

1979

# Utah Department of Transportation v. Glen E. Fuller And Connie J. Fuller, His Wife; Kimberly G. Fuller; Kent F. Fuller : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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UTAH DEPARTMENT OF  
TRANSPORTATION,

Plaintiff-Respondent,

vs.

No. 16404

GLEN E. FULLER and CONNIE  
J. FULLER, his wife; KIMBERLY  
G. FULLER; KENT F. FULLER,

Defendants-Appellants

---

BRIEF OF APPELLANTS

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Interlocutory Appeal  
taken from Order of Immediate Occupancy  
First Judicial District Court in and for  
Box Elder County, State of Utah  
Honorable VeNoy Christoffersen, Judge

---

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JUN 20 1979

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No. 16404

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BRIEF OF APPELLANTS

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NATURE OF THE CASE

This interlocutory appeal is brought for the purpose of determining the constitutional and legislative extent and authority of the Utah Department of Transportation in exercising its powers of eminent domain. Specifically, defendants in this interlocutory appeal challenge plaintiff's authority to condemn for the purpose for which their lands are sought and also challenge the manner in which plaintiff seeks to implement whatever eminent domain powers might exist in the circumstances.

DISPOSITION IN LOWER COURT

Plaintiff upon filing its Complaint moved for an Order of Immediate Occupancy, to which defendants filed their objections

and a Motion to Dismiss. After a hearing on the matter, the lower court issued a Memorandum Decision, which in substance denied the Motion to Dismiss, and entered an Order of Immediate Occupancy permitting plaintiff to proceed with construction.

Defendants sought and were granted an Interlocutory Appeal.

#### RELIEF SOUGHT ON APPEAL

Defendants seek to have the Complaint dismissed and the "Amended" Order of Immediate Occupancy nullified, and for a directive to the lower court protecting defendants' property by awarding damages or granting injunctive or other relief from construction activities which might be undertaken by plaintiff or its contractor.

#### STATEMENT OF FACTS

In this matter plaintiff undertook the construction of a roadside rest area on the west side of I-15 freeway in Box Elder County at a point approximately 5 miles northwest of Brigham City and about two blocks west of the Brigham City airport. Being on the west side of the freeway, it will naturally accommodate travelers following a southbound traffic flow. (See Complaint--Exhibit A-1) The total rest stop area will contain 19.54 acres of land. As noted on the Exhibit, which was made a part of the Complaint, a small rectangular area was located at

west side of the freeway, and to the north of the rest stop area, for a sewage lagoon.

Because of a high ground water table in the area, and since no public sewage facilities existed, plaintiff undertook to solve the sewage problem by first selecting two contiguous sites approximately 1,000 feet east of the freeway and adjacent to the west property line of the Brigham City Airport. The Brigham City Airport officials objected to this location ( Rep.Tr. 23, Tr. 85-4,5 and Tr. 84-11), and a third location ( as shown on Exhibit A of the Complaint) was selected on the west side of the freeway and immediately north of, and contiguous to, the roadside rest area.

The third location for the sewage lagoon, which encompassed a site of 3.10 acres ( Tr. 84-12), also drew objections from area residents; in fact, different individuals came to Salt Lake City to register their objections; and Mr. Wilde, who did the design work on the project, stated that " All the property owners.. in the area objected to the sewage lagoon. ( Tr. 84-14)

Thereafter, and just shortly before the Complaint was filed in this action, a fourth location was selected on the east side of the freeway approximately across from the third location; however, instead of the final location containing 3.10 acres for

sewage lagoon purposes; it was enlarged to double its original size , so as to include 6.05 acres.

During the design and planning stages of the fourth and enlarged sewage lagoon area, plaintiff and certain property owners in the area had discussions whereby, at no charge whatsoever, the proposed sewage lagoon would accept effluent from the Brigham City Airport ( Rep. Tr. 29), an adjoining land developer by the name of Thompson from California, whose property lay on the west side of the freeway ( Rep. Tr. 10), and possibly other individuals. Mr. Woodrow Burnham, project design engineer for plaintiff, stated ( Tr. 18) that Brigham City, Mr. Thompson, possibly Mrs. Hunsaker ( another property owner on the west side of the freeway), and others, could connect their pipes and discharge effluent into the proposed sewage lagoon, recognizing that its proposed size was in fact larger than the immediate needs of the plaintiff ( Tr. 85-15). The proposed facility would be built entirely at the cost of the plaintiff ( with federal funds), and without any cost whatever to others who might hook into the sewage lagoon ( Tr. 85-16 , Rep. Tr. 30), although Mr. Thompson volunteered that he would have put up \$11,000.00 ( Tr. 85-15) to compensate for what it would have cost him to put in his own waste water facility.

As a means of implementing the use of the proposed sewage

lagoon on defendants' properties by others, Mr. Burnham caused to be prepared a Policy Statement pertaining to additional users of the proposed sewage lagoon ( R. 73, Tr. 85-12), wherein it provided, among other things, that plaintiff would ultimately attempt to make the sewage lagoon a " community facility, if possible."

## ARGUMENT

### POINT I

THERE IS NO STATUTORY AUTHORITY PROVIDING FOR THE CONDEMNATION OF A SEWAGE LAGOON LOCATED SEPARATE AND APART FROM A ROADSIDE REST AREA.

Section 27-12-96 Utah Code Annotated, 1953 ( Laws of 1963) furnishes the only authority authorizing the taking of private property for roadside rest areas. The applicable provision of the statute follows:

" 27-12-96 Acquisition of rights of way and other real property- The commission is authorized to acquire any real property or interests therein, deemed necessary for temporary, present, or reasonable future state highway purposes by gift, agreement, exchange, purchase, condemnation, or otherwise. Highway purposes as used in this section or otherwise in this act shall include, but shall not be limited to the following:

(11) The construction and maintenance of roadside rest areas adjacent to or near any highway.

History L. 1963, ch. 39, Para 96. "

Conceivably, a "roadside rest area" might incorporate a modest-sized sewage lagoon facility within the complex to accommodate restroom facilities for the traveling public; but to consider a non-contingent six-acre sewage lagoon, located as a separate facility across the freeway from the rest area-- and serving numerous prospective users, is stretching the concept of a "roadside rest area" far beyond reality. This is even more apparent in view of the testimony at the hearing of Mr. Wilde, who stated ( T. 84-12,13) that the proposed facility located contiguous to the rest area would have been only one-half as large as the one being contemplated in this action and that the State's lack of experience with these sewage lagoon facilities involved several unknown "variables". ( Rep. Tr. 31 )

A "roadside rest area" cannot within reason include an "area" utilized for the roadstop rest purposes and a separate "area" for a sewage lagoon. The definition of the word "area", according to Volume 4 of Words and Phrases, at pages 8 and 10, states:

" ' area' can mean any plane surface, the enclosed space which a building stands, a particular extent of surface  
" ' area' in geometry means the superficial contents of any figure; the surface included within any given lines

A "roadside rest area" by definition does not contemplate two separate distinct parcels of land; in fact, the words "roadside rest area" by definition do not contemplate

side rest" qualify the word " area," and no possible construction or innuendo surrounding the words " sewage lagoon" can possibly bring such a separate facility within the meaning of a " road-side rest area".

Plaintiff may argue that the words "but shall not be limited to", which are found in Section 27-12-96, would enlarge upon the definition of " highway purposes" therein contained, but those gratuitous words will not enlarge the power of eminent domain under general condemnation law and our specific Utah cases. The power of eminent domain is strictly construed, as pointed out in Volume 1 of Nichols on Eminent Domain, Section 3.213:

"One of the most firmly established principles of law of eminent domain is that the burden is on a party seeking to exercise the power of eminent domain to show a warrant from the legislature either in express terms or by necessary implication. The burden is also on the condemnor to show that it is acting within the scope of statutory power. Unless expressly provided by statute, mere authority to acquire or purchase property does not confer the power of eminent domain by implication. Although doubtful inferences will not sustain an exercise of the power, a clearly implied power will be recognized. Even though there is an apparent grant of power, if such grant is not clear and explicit and if no provision is made for compensation the grant will not be implied. Thus, a statute which merely sets forth a code of procedure will not impliedly grant the power. Nor does it follow, because the denial of the power will defeat the object to be attained, that the legislature intended to grant the power."

The Utah case of Great Salt Lake Authority v. Island Ranching Company, 18 Utah 2d 279, 421 P. 2d 504, is quoted by Nichols in support of the foregoing rule. In that case this

Court held that the Authority did not have the power of eminent domain to acquire Antelope Island by reading into the Act creating the Great Salt Lake Authority the power by implication from general words found in the Act; rather, it was held that the express power must necessarily issue from the legislature.

Judge Christoffersen did not enter any Findings of Fact in this matter, but he did issue a Memorandum Decision ( R. 49), wherein he stated that-- " ... in order to maintain the roadside rest area it is necessary, in this particular case, that there be some method of taking care of the sewage problem."

There are many instances in property acquisitions by governmental agencies where the disposal of sewage, or some other activity, is " necessary", but without a clear mandate in the statutes a " necessary" function will not be permitted. In this instance, part of the taking for the roadside rest area was from the Thompson property on the west side of the freeway, and the only interpretation of the statute which would have allowed a sewage lagoon to be constructed would have been to enlarge that taking so as to accommodate the entire project.

Invariably, governmental agencies, given the power of eminent domain for certain purposes, always seek to extend those powers far beyond the realm of necessity. As the hearing in this

matter clearly pointed out ( and as the depositions reveal) a workable, gravity-flow sewage lagoon could have easily been established ( Rep. Tr. 25, Tr. 84-11) as part of the total land area acquired for the rest stop area facility on the west side of the freeway! The proposed fourth location of a sewage lagoon on the defendants' properties does not contain the elements of public necessity, it is planned at this fourth location to service numerous individual property owners, and the proposed fourth location was actually prompted by local elements objecting to odors which would emanate from a sewage lagoon at the other three planned locations. ( Rep. Tr. 36, Tr. 84-15) Under the circumstances, to construe Section 27-12-96 ( 11) so as to include such a sewage lagoon, by implication, is stretching the statute clear out of proportion to its intended purpose.

## POINT II

THE CONDEMNATION RESOLUTION PURPORTING TO SUPPORT THE TAKING IS FATALY DEFECTIVE.

It has long been recognized that a valid Resolution must be adopted by the State Road Commission members before the Department of Transportation can proceed with a condemnation action, and the district judges in Utah have uniformly insisted that such a Resolution be produced in court as a prerequisite to any further consideration of a condemnation action.

The Complaint contains a Condemnation Resolution ( R. 2, 1 wherein it provides that a public improvement is involved, "... namely a State Highway." Further, another reference is made therein to the " proposed State Highway", but the attachment to the Resolution specifies that the land is being taken in fee "... for a rest area sewage lagoon adjoining a freeway..." It is obvious that the " freeway" would have to be the " State Highway", and that the sewage lagoon adjoining the freeway is no a " State Highway" as set forth in the Resolution. Further, Section 27-12-96, Utah Code Annotated, which refers to " roadside rest areas" , would at the very best regulate the claimed usage of plaintiff for the proposed sewage lagoon to that of a " High purpose (s)" as set forth in the introductory paragraph of that Section of the Code.

Nowhere in the Condemnation Resolution does it provide for the taking pursuant to a legitimate purpose provided by our Utah laws-- the sewage lagoon referred to is neither a State Highway nor is it a roadside rest area. The Condemnation Resolution is fatally defective, and there was no jurisdictional basis for the court to proceed to issue an Order Immediate Occupancy even if it otherwise had power to do so.

POINT III

THE PROPOSED USE OF THE SEWAGE LAGOON VIOLATES STATE AND FEDERAL CONSTITUTIONAL PROHIBITIONS IN THAT IT SPECIFICALLY CONFERS SPECIAL DIRECT BENEFITS UPON INDIVIDUAL AND PUBLIC ORGANIZATIONS BEYOND THE SCOPE OF A PROPER PUBLIC PURPOSE.

Nichols on Eminent Domain, Vol. 2A, recognizes that the very nature of many public projects is such that different individuals receive " incidental" benefits, such as a landowner who owns a parcel of land adjacent to an interchange finding his land values have substantially increased by reason of the proximity to the interchange. Also, as part of a public project, our courts have even sanctioned the construction of a roadway to a private property if, in so doing, it prevents that property from being landlocked by reason of the project, thereby reducing severance damages.

"7.222 Incidental Private Benefit.

If the use for which land is taken by eminent domain is public the taking is not invalid merely because an incidental benefit will enure to private individuals."

On the other hand, in situations of the type before the Court in this case, Nichols recognizes a different rule:

"7.222 (4) Comingling of Uses.

...The use for which the property is acquired by eminent domain must ordinarily be the use of the condemnor. An acquisition which is primarily for private benefit is not a public use..."

It becomes important at this point to recognize that the presently proposed sewage lagoon of 6.05 acres is double the size of the lagoon proposed of the west side of the freeway. Further, we should apply a practical and sensible perspective to what plaintiff is attempting to do in that a six-acre lagoon takes in a substantial amount of land, in this case being 525 feet long and 500 feet wide-- approaching the size of the area within a square city block. This large area for a sewage lagoon must strike anyone as being unnecessarily large in view of the size of the public roadside rest area being served. Mr. Wilde volunteered that --

" There will be parking facilities for both trucks and cars. There will be an information center building, which will include restrooms and also ( an) area where the Utah Travel Council will have facilities to help the traveling public. There will be a picnic table. And that's about all."

(Tr. 84-5)

Mr. Wilde further explained that the final proposed sewage lagoon was planned to accommodate highway service needs for traffic volume 20 years into the future ( Rep. Tr. 26, 27); even so, the disproportionately large size of the sewage lagoon to accommodate the minimal facilities can only lead to the conclusion that the sewage lagoon was planned to accommodate the specific needs of various individuals, and the Brigham City airport property, in the immediate area.

Mr. Woodrow Burnham, who was largely responsible for the location of the sewage lagoon, caused to be prepared for distribution a document labeled " Policy Concerning Additional Users of Evaporation Pond-- Brigham South Bound Rest Area", introduced as " Exhibit 2 ( R. 73 Tr. 85-12), which set forth 8 separate statements whereby private users could utilize the sewage lagoon. The only requirement was that each would pay his or its connection cost and share the cost of operations. Recognizing that the time might come when the lagoon should be enlarged Paragraph 8 of the Exhibit further provides:

" 8. When enlargement of the pond becomes necessary, UDOT will arrange to make it a community facility if possible. If this is done, it will come under the control of the local governing body. Any expansion of the system must receive prior approval of the Bureau of Water Polution Control."

The foregoing Policy Statement recognizes that the proposed sewage lagoon is being planned as an ultimate public facility which will be expanded in scope far beyond the uses of the proposed roadside rest area facility. And it must also be recognized that when one looks down the road some 20 years, changing conditions and the construction of improvements in reliance upon using the facility make it abundantly clear that the plaintiff would in no event forcibly remove private users from its service; rather, common sense tells us that the

pressure would naturally be to have the facility enlarged to protect vested investments. In fact, the first policy statement ( Exhibit 1-- Burnham Dep. , Tr. 85-11, 12) actually suggested that any enlargement requiring additional land would be effected by the right of eminent domain.

It now becomes necessary to specifically address our inquiry to the issue of whether the use of the sewage lagoon by the Brigham City Airport, Mr. Thompson ( the developer), the Hunsaker property, and possibly others, confers upon them only an " incidental" benefit, or whether it is a special and direct benefit in violation of constitutional prohibitions against the use of state and federal public funds.

Article VI, Section 29 of the Constitution of Utah provides:

"Section 29. Lending Public Credit Forbidden

The Legislature shall not authorize the State, or any County, City, Town, township, district or other political subdivision of the State to lend its credit or subscribe to stock or bonds in aid of any railroad, telegraph or other private individual or corporate enterprise or undertaking."

Article I, Section 2 of the Constitution of Utah also provides:

"Section 2. (All political power inherent in the people  
All political power is inherent in the people, and all governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require  
( underlining added)

Similarly, Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

"... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It thus becomes necessary to determine whether in this instance public funds are being unlawfully expended in pursuit of private endeavors, thus providing unequal advantages to some citizens or organizations at the expense of state and federal taxpayers in general as contrasted with those situations providing only incidental benefits as the result of the construction of a public project. In this respect the actual facts become important to the decision. And since Judge Christoffersen in his Memorandum Decision ( R. 49) did not address this aspect of defendants' objections, recourse will be had to the actual facts.

The expenditure of public funds for challenged purposes has received a fairly liberal construction by most courts where the expenditure serves a public purpose. In Thomas v. Daughters of the Utah Pioneers, 114 Utah 108, 197 P. 2d 477, this Court adopted the general rule that a tax for a private purpose is unconstitutional, but pointed out that-- "... the vital point in all such appropriations is whether the purpose is public;...

the test is in the end, not in the means."

In the foregoing case a lease of land and the expenditure of funds for a museum to display pioneer relics was a proper public objective, but recognized that if the building constructed by the State had "... reserved part to the Daughters of Utah Pioneers, Inc. for its own private purposes and to the exclusion of the public, then ... our act might not be sound."

In State Road Commission of Utah v. Utah Power & Light Company, 10 Utah 2d 333, 353 P. 2d 171 ( 1960), our Court held that, notwithstanding the common law rule, the legislature could pass a Utility Relocation Act providing reimbursement to public utilities who were required to remove their facilities from highway rights-of-way to accommodate freeways and other highway projects, solely upon the basis that the State recognized a moral obligation in the circumstances. Further, Wallberg v. Utah Public Welfare Commission, 115 Utah 242, 203 935 ( 1949) recognized that a legislative act to aid needy persons of advanced age as being a proper expenditure of public funds for public welfare and to uphold the State's moral obligation to look after its needy. To similar effect, in the case of Tribe v. Salt Lake City Corporation, 540 P.2d 499

( 1975) the problem of " urban blight" was recognized as one of statewide concern and thus justified creation of the Redevelopment Agency of Salt Lake City.

In comparing the present situation, whereby Brigham City airport and numerous other individuals are permitted to hook on to the sewage lagoon for a period of time up to possibly twenty years-- and more likely indefinitely, let us simply take the example of Mr. Thompson, whose property is located on the west side of the freeway and who plans a commercial-type development:

1. State and federal funds will construct the sewage lagoon "... without any cost to... adjoining people " ( Tr. 85-16, Rep. Tr. 30), even though Mr. Thompson recognized that there would be a saving to him by not putting in his own facility in the amount of \$11,000.00.
2. No private user will be obligated to pay the pro-rata cost of land acquisition, including severance damages to adjoining lands occasioned by the inability to utilize lands contiguous to the sewage lagoon for a distance of 1,000 feet under Utah Board of Health Regulations and Rules.
3. All engineering, legal, administrative and related expenses will be paid from state and federal funds with-

out the necessity of private contributions of any kind.

4. General supervision of the facility will be the cost of the State of Utah, except for direct costs of operation and maintenance which will be pro-rated.

To even argue that such sewage-use benefits are simply " incidental" to someone like Mr. Thompson's commercial development simply must be considered an absurd position. His recognition that the benefit would be \$11,000.00 must be considered minimal in view of other valuation and cost factors which would enter into final costs; in fact, the benefit to him is simply tremendous; one considers that the 1,000 foot Board of Health Restriction when applied to his lands were he to construct his own sewage treatment for a commercial development, would probably prohibit development of most of the more valuable portion of his entire property. As such it is entirely possible that the total direct benefit conferred upon him could have a fair market value well in excess of \$100,000. Similarly, the same situation would apply to the Brigham City Airport and other private users in the immediate area.

The competitive advantage to an area sewage user by having the free facility available for sewage purposes provides an incalculable direct advantage to those properties which can use the facility, one which cannot be taken advantage of by others.

not so fortunate as to be placated by highway officials-- all of which is a direct ( and not incidental) benefit conferred by expressly and directly enlarging and making available a sewage facility solely at the expense of the taxpayers of the State of Utah and of the United States.

One of the great dangers of permitting deals and arrangements involving an intermingling of public and private uses in situations of this type is that the opportunity for unlawful or irregular conduct is ever present, and, even though no improper action should occur, factual situations as are present in this case often create unanswered questions. As a case in point, the large, expensive overpass on I-15 freeway just a short distance north of the proposed roadside rest stop area ( and shown on Exhibit A-1 of the Complaint at the extreme right-hand side) was built around the year 1963, before defendants acquired the adjacent properties. The overpass, unused for more than 15 years and the object of newspaper and television inquiries and questions, dead-ends on the east side of the freeway without connection to any road system, and now is, and for the foreseeable future probably will be, of no utility or service of consequence.

The subject case presents a classic illustration of the misuse of public funds for private purposes.

POINT IV

THE PROPOSED LOCATION OF THE SEWAGE LAGOON WAS ARBITRARILY DETERMINED AND ITS CONSTRUCTION WILL CONSTITUTE A WASTE OF PUBLIC FUNDS.

As previously noted, witnesses Wilde and Burnham testified that the planning of the sewage lagoon was haphazard because of the variables involved and the lack of experience with any lagoons of this type in the State of Utah, but that in any event the proposed lagoon had an over-capacity. It was because of this situation that it was anticipated that highway needs would not use its capacity until 1997 ( i.e. 20 years)-- and if the fuel shortage worsens it may never be fully used, creating another " mistake" similar to that of the large overpass a short distance up the road. Although the entire situation surrounding the final proposed sewage lagoon is entirely suspect in defendants' minds, even accepting plaintiff's reasoning for its location and necessity at face value challenges the principles set forth in Salt Lake County v. Ramoselli ( 1977), 567 P. 2d 182, wherein Salt Lake County sought to condemn some 11 acres of land to be used as a park and recreation area.

In the Ramoselli case no defined plans had been adopted or approved for prospective park use and no time frame for the use within the reasonably foreseeable future had been determined (#

though a voluntary acquisition of nearby property for public use some six years prior had not as yet been placed to its intended purpose). The issue there presented involved the powers of the courts to consider the necessity and other aspects of condemnation acquisitions at the Order of Occupancy stage of proceedings. In holding that the authority of judicial review existed and that a clear abuse of discretion existed in that case, this Court held that in eminent domain situations--

"... the courts possess full authority to determine the proper limits of the power to prevent abuses in its exercise,..."

Further stating that the question of necessity of a taking is the functional prerogative of the judicial system, 1 Nichols on Eminent Domain, Sec. 4.11 (2) p. 4-157 was quoted:

"... In every case, therefore, there is a judicial question whether the taking is of such a nature that it is or may be founded on public necessity..."

Defendants additionally contend that the construction of any sewage lagoon on the east side of the freeway, as compared to a construction on the west side where the rest stop area is to be located, constitutes not only an arbitrary decision but that it also will constitute a substantial waste of public funds. Although Mr. Wilde stated that there was about one foot difference in elevation between the west and the east side of the freeway, he had to admit that the whole area was "relatively flat", and that

to build the rest stop facility and to run a gravity flow sewage system into a sewage lagoon, whether on the east side or on the west side of the freeway, would require that the sewage pipe be placed above existing ground level by bringing in fill material. When asked if it would be possible to build a sewage lagoon on the west side of the freeway ( as planned at location No. 3), and to dig it somewhat deeper, and to simply move the additional dirt from the lagoon area into the 19-acre rest stop area, Wilde grudgingly admitted that the addition of approximately eight inches of material might not change the grade of traffic coming into the rest stop area by any material amount ( Rep. Tr. 33-3). In a feeble attempt to support his claim that the east-side sewage lagoon would cost less to construct than one on the west side of the freeway Wilde finally admitted:

" Q. So all you took into account was the cost of physically picking up and removing the dirt from a six-acre area on the west side over and above what it would cost on the east side and trucking it away somewhere?

A. Yes.

( Rep. Tr. 35-36)

Plaintiff's cost-reasoning becomes absurd in light of

simple reality for the following reasons:

1. The utilization of excavated material from a site on the west side of the freeway could be accomplished with fast carryalls moving that dirt to the general rest stop area, which needed building up by the amount of some 8 inches which could be achieved;
2. It makes no practical sense to remove excavated material from a proposed lagoon at either location, and to simply haul it away to some distant location to be dumped and wasted; in fact, even if a specially compacted material had to be placed within special portions of the rest stop area, all of the excavated material from a proposed sewage lagoon could be deposited to good advantage in spots not requiring load bearing characteristics;
3. Any excavation of dirt from the proposed sewage lagoon location on the east side of the freeway must necessarily contend with highway-entry ( and possibly -crossing) problems and expenses-- a situation which would not encountered if the sewage lagoon were to be placed on a west side location;
4. The removal of excavated dirt from the proposed lagoon location on the east side of the freeway would undoubtedly require more expensive types of earth moving equipment in order to move it the contemplated longer distance for removal at some undesignated location; and

5. A sewage lagoon on the east side of the freeway would necessitate the boring and placement of a tube under the freeway for some 200 feet, and to be placed therein an 12-inch sewer pipe, at a cost of several thousand dollars.

Although simple logic and common sense tells us that the proposed sewage lagoon just simply by its nature has to be a more expensive undertaking than a similar facility on the west side of the freeway, defendants produced the Affidavits of two well-qualified contractors in the area relating to two aspects of the construction. Mr. Robert Whitaker of Whitaker Construction Company of Brigham City furnished his Affidavit stating that he had installed casing pipe under the Interstate Freeway immediately to the north of the subject area for Corinne City's water system within the past year, and that to auger the distance of 200 feet with a 12-inch casing pipe would cost \$48.00 per running foot, or \$9,600.00 total cost-- without the 12-inch sewer pipe to be placed therein ( R. 36-37). This is a substantial difference from Mr. Wilde's estimate of the cost of installation and the furnishing of both casing and sewer pipe in the sum of \$5,600.00 ( Rep. Ex. 35).

As for earth-moving costs, Wilford E. Skeen, a northern Utah earth-moving contractor, furnished his Affidavit stating that he could excavate a sewage lagoon area on the west side of the

freeway and move the material from six acres of ground and haul it an average distance of 1,250 feet to the south and spread it over the 19.54 acres within the rest stop area for 35¢ per cubic yard of material moved ( i.e. \$3,387.00 per acre to a depth of one foot) ( R. 34). The simple, efficient and logical method outlined by Mr. Skeen is in sharp contrast to the evasive and clearly incompetent answers given by Mr. Wilde for plaintiff:

" Q. And when you use \$34,000, where did you contemplate taking that dirt to if you went north of the rest stop area?

A. Well, some of it will be used, but we have excess material and it will have to be hauled away by the contractor.

Q. All right. But if it weren't hauled away and just made to enlarge the rest stop area itself by an extra six or eight inches, that \$34,000 figure would be much higher than the realties would be, would it not?

A. The excavation costs that much no matter where you put it.

Q. No matter where you put it?

A. Right.

Q. You mean it costs the same to bring it right down here into the rest stop area with these big carry all cans

as it would to load it in trucks and haul it two or

miles away?

A. It is in our estimate of the excavation costs.

Q. In your estimate. But as a practical matter the cost is far different, isn't it, if you truck it a couple of miles to get rid of it or carry it a thousand feet or thereabouts?

A. Well, it could be, but we don't pay our contractors to haul it away. They do what they want with it.

( Rep. Tr. 34-35)

The logistics of earth moving and simple construction methods, taken in the light of Mr. Wilde's " expert" engineering testimony, surely must convince almost anyone that something is basically wrong with plaintiff's concept and plans for a sewage disposal system for its rest area. As always, there are the unanswered questions in defendant's minds and those intimate areas of planning which are impossible to probe in detail, but the record before this Court should amply establish an abuse of discretion in this case.

Nor does plaintiff's attempted showing of necessity take into account in any way the strip of land between the freeway and the Brigham City airport being developed by Brigham City and private individuals ( including defendants) for airport-related industrial uses. The damages to defendants' properties caused

by the loss of the 6.05 acres, together with the inability to fully utilize approximately 60 acres of contiguous lands because of the Board of Health's 1,000 foot building requirement, is yet another problem-- and the subject of very substantial taking and severance damages. But if defendants have failed in their purpose of convincing the Court to this point of the arbitrary and illegal nature of the proposed project, elaboration on the matter of damages to their properties can add little more to this brief. In any event, the plainly evident additional construction costs on the east side of the freeway, over and above what the cost of a sewage lagoon would be on the west side of the freeway, is a matter of importance involving an obvious waste of public funds.

### CONCLUSION

There is little doubt that the power and extent of eminent domain has broadened in recent years, not only because of new and varied legislative authority, but also because there has developed in this State a tendency on the part of most lower courts to simply rubber-stamp the desires of those governmental agencies and others having the power of eminent domain. As part of this development in the law, there has developed an unique immunity from investigation and a lofty status above the law peculiar to the planners and engineers who design the various public projects.

The courts have been content to accept the most feeble and ill-conceived plans, with a modicum of proof, as a sufficient prima facie showing for the granting of the full power of government in a field which often trespasses upon the most basic human civil right-- that of owning real property.

There certainly should be some reasonable parameters beyond which the power of eminent domain cannot proceed, measured by reasonable standards construing constitutional and statutory laws and by the application of sound reason applied to the end results of letting the power get out of control. Otherwise what might appear to be a necessary tool of government will surely produce side effects detrimental to society at large and, specifically, the taxpayers who sponsor these various projects. In short, this case presents a classic situation for the application of reasonable limits to apply concerning both the authority to condemn and the manner and extent to which such authority, if it does exist, can be pursued.

As stated in defendants' Petition for Interlocutory Appeal, if plaintiff can extend its statutory authority and condemn as contemplated in this action, it could select and condemn a roadside rest area site at some lookout point in a canyon, and then, because it was deemed "necessary"--

1. Condemn the water rights in a nearby spring to serve the rest area ( and furnish excess unused culinary water to a nearby settlement of, say, 5 houses);
2. Condemn a non-contiguous 6 acre tract for a sewage lagoon a half mile distant ( and permit the 5 houses to utilize the developed sewage lagoon without payment of any of the initial construction costs of the lagoon);
3. Condemn easements across properties of third parties for both the water and sewer lines; and
4. Condemn a right-of-way across yet another property for a roadway to serve and maintain the spring.

The " Amended" Order of Immediate Occupancy should be reversed and set aside and the Complaint should be dismissed, and the lower court should be directed to protect defendants' property from construction activities which plaintiff or its contractor might undertake.

Respectfully submitted,

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