or which has not been "listed for taxation", is property which has "escaped assessment" within the meaning of section 59-5-17. Brief of Respondent Kennecott at 8-9. The County's pleadings make no allegation that any of Kennecott's property has "escaped assessment" only that Kennecott's property has allegedly been undervalued or underassessed. Given that allegation, the virtually undisputed law in this and other jurisdictions, as restated by the Tax Commission in Nupetco Associates v. County Board of Equalization of Salt Lake County, Appeal No. 84-18-1600, is:

Property which has been undervalued due to a clerical mistake in the quantity of the property to be assessed or in the assessed valuation does not result in property which has escaped valuation.

See Brief of Respondent Kennecott at 8-9. Cases from this jurisdiction cited in support of Kennecott's argument are Union Portland Cement Co. v. Morgan County, 230 P. 1020 (Utah 1924); and Builders Component Supply Co. v. Cockayne, 22 Utah 2d 172, 450 P.2d 97 (1969).

In addition to the points Kennecott makes, it should be stressed that section 59-5-17, which gives the County Assessor the statutory right to reassess property that has "escaped" assessment, has no bearing upon the Tax Commission's constitutional and statutory duties. Kennecott briefly discusses this under Point I C of its brief by demonstrating that the County is not the assessor of Kennecott's property. See Brief of Respondent at 12. From the Tax Commission's perspective, the same point should be reinforced.

The very case upon which the County relies to give it standing, Kennecott Corporation v. Salt Lake County, 702 P.2d 451 (Utah 1985), holds in addition that the Tax Commission has the exclusive constitutional responsibility for assessing "mines and mining claims." As this Court stated in the Kennecott, 702 P.2d at 457:

Article XIII, Section 11, provides for creation of the Tax Commission and provides that the Tax Commission shall "assess mines and public utilities." In State ex rel. Public Service Commission v. Southern Pacific Co., we held that Article XIII, Section 11, limits the Legislature's power to confer the power of assessment on any other governmental entity.

(Emphasis added.)

The Tax Commission clearly has the undelegable constitutional duty to assess "mines". It follows that the County, by seeking to compel a reassessment of Kennecott's property under section 59-5-17 is likewise asking the judiciary either to (1) apply section 59-5-17 to the Tax Commission and force it to reassess the property; or (2) permit the County Assessor to reassess Kennecott's property again under section 59-5-17. Both remedies are inappropriate. The judiciary cannot grant the first remedy because it has no constitutional prerogative to rewrite section 59-5-17 and make it apply to the Tax Commission instead of the County Assessor.⁷ The second remedy is inappropriate because the Tax Commission, not the County Assessor, has the sole constitutional responsibility of assessing mines.

The County attempts to sustain its counterclaim by arguing that an undervaluation can be equated with escaped assessment, thereby making section 59-5-17 an appropriate remedy against Kennecott and presumably against the Tax Commission as well. The basis for this argument is a proffered distinction between Union Portland Cement and the County's counterclaim and crossclaim. The County claims that "over \$500 million worth of minerals produced by Kennecott in 1981 had a value for tax purposes of

⁷ Utah Const. art. V sec. 1 provides in pertinent part that "no person charged with the exercise of powers properly belonging to one of these departments [Executive, Legislative and Judicial] shall exercise any functions appertaining to either of the others" See also Timpanogsos Planning and Water Management Agency v. Central Utah Water Conservancy District, 690 P.2d 562, 564 (Utah 1984) wherein this Court expressed a "reluctance to encroach upon the legislature's powers to make laws"

zero (0) in 1981." Therefore, says the County, these minerals "escaped" assessment and can be reassessed by the County Assessor. Brief of Appellant at 11.

The defects in this argument are at least twofold:

First, as an evidentiary matter, there was no record before the trial court or this Court to the effect that "over \$500 million" worth of minerals has "escaped" taxation, assuming for argument's sake that "escaped" means "undervalued." The addenda included with the County's brief imply that the "minerals" not taxed are supposedly worth an extraordinary amount. But those addenda were stricken both by the trial court and this Court. (Rec. 1007). Factually, therefore, there is no evidentiary support for the County's statement.

Second, Kennecott demonstrates that section 59-5-17 was intended as a remedy for those instances in which the taxing authority erred by overlooking and/or omitting taxable property from the rolls that should have been included. See Brief of Respondent Kennecott at 9-12. Section 59-5-17 was not intended to overrule specific statutory authority -- in this instance, section 59-5-57 which mandates in pertinent part:

. . . there shall be no valuation based upon net annual proceeds for the purpose of assessment of any such mine or mining claim for any one year in which there were no gross proceeds realized in the year next preceding the year of assessment

(Emphasis added.)

The County's attempt to distinguish Union Portland Cement by equating an oversight of fact with a mandate of law is wholly inadequate.

II

THE COUNTY IS NOT ENTITLED TO A REASSESSMENT OF KENNECOTT'S PROPERTY BECAUSE KENNECOTT ALLEGEDLY RECEIVED THE BENEFIT OF THE ROLLBACK INTENDED FOR LOCALLY ASSESSED PROPERTIES.

Point III of the County's brief restates the arguments just discussed by claiming that Kennecott's property received a rollback in value for 1981, that a rollback constitutes "escaped assessment", and that, accordingly, the court may order the Tax Commission to reassess Kennecott's property. See Brief of Appellant 13. Kennecott, which also assumes that it received a rollback for 1981, responds to this argument by reasserting its position that allegedly undervalued property cannot be reassessed under section 59-5-17. Kennecott states:

As is amply pointed out in this Brief, the allegation by the County is not that Kennecott's property was not assessed at all, but that Kennecott's property was undervalued and underassessed as a result of the application of the roll back in 1981 and the years prior thereto. Clearly, under Point I above, the escaped assessment statute relied upon by the County does not apply and may not properly be used to have Kennecott's property revalued for the years in question.

Brief of Respondent Kennecott at 24.

As explained above, Kennecott's argument is correct. Kennecott does not mention, however, that there was no conclusive evidence before the trial court that the Tax Commission, rightly or wrongly, ever gave Kennecott the rollback it assumes it received. John Stewart's affidavit,⁸ the only affidavit which

⁸ John Stewart is the Supervisor of Mine Valuation for the Property Tax Division of the Utah State Tax Commission.

was not stricken below, states unequivocally:

For the tax years 1981 and 1982, the Property Tax Division of the Utah State Tax Commission valued Kennecott's property as follows: a) Kennecott's personal property was valued at it's fair market value, meaning historical cost less depreciation. b) Kennecott's improvements, meaning improvements to existing structures attached to the land, were valued at a 1978 base year value and then multiplied by a factor or "factored up" to current fair market value. c) Kennecott's mining claims were valued at the statutory rate mandated by Utah Code Ann. §59-5-57. . .

The statement in Mr. Yorgason's [stricken] affidavit (and repeated in Mike Reed's [stricken] affidavit, pages 9 and 11 of Exhibit A) which claims that Kennecott's property for 1981 and 1982 was "rolled back to their 1789 [sic] level" is categorically false.

(Rec. 872).

Although the County and Kennecott both make their respective arguments assuming that Kennecott had received a "rollback" for 1981, the only evidence before the district court is ambiguous, inconclusive or to the contrary. Consequently, it appears that the County, under Point III of its brief, may be asking the court to redress an injury that it never received.⁹

⁹ The Tax Commission does not intend by this statement to suggest that the case ought to be remanded. Kennecott's argument, that undervaluation is not a basis for reassessment, is fully dispositive of this case even though the property was arguably never "undervalued" by the "rollback".

III

THE COUNTY MAY NOT HAVE KENNECOTT'S PROPERTY REASSESSED IN DISREGARD OF THE NET PROCEEDS METHOD BECAUSE THE ORIGINALLY ASSESSED VALUE IS NOT HIGH ENOUGH.

A. THE NET PROCEEDS FORMULA CODIFIED AT SECTION 59-5-57 IS CONSTITUTIONAL.

The County's principal crossclaim against the Tax Commission appears to be that the "net proceeds" formula codified at section 59-5-57 is unconstitutional. In reply, the Tax Commission agrees with Kennecott that section 59-5-57 is constitutional because the legislature has broad power to determine the method of assessing mines in Utah. See Brief of Respondent Kennecott at 20-21. It thus makes no sense to argue that the legislature's exercise of its constitutional powers to assess mines under Article XIII section 4 of the Utah Constitution conflicts with Article XIII sections 2 and 3 of the same constitution. The only constitutional limitation on the legislature under Article XIII section 4 is that mining claims "shall be assessed" and that the method in use as of 1931 when section 4 was amended "shall not be changed before January 1, 1935."

Obviously, the legislature cannot simply ignore the requirements of Article XIII sections 2 and 3 in determining the methods of assessment under section 4. But this Court, in Rio Algom, has already decided that:

Thus, §§ 2 and 3 of Article XIII permit the Legislature to adopt means to achieve that degree of uniformity in valuation that is practicably attainable within the general confines of the term "market value."

Id. 681 P.2d at 192.

The legislature, in short, has broad powers to prescribe procedures for determining fair market value and broad powers to determine the means by which mines shall be taxed. Reading Article XIII sections 2, 3 and 4 together makes it virtually indisputable that the legislature can constitutionally tax metalliferous mines and mining claims as it deems proper.

B. THIS COURT SHOULD NOT PASS UPON THE CONSTITUTIONALITY OF SECTION 59-5-57.

Notwithstanding the arguments made in the preceding paragraph that section 59-5-57 is constitutional, this Court should consider avoiding the constitutional question altogether. As explained in part I of this brief, the County has no cause of action against Kennecott for an alleged undervaluation of its property. Neither can the County force the Tax Commission to reassess Kennecott's property because (1) section 59-5-17 does not apply to the Tax Commission, as explained in part I of this brief; and (2) the County failed to protest Kennecott's assessment before the Tax Commission, as explained in Point II of Kennecott's brief.

Because the County cannot force a reassessment of Kennecott's property, the County's constitutional claim becomes moot. Stated another way, it makes no sense to adjudicate a constitutional issue if the alleged injury of undervaluation cannot be redressed. This appeal should be resolved in its entirety upon the principle that an alleged underassessment is not interchangeable with escaped assessment. Were this Court to arrive at that conclusion, it would be unnecessary to determine

the constitutionality of section 59-5-57. As a matter of sound jurisprudence, the constitutionality of a statute should not be passed upon unless it is absolutely necessary for determining the merits of the case. See e.g. Lemback v. Cox, 639 P.2d 197, 200 (Utah 1981) in which this Court declined to pass upon a constitutional question (judicial preference for maternal custody) when the case could be decided upon another basis (best interest of the child).

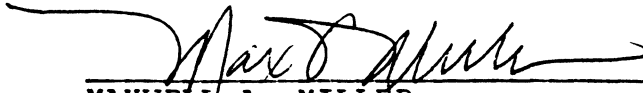
CONCLUSION

As demonstrated in this brief and in Kennecott's brief, underassessment does not constitute escaped or omitted assessment whereby the County Assessor, acting under Utah Code Ann. § 59-5-17 (1953), as amended, can reassess Kennecott's taxable property. Consequently, the County cannot force a reassessment of Kennecott's taxable property because it is allegedly undervalued.

In addition, the County cannot invoke Utah Code Ann. § 59-5-17 (1953), as amended, which expressly applies only to the County Assessor, as a remedy to force the Tax Commission to reassess Kennecott's taxable property.

Finally, and because the County cannot force a reassessment of Kennecott's taxable property, it is unnecessary for this Court to decide whether the "net proceeds" formula for taxing metalliferous minerals, codified at Utah Code Ann. § 59-5-57 (1953), is constitutional. In any event, however, the "net proceeds" formula is constitutional because the Utah Constitution gives the legislature broad powers to determine how metalliferous minerals shall be taxed.

RESPECTFULLY SUBMITTED this 21st day of September, 1987.




MAXWELL A. MILLER
Assistant Attorney General
Attorney for Respondent
Utah State Tax Commission

CERTIFICATE OF MAILING

I hereby certify that on the 21st day of September,
1987, a true and correct copy of the foregoing Brief of
Respondent was mailed first class, postage prepaid to:

Bill Thomas Peters, Esq.
#9 Exchange Place, Suite 1000
Salt Lake City, UT 84111

James B. Lee, Esq.
Parsons Behle & Latimer
185 South State Street
Salt Lake City, UT 84147-0898



1

ADDENDUM 1

ASSESSMENT OF PROPERTY

59-5-57. Assessment of mines.—All metalliferous mines and mining claims, both placer and rock in place, shall be assessed at \$5.00 per acre and in addition thereto at a value equal to two times the average net annual proceeds thereof for the three calendar years next preceding or for as many years next preceding as the mine has been operating, whichever is less; provided, however, there shall be no valuation based upon net annual proceeds for the purpose of assessment of any such mine or mining claim for any one year in which there were no gross proceeds realized in the year next preceding the year of assessment. All other mines or mining claims and other valuable mineral deposits, including lands containing coal or hydrocarbons, shall be assessed at thirty per cent of their reasonable fair cash value. All machinery used in mining and all property or surface improvements upon or appurtenant to mines or mining claims and the value of any surface use made of mining claims or mining property for other than mining purposes shall be assessed at thirty per cent of their reasonable fair cash value. In all cases where the surface of lands is owned by one person and the mineral underlying such lands is owned by another, such property rights shall be separately assessed to the respective owners. In such cases the value of the surface if it is used for other than mining purposes shall be assessed by the assessor of the county in which the property is situated.

ADDENDUM 2

REVENUE AND TAXATION

59-5-17. Property escaping assessment—Five-year limitation period on assessment—Duties of assessor.—Any property discovered by the assessor to have escaped assessment may be assessed at any time as far back as five years prior to the time of discovery, and the assessor shall enter such assessments on the tax rolls in the hands of the county treasurer or elsewhere, and when so assessed shall be reported by the assessor to the county auditor, if made after the assessment book has been delivered to the county treasurer, and the auditor shall charge the county assessor with the taxes on such property, and the assessor shall give notice to the person assessed therewith and the assessor shall forthwith proceed to secure or collect the taxes as provided in chapter 10 of this title.

ADDENDUM 3

Sec. 2. [Tangible property to be taxed—Value ascertained—Properties exempt—Legislature to provide annual tax for state.]

All tangible property in the state, not exempt under the laws of the United States, or under this Constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The property of the state, counties, cities, towns, school districts, municipal corporations and public libraries, lots with the buildings thereon used exclusively for either religious worship or charitable purposes, and places of burial not held or used for private or corporate benefit, shall be exempt from taxation. Tangible personal property present in Utah on January 1, m., which is held for sale or processing and which is shipped to final destination outside this state within twelve months may be deemed by law to have acquired no situs in Utah for purposes of ad valorem property taxation and may be exempted by law from such taxation, whether manufactured, processed or produced or otherwise originating within or without the state. Tangible personal property present in Utah on January 1, m., held for sale in the ordinary course of business and which constitutes the inventory of any retailer, or wholesaler or manufacturer or farmer, or livestock raiser may be deemed for purposes of ad valorem property taxation to be exempted. Water rights, ditches, canals, reservoirs, power plants, pumping plants, transmission lines, pipes and flumes owned and used by individuals or corporations for irrigating land within the state owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed so long as they shall be owned and used exclusively for such purposes. Power plants, power transmission lines and other property used for generating and delivering electrical power, a portion of which is used for furnishing power for pumping water for irrigation purposes on lands in the state of Utah, may be exempted from taxation to the extent that such property is used for such purposes. These exemptions

shall accrue to the benefit of the users of water so pumped under such regulations as the Legislature may prescribe. The taxes of the indigent poor may be remitted or abated at such times and in such manner as may be provided by law. The Legislature may provide for the exemption from taxation of homes, homesteads, and personal property, not to exceed \$2,000 in value for homes, homesteads, and all household furnishings, furniture, and equipment used exclusively by the owner thereof at his place of abode in maintaining a home for himself and family. Property not to exceed \$3,000 in value, owned by disabled persons who served in any war in the military service of the United States or of the state of Utah and by the unmarried widows and minor orphans of such disabled persons or of persons who while serving in the military service of the United States or the state of Utah were killed in action or died as a result of such service may be exempted as the Legislature may provide.

The Legislature shall provide by law for an annual tax sufficient, with other sources of revenue, to defray the estimated ordinary expenses of the state for each fiscal year. For the purpose of paying the state debt, if any there be, the Legislature shall provide for levying a tax annually, sufficient to pay the annual interest and to pay the principal of such debt, within twenty years from the final passage of the law creating the debt. (As amended November 4, 1930; November 5, 1946; November 4, 1958, effective January 1, 1959; November 6, 1962, effective January 1, 1963; November 3, 1964, effective January 1, 1965; November 5, 1968, effective January 1, 1969.)

**Sec. 3. [Assessment and taxation of tangible property—Exemptions—
Personal income tax—Disposition of revenues.]**

The Legislature shall provide by law a uniform and equal rate of assessment and taxation on all tangible property in the state[,] according to its value in money, and shall prescribe by law such regulations as shall secure a just valuation for taxation of such property, so that every person and corporation shall pay a tax in proportion to the value

of his, her, or its tangible property, provided that the Legislature may determine the manner and extent of taxing transient livestock and livestock being fed for slaughter to be used for human consumption. Land used for agricultural purposes may, as the Legislature prescribes, be assessed according to its value for agricultural use without regard to the value it may have for other purposes. Intangible property may be exempted from taxation as property or it may be taxed in such manner and to such extent as the Legislature may provide. Provided that if intangible property be taxed as property the rate thereof shall not exceed five mills on each dollar of valuation. When exempted from taxation as property, the taxable income therefrom shall be taxed under any tax based on incomes, but when taxed by the state of Utah as property, the income therefrom shall not also be taxed. The Legislature may provide for deductions, exemptions, and/or offsets on any tax based upon income. The personal income tax rates shall be graduated but the maximum rate shall not exceed six per cent of net income. No excise tax rate based upon income shall exceed four per cent of net income. The rate limitations herein contained for taxes based on income and for taxes on intangible property shall be effective until January 1, 1937, and thereafter until changed by law by a vote of the majority of the members elected to each house of the Legislature. All revenue received from taxes on income or from taxes on intangible property shall be allocated to the support of the public school system as defined in Article X, Section 2 of this Constitution. (As amended November 6, 1900; November 6, 1906; November 4, 1930; November 5, 1946; November 5, 1968, effective January 1, 1969.)