

1980

# Utah State Tax Commission v. Parson asphalt Products, Inc. : Brief of Plaintiff-Respondent Parson asphalt Products, Inc

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

ROBERT B. HANSEN; Attorney for Appellant; LaVar E. Stark; Attorney for Respondent;

---

## Recommended Citation

Brief of Respondent, *Parson Asphalt v. Utah Tax Comm'n*, No. 16797 (Utah Supreme Court, 1980).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/2018](https://digitalcommons.law.byu.edu/uofu_sc2/2018)

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 (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE SUPREME COURT OF THE STATE OF UTAH

---

IN THE MATTER OF: )  
Parson Asphalt Products, Inc., )  
regarding special fuel tax )  
liability for the years of ) Civil No. 16797  
October 1973 to September )  
1976, before the Utah State )  
Tax Commission )

---

BRIEF OF PLAINTIFF-RESPONDENT  
PARSON ASPHALT PRODUCTS, INC.

---

Review of a Decision  
of the  
Second Judicial District Court  
Weber County  
The Honorable John F. Wahlquist, Presiding

---

LA VAR E. STARK  
Attorney at Law  
2651 Washington Boulevard  
Suite #10  
Ogden, Utah 84401  
Telephone: 393-8688  
Attorney for Plaintiff-Respondent

ROBERT B. HANSEN  
Attorney General

MARK K. BUCHI  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114  
Telephone 533-5261  
Attorney for Defendant-Appellant

FILE

IN THE SUPREME COURT OF THE STATE OF UTAH

---

IN THE MATTER OF: )  
Parson Asphalt Products, Inc., )  
regarding special fuel tax )  
liability for the years of ) Civil No. 16797  
October 1973 to September )  
1976, before the Utah State )  
Tax Commission )

---

BRIEF OF PLAINTIFF-RESPONDENT  
PARSON ASPHALT PRODUCTS, INC.

---

Review of a Decision  
of the  
Second Judicial District Court  
Weber County  
The Honorable John F. Wahlquist, Presiding

---

LA VAR E. STARK  
Attorney at Law  
2651 Washington Boulevard  
Suite #10  
Ogden, Utah 84401  
Telephone: 393-8688  
Attorney for Plaintiff-Respondent

ROBERT B. HANSEN  
Attorney General

MARK K. BUCHI  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114  
Telephone 533-5261  
Attorney for Defendant-Appellant

## TABLE OF CONTENTS

NATURE OF THE CASE . . . . .	1
DISPOSITION OF THE CASE IN THE LOWER COURT . . . . .	1
RELIEF SOUGHT ON APPEAL . . . . .	1
STATEMENT OF FACTS . . . . .	2
ARGUMENT	
POINT I - THE TRIAL COURT WAS NOT LIMITED TO THE "ARBITRARY AND CAPRICIOUS" STANDARD OF REVIEW. . . . .	3
POINT II - THE ROAD TO ANTELOPE ISLAND WAS NOT A "HIGHWAY" UNDER THE UTAH USE FUEL TAX ACT . . . . .	4
POINT III - THE TRIAL COURT'S FINDING THAT THE ROAD WAS A NEW ROAD IS SUPPORTED BY THE EVIDENCE. . . . .	8
CONCLUSION . . . . .	10

## TABLE OF AUTHORITIES

### CASES CITED

<u>Armstrong v. City of St. Louis</u> , 3 Mo, App. 151, 157 . . . . .	6
<u>Emmertson v. State Tax Commission</u> , 72 P2d 467, 470 (Utah). . . . .	5
<u>Fischer v. Malleable Iron Range Co.</u> , 225 NW2d 542, 545 (Minn) . . . . .	6
<u>Santoro v. Brooks</u> , 254 P. 1019 (Oregon) . . . .	6,7
<u>Shelton v. Shelton</u> , 280 SW2d 803, 805 (Tenn). .	6
<u>Worthington v. McDonald</u> , 68 NW2d 89,92 (Iowa) .	6

### STATUTES CITED

Utah Code Ann. 27-12-2 . . . . .	5
Utah Code Ann. 27-12-2(8) . . . . .	4
Utah Code Ann. 41-11-48 . . . . .	4
Utah Code Ann. 41-11-49(c). . . . .	4
Utah Code Ann. 41-11-50 . . . . .	4
Utah Code Ann. 59-24-3(1) . . . . .	3
Utah Code Ann. 59-24-4 . . . . .	4

IN THE SUPREME COURT OF THE STATE OF UTAH

---

IN THE MATTER OF:

Parson Asphalt Products, Inc.,	)	
regarding special fuel tax	)	
liability for the years of	)	Case No. 16797
October 1973 to September	)	
1976, before the Utah State	)	
Tax Commission	)	

---

NATURE OF THE CASE

The Utah State Tax Commission, after a hearing, affirmed the assessment of the special fuel tax against Parson Asphalt Products, Inc., (Respondent herein) in the sum of \$16,711.94, plus interest and penalties. Respondent appealed and petitioned review to the Second Judicial District Court in and for the County of Weber, State of Utah.

DISPOSITION OF THE CASE IN THE LOWER COURT

After a trial de novo, Judge John F. Wahlquist, presiding without a jury, issued Findings of Fact and Conclusions of Law and Order, Judgment and Decree ruling that the fuel used by Petitioner for and during the reconstruction of State Highway 127, known as the road to Antelope Island, was exempt from the special fuel tax and set aside the decision and order of the State Tax Commission.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the judgment of the lower court affirmed.

### STATEMENT OF FACTS

In addition to the facts recited in the stipulation the trial court heard the testimony of Mont Wilson, engineer for Respondent, received into evidence documentary evidence by way of an exhibit which showed amounts spent and work done on this road since its designation in 1965, and reviewed the transcript of the hearing held before the State Tax Commission.

The original design of the road was inadequate. It was too narrow and the sides were too steep and was therefore subject to erosion due to wind and water action. As a result of the erosion the road washed out annually, (R 71, 72) and was under water for 4 to 6 months at a time. It was not substantial enough to remain generally open for public traffic. (R 69)

The State expended about \$25,000.00 per year commencing in 1976, to maintain the road and in addition contracted for extensive repairs with private contractors in 1965, 1968, 1969, 1979, 1971, 1972 and 1973. (Exhibit 1P)

However, the annual washouts continued until the road was redesigned and rebuilt by Respondent pursuant to contract in 1973. (R 78)

The new road was significantly different from the old one. It was much wider having a subbase in some areas as wide as 220 feet. It had a different side slope design in that they were very flat (beach slopes) so that the wave

action would not cause it to erode. (R 75)

Since the reconstruction the road has not washed out.  
(R 78)

## ARGUMENT

### POINT I

THE TRIAL COURT WAS NOT LIMITED TO THE  
"ARBITRARY AND CAPRICIOUS" STANDARD OF  
REVIEW.

Appellant argues that since U.C.A. 41-11-50 provides for an exemption from the fuel tax in those cases where the purchasers or users of special fuel shall establish to the satisfaction of the Commission that they are entitled to the exemption, the Commission's decision should not be set aside unless it acted unreasonably, arbitrarily, or capriciously. This argument ignores the plain language of the applicable statutes. U.C.A. 59-24-3(1) provides:

All appeals from and petitions for review of decisions of the State Tax Commission brought before the tax division of any district court shall be original, independent proceedings and shall be tried without jury and de novo.

U.C.A. 59-24-4 adds that:

In proceedings of the tax division of any district court and on appeal therefrom, a preponderance of the evidence shall suffice to sustain the burden of proof. . . .

Under these statutes, the instant proceedings should be independent and de novo with a preponderance of evidence sufficient to sustain the burden of proof. Therefore, the trial court



was not limited to the "arbitrary and capricious" standard of review but should make a fresh examination of the issues.

## POINT II

### THE ROAD TO ANTELOPE ISLAND WAS NOT A "HIGHWAY" UNDER THE UTAH USE FUEL TAX ACT.

The central issue in this case is whether the road to Antelope Island qualifies as a "highway" under the Utah Use Fuel Tax Act (the "Act"), U.C.A. 41-11-48, et seq. If the road does not, then Respondent is exempt from the fuel tax by the operation of U.C.A. 41-11-50. This statute provides in part:

A tax is hereby imposed at the rate of seven cents\* per gallon on the sale or use of special fuel, provided that the sale or use of special fuel for any purpose other than to operate or propel a motor vehicle upon the public highways of Utah shall be exempt from application of this tax. . . .

Thus, if the instant road was not a "highway" under the Act, Respondent qualifies for the exemption.

As support for its argument that the instant road was a "highway," the Appellant invokes the definition of "public highway" from U.C.A. 27-12-2(8). It would be inappropriate, however, to apply a definition from Title 27 to a matter involving the Utah Use Fuel Tax Act in Title 41 when the Act contains its own definition of "highway." U.C.A. 41-11-49(c) provides:

---

\*By a recent amendment, the tax rate has been changed to nine cents per gallon, but this change does not affect this case.

Highway shall mean and include every way or place, of whatever nature, generally open to the use of the public for the purpose of vehicular travel notwithstanding that the same may be temporarily closed for the purpose of construction, reconstruction, maintenance or repair.

Since the Act contains its own definition of "highway," it would be inappropriate to resort to a definition outside the Act. This is particularly true where the definition from Title 27 is limited in application to Chapters 12 and 13 of the Title: U.C.A. 27-12-2 provides: "As used in chapters 12 and 13 of this title: (8) Public Highway means. . ."

Applying the definition of "highway" from the Act to the instant facts suggests that that road to Antelope Island fails to qualify as a "highway." The Act provides that a road will be a "highway" only if it is "generally open to the use of the public." From the time of the first attempt at construction, the road was washed out each year. Indeed, it was closed about as much as it was open. The Appellant ignores the compelling nature of these facts and instead argues that because the road was open at least as often as it was closed, it was "generally open." No simple comparison of the number of days the road was open to the number closed will suffice, however. Instead, "generally open" should be given its common everyday meaning. Emmertson v. State Tax Commission, 72 P2d 467, 470. Looking at the phrase "generally open" from this perspective, it is evident that a road washed out this often fails to qualify as "generally open."

The conclusion that the instant road was not "generally open" is supported further by the use of the word "temporarily" elsewhere in the statute. As more fully detailed above, U.C.A. 41-11-49(c) provides, "Highway shall mean . . . every way . . . generally open . . . notwithstanding that the same may be temporarily closed . . ." The word "temporarily" means not of long duration, not permanent, but for a short time."

Fischer v. Malleable Iron Range Co., 225 NW2d 542, 545 To the same effect are Worthington v. McDonald, 68 NW2d 89, 92 and Shelton v. Shelton, 280 SW2d 803, 805. Since the road to Antelope Island was closed about as often as it was open, it can hardly be said that the closure was "not of long duration, not permanent, but for a short time." Thus, the closure was more than temporary, so the instant road fails to qualify as a "highway."

The conclusion that the road was not a "highway" is supported by case law as well. In Armstrong v. City of St. Louis, 3 Mo. App. 151, 157, the Court said, "It is a contradiction in terms of speak of an impassable public highway. We might as well speak of an uninhabitable dwelling house, or an invisible illumination."

Santoro v. Brooks, 254 P. 1019 (Oregon) also supports the conclusion that the instant road was not a "highway." This case involved a suit in negligence for damages arising from an automobile accident. The negligence issue pivoted

on whether the site of the accident was an intersection. Under Oregon law an intersection is "the point or place where on highway or public way joins another at an angle. . . ." Thus, to determine whether the accident occurred at an intersection, the Court first had to determine if there were two "highways" coming together. Although one road has been dedicated as a "highway" and was shown as such on the official city plat, the Court held that it was not a highway for these reasons:

This street was but little used and was a dump ground for a broken-down automobile. It was also considered a good place to pile lumber and to keep sand and gravel. During one period in its history it was used as a cow pasture and had been farmed to some extent . . . (and) "was all grown up to grass."

As a result, the Oregon Supreme Court concluded that "This alleged street, under the conditions existing at the time of the accident, did not constitute a 'highway or public way,' as contemplated by Oregon Motor Vehicle Law." (Ibid.)

The instant facts even more strongly than the Santoro facts suggest that the road was not a "highway" because in Santoro the road had merely fallen into disuse but remained passable, whereas here, the road was not even passable for several months each year. Thus, the holding of Santoro supports the conclusion that the road was not a "highway."

### POINT III

#### THE TRIAL COURT'S FINDING THAT THE ROAD WAS A NEW ROAD IS SUPPORTED BY THE EVIDENCE.

Because the original design of the road was inadequate, it washed out annually and was under water for 4 to 6 months at a time. Mr. Wilson, engineer for respondent, was formerly employed by State Highway Department as a resident engineer and construction project engineer and was familiar with the history of the Antelope Island Road since its designation in 1965. (R 62-66) Referring to a period of time in 1965 and 1966, Mr. Wilson stated: "The road as attempted by the State and County forces was not--did not--accomplish the purpose of a road. Namely, it was constructed and for short periods of time the road was open to public traffic, but the road as constructed by the State was not substantial enough to remain in passover condition for public traffic." (R 69) Referring to a period of time from 1965 forward, Mr. Wilson went on to say: "and it was the consensus of that group of engineers that the section of the road was not sufficient to, first of all, stay in place and carry the requiring traffic loading from the mainland to the island. It was felt that it was not substantial. It wasn't constructed to the necessary typical section to remain in place.\*\*\* And it was felt that the attempt to build the road was, unless it was done in a proper manner, funded

to the proper extent to build a proper road, it would never stay in. It would never become a road.\*\*\* The design and the construction of the road was in the beginning-- the fill slopes, the side slopes of the fille were too steep. The width of the road where the public traveled was not wide enough. It was subject to erosion from wind action, wave action, water action. And this was later proved by the necessity to go in and continually try to keep in in shape such that it could carry traffic. (R 69-72)

Exhibit 1-P indicated that the State expended about \$25,000.00 per year commencing in 1965, to maintain the road and in addition contracted for extensive repairs with private contractors as follows:

1965	\$223,440.00
1968	139,452.00
1969	189,550.00
1970	59,159.00
1971	99,916.00
1972	146,353.00
1973	337,426.00

The annual washouts continued to occur until the road was redesigned and rebuilt by Respondent pursuant to contract in 1973 costing \$2,209,627.00 (imported borrow) (and thereafter bridge structure work was done by Pritchett Construction (\$54,312.00 bid) and surfacing by LeGrande Johnson (\$636,231.00 bid).)

The new road as constructed by Respondent was significantly different from the old road. It was much wider and



had a different configuration. Mr. Wilson stated: "The subbase which we constructed in some cases was as wide as 220 feet. This, plus another significant different in the road as we constructed it was that the fill slopes were very flat and they called them beach slopes. It was designed with the theory that the wave action would come up these very flat slopes, pick up the sediment, film material, and then when the wave returned back to the main body of water it would drop that sediment leave it there and hence the road would remain in place rather than being washed out into the lake." (R 75)

The pictures introduced into evidence by Respondent (hearing exhibits 11-121, prints, and trail exhibits 2P-11P, slides), illustrate the washout conditions from 1965 until the rebuilding was done.

Based on Mr. Wilson's testimony, which was uncontested both at the hearing before the State Tax Commission and at the trial de novo, and the stipulation of the parties, the trial Judge properly concluded that the road as constructed by Respondent was a new road.

#### CONCLUSION

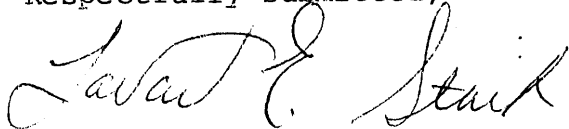
The review by the District Court was a trail de novo allowing the trial Judge to make new findings, supported by a preponderance of the evidence.

From 1965 until the road was built by Respondent annual attempts to construct the road failed. Evidence before the trial court supports the position that the road to Antelope Island was impassable so often that it failed to qualify as a "highway" within the meaning of the Utah Use Fuel Tax Act. Finally after successive failures to build an adequate road the project was radically redesigned and adequately funded resulting in the construction of a new road which has withstood the test of time.

The judgment of the trial court ought to be affirmed.

DATED this 31 day of March, 1980.

Respectfully submitted,

A handwritten signature in cursive script, reading "LaVar E. Stark". The signature is written in dark ink and is positioned above a horizontal line.

LA VAR E. STARK  
Attorney for Plaintiff-  
Respondent