

1980

Richard B, Jensen as State Auditor of the State of Utah v. William K, Dinehart, as the Director of the Division of State Lands of the State of Utah : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD B. JENSEN, as State
Auditor of the State of Utah,

Plaintiff and Appellant,

v.

WILLIAM K. DINEHART, as the
Director of the Division of
State Lands of the State of Utah,

Defendant and Respondent.)

Case No. 16832

BRIEF OF APPELLANT

APPEAL FROM THE ORDER OF THE THIRD JUDICIAL
DISTRICT COURT FOR SALT LAKE COUNTY, STATE OF
UTAH, THE HONORABLE CHRISTINE M. DURHAM, JUDGE.

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February 29, 1980

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Case No. 16832

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Plaintiff brought this action for a declaratory judgment to clarify a long-standing dispute^{1/} between state officials concerning the disposition of mineral proceeds from state school lands. The specific question is whether either the Utah Enabling Act, 28 Stat. 107, or the Act of January 25, 1927, 44 Stat. 1026, 43 U.S.C. §870, requires mineral proceeds to be deposited in the permanent school fund, and only the interest earned thereon used to support the public schools, or whether those Acts authorize the State of Utah to decide whether such mineral proceeds are to be placed in the permanent school fund or in the uniform school fund (the operating fund used to meet current obligations).

1. See Appendix C, page 26, for a summary of past administrative practices.

DISPOSITION IN THE LOWER COURT

The trial court held that mineral proceeds derived from school trust lands must be deposited in the permanent school fund, and, in so doing, invalidated sub silentio Article X, Section 3, of the Utah Constitution.

RELIEF SOUGHT ON APPEAL

Plaintiff asks this Court to reverse the judgment of the lower court, and to hold that Article X, Section 3, of the Utah Constitution is consistent with the Utah Enabling Act, 28 Stat. 107, and the Act of January 25, 1927, 44 Stat. 1026, 43 U.S.C. §870.

STATEMENT OF FACTS

The facts are not in dispute. They consist essentially of the legislative history of school land grants from the United States to the State of Utah, and are more logically presented as part of the Argument section of this Brief.

For present purposes, it is sufficient to note that the Utah Enabling Act requires that all proceeds derived from the sale of school trust lands must be deposited in a permanent school trust fund, and the income derived therefrom shall be used exclusively for the support of Utah's public schools. The "income" thus realized is appropriated by the Legislature for expenditure, and it transferred from the permanent fund to the uniform school fund, which is the operating account from which funds are drawn to support the public schools.

The income derived from the permanent school fund is not sufficient to provide all of the state support for public schools, and the Legislature also appropriates substantial amounts from the State's general fund to the uniform school fund.

Where the State still owns school trust lands, the lands themselves are considered to be, for all practical purposes, part of the permanent school trust, and the "income" from such lands (e.g., lease rentals from livestock grazing) is similar in nature to the "income" realized on the permanent school fund, and is deposited in the uniform school fund and used for current expenditures to support the public schools.

The present dispute is whether mineral proceeds from school lands are essentially in the nature of proceeds derived from the sale of school trust lands, and therefore must be deposited in the permanent school fund, or whether mineral proceeds are essentially in the nature of rental income from school trust lands, and therefore must be deposited in the uniform school fund. Resolution of the issue hinges on the interpretation to be given to the Utah Enabling Act and the Act of January 25, 1927, both supra, and, in light of such interpretation, a determination as to whether Article X, Section 3, of the Utah Constitution is valid. That provision of the Utah Constitution requires that all mineral proceeds from school trust lands be deposited in the uniform school fund for current use.^{2/}

Plaintiff, as the Utah State Auditor, has determined by audit that Defendant Division of State Lands had deposited, as of June 30,

2. The implementing statute is Section 65-1-64, Utah Code Annotated (Vol. 7A, 2d Rep.).

1978, the sum of \$14,814,150.00 in the permanent school fund, rather than the uniform school fund, in violation of Article X, Section 3, of the Utah Constitution. Similarly, there are eleven other permanent trust funds (e.g., University of Utah, Utah State University, State Industrial School, School for the Deaf, School for the Blind, etc.), wherein the Defendant has deposited, as of June 30, 1978, a cumulative total of \$1,566,861.00, rather than in the respective operating accounts for those institutions, as required by law.

ARGUMENT

All that is necessary to dispose of this case is to examine the basic school land grant under the Utah Enabling Act of 1894 and the mineral grant authorized by the Act of January 25, 1927. Those two statutes will now be reviewed, and it will be seen that Article X, Section 3, of the Utah Constitution is in all respects in compliance with the conditions and provisions contained within those federal statutes.

I. The School Land Grant under the Utah Enabling Act did not Include Known Minerals

A. Preface

The most significant observation to be made from the discussion that follows is that Congress did not intend to grant minerals to Utah under the Utah Enabling Act, and consequently there was no congressional intent at all with respect to any mineral proceeds. Obviously, Utah could not realize mineral proceeds from minerals that were not granted.

3. See Appendix B, page 25, for an identification of the funds, accounts and amounts in controversy.

It was conceptually possible for Utah to receive title to school lands in place under the 1894 Act at a time when there was no known mineral value, and then to have a subsequent discovery of valuable minerals in such lands. In such a case Utah would not be divested of the mineral estate by virtue of the subsequent mineral discovery, but there certainly is no implication of any congressional intent with respect to the use and disposition of proceeds realized from the lease of such subsequently discovered minerals.

B. Utah Enabling Act of 1894: Congressional Conditions for Creation of the Public Trust for Public Schools

Federal land grants to the States for the support of the common schools create a solemn public trust of critical importance for the support of public schools. This trust is in the nature of a bilateral compact whereby Utah, as a sovereign State admitted into the Union on an equal footing with the Original States, agreed not to tax federal lands within Utah, and whereby the United States, for its part, granted four sections of federal lands within each township to Utah for the aid and support of the public schools, thus compensating Utah for the limited and reduced property tax base available to raise revenues to support governmental functions (specifically, the operation and maintenance of the public school system). The United States Court of Appeals for the Tenth Circuit recently summarized the legal nature and implications of school land grants to the States:

The historical background leading to Congressional enactment of the state school land grant statutes should aid in lending perspective to the legislative intent.

There were no federal lands within the borders of the original thirteen states when they adopted and ratified the United States Constitution. Thus, virtually all of the lands within their borders were subject to taxation, including taxation necessary for the maintenance of their public school systems. When other states were subsequently admitted into the Union, their territorial confines were "carved" from federal territories. The "public lands" owned and reserved by the United States within those territorial confines were not subject to taxation. This reservation by the United States created a serious impediment to the "public land" states in relation to an adequate property tax base necessary to permit these states to operate and maintain essential governmental services, including the public school systems. It was in recognition thereof, i.e., in order to "equalize" the status of the newly admitted states with that of the original thirteen states, that the Congress enacted the federal land grant statutes. The specific purpose was to create a binding permanent trust which would generate financial aid to support the public school systems of the "public land" states. The nature of the Congressional land grant program was "bilateral" in effect. It constituted a solemn immunity from taxation of federal lands reserved or retained in ownership by the United States within the territorial boundaries of the newly admitted states in return for the acceptance by the states of the lands granted, to be held and administered by the states under trust covenants for the perpetual benefit of the public school systems.

Large quantities of the public domain have been granted by the Congress to the various states either for general or specific purposes. Many of these grants are unrestricted. None, to our knowledge, involve the trust covenants attendant with the state school land grant statutes. A grant by Congress of land to a state for the benefit of the common schools is an absolute grant, vesting title for a specific purpose. *Alabama v. Schmidt*, 232 U.S. 168 (1914). The school land grant and its acceptance by the state constitutes a solemn compact

between the United States and the state for the benefit of the state's public school system. *State of Nebraska v. Platte Valley Power and Irr. Dist.* 23 N.W.2d 300 (Neb. 1946), 166 A.L.R. 1196. A state accepting the school land grant must abide its duty as trustee for the benefit of the state's public school system. (*Utah v. Kleppe*, 586 F.2d 756, 758 (1978) (Emphasis added)).

The Utah Enabling Act was passed by Congress as the Act of July 16, 1894, 28 Stat. 107, and was entitled:

An Act To enable the people of Utah to form a constitution and State government, and to be admitted into the Union on an equal footing with the original States.

With respect to the immunity of federal lands from taxation by the State, Section 3 of the Enabling Act authorized a convention to be convened for the purpose of forming a constitution and state government, requiring that:

. . . said convention shall provide, by ordinance irrevocable without the consent of the United States and the people of said State . . . that the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and . . . that no taxes shall be imposed by the State on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use . . .

Section 3 of the Enabling Act then proceeded to require the State of Utah, prior to statehood, to adopt an "ordinance irrevocable" for:

. . . the establishment and maintenance of a system of public schools, which shall be open to all the children of said State and free from sectarian control.

Section 6 of the Enabling Act then provided:

That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State . . . are hereby granted to said State for the support of common schools.

Section 10 of the Enabling Act then imposed the specific conditions on the use and disposition of the school land grant contained in Section 6:

. . . the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools . . .

C. Utah Constitution: Acceptance of the Public Trust

Utah accepted the conditions and obligations of the federal grant to create a trust in aid and support of the public schools by providing in Section 3, Article X, of the Utah Constitution that such school lands and all proceeds derived therefrom:

. . . shall be and remain a permanent fund, to be called the State School Fund, the interest of which only shall be expended for the support of the common schools.

Section 7, Article X, of the Utah Constitution further provided that:

All public school funds shall be guaranteed by the State against loss or diversion.

Thus, the public trust for the support of Utah's public school system was created by the grant and attendant conditions established by Congress in the Utah Enabling Act and the acceptance by Utah through the adoption of its Constitution.

D. Known Minerals Not Granted

Generally, school land grants to new States admitted into the Union after 1845 expressly excluded mineral lands (see, e.g., Section 13, Idaho Admission Act of July 3, 1890, 26 Stat. 215, and Wyoming Act of Admission of July 10, 1890, 26 Stat. 223). However, the Utah Enabling Act, as has been seen, did not expressly include or exclude mineral lands from the grants to the State. Any uncertainty about the matter was resolved in United States v. Sweet, 245 U.S. 563 (1918), wherein the United States Supreme Court specifically held that Congress did not intend to grant to Utah school sections known to be mineral in character as of the date title would have passed to the State by the terms of the grant in the Utah Enabling Act.

E. Summary

To keep the matter in perspective, it must be emphasized that the parties are not in disagreement with respect to the importance, solemnity, or bilateral nature of school land grants to the States. Utah must honor the conditions and restrictions imposed upon the school trust by the United States and accepted by the State. Lassen v. Arizona, 385 U.S. 458 (1967); Utah v. Kleppe, 586 F.2d 756 (1978).

The point of dispute is whether there is any provision in the Utah Enabling Act evidencing a congressional intent to require mineral proceeds to be deposited in a permanent fund. The face of the Enabling Act makes clear there is no such requirement expressly

set forth in the Act. And United States v. Sweet, supra, makes clear that there is no such requirement to be implied from the Act.

It was not until 1927 that Congress put its mind to the question of granting minerals to the States as part of the school land grant programs, and to a consideration of appropriate safeguards attendant to such mineral grants. And that is the matter now to be considered.

II. The Mineral Grant under the Act of January 25, 1927, Authorized the States to Decide Whether Mineral Proceeds should be Deposited in Permanent or Operating School Trust Accounts

A. Provisions of the Act of January 25, 1927

The scope of the statehood school land grant with respect to numbered school sections in place was extended to expressly include sections which were mineral in character by the Act of January 25, 1927, 44 Stat. 1026, 43 U.S.C. §870. In so doing, Congress expressly set forth the conditions that were to be applicable to the mineral grant and to the proceeds derived therefrom. The relevant language of the grant provided that:

. . . the several grants to the States of numbered sections in place for the support or aid of common or public schools be, and they are hereby, extended to embrace numbered school sections mineral in character.

Subsection (b), 43 U.S.C. §870(b), then provided:

(b) That the additional grant made by this act is upon the express condition that all sales, grants, deeds, or patents for any of the lands so granted shall be subject to and contain a reservation to the State of the coal and other minerals in the lands so sold, granted, deeded or patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands shall be subject to lease by the State as

the Legislature may direct, the proceeds of rentals and royalties therefrom to be utilized for the support or in aid of the common public schools; Provided, that any lands or minerals disposed of contrary to the provisions of this act shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States district court of the district in which the property or some part thereof is located. (Emphasis added).

Congress clearly did not require mineral proceeds to be placed in any permanent fund, but required merely that "the proceeds of rentals and royalties therefrom" be utilized "for the support or in aid of the common public schools." This provision related directly to the "additional grant" of minerals, and left to the States the discretion as to whether proceeds from mineral leases should be deposited in permanent funds or in operating funds. It didn't matter to Congress where the funds were deposited, so long as they were used exclusively for the support of the public schools.

With respect to the mineral grant, Congress required only that:

1. The States reserve the mineral estate in school trust lands if and when the surface estate is sold;
2. The mineral estate be leased in the manner, and subject to the terms and conditions, provided for by the state legislature; and
3. The proceeds from mineral leases be used exclusively for the support of the common public schools.

As the next section of this Brief will demonstrate, Utah complied with all of these conditions and requirements of the grant of minerals in school trust lands.

B. Utah Compliance with the Act of January 25, 1927

1. Reservation of Minerals

The federal requirement that all coal and other minerals in school lands be reserved is satisfied by Section 65-1-15, Utah Code Annotated (2d. Rep. Vol. 7A), which provides in pertinent part that:

All coal and other mineral deposited in lands belonging to the state of Utah are hereby reserved to the state. Such deposits are reserved from sale, except on a rental and royalty basis as provided by law, and the purchaser of any lands belonging to the state shall acquire no right, title or interest in or to such deposit; but the rights of such purchaser shall be subject to the reservation of all coal and other mineral deposits, and to the conditions and limitations prescribed by law providing for the state and persons authorized by it to prospect or mine, and to remove such deposits, and to occupy and use so much of the surface of said lands as may be required for all purposes reasonably incident to the mining and removal of such deposits therefrom . . .

2. Provisions for Leasing Minerals

The federal requirement that the state legislatures provide terms and procedures for leasing minerals in school lands is satisfied by a comprehensive leasing system set forth in several statutes, including Sections 65-1-18, 65-1-22, 65-1-23, 65-1-45, 65-1-46, and 65-1-47, Utah Code Annotated (Vol. 7A, 2d Rep.). The content of these statutes is not a matter of present interest or relevance. The salient and uncontested fact is that the Utah Legislature has adequately provided for the lease of minerals in school trust lands in full compliance with the requirement of the 1927 Act.

3. Use of Mineral Proceeds for Support of the Public Schools

The federal requirement that revenues derived from the lease of minerals in school trust lands be used exclusively for the support of the common schools is satisfied by Article X, Section 3, of the Utah Constitution, as amended in 1939, which provides:

The proceeds of the sales of all lands that have been or may hereafter be granted by the United States to this state, for the support of the common schools, and five percentum of the net proceeds of the sales of United States public lands lying within the states and sold by the United States subsequent to the admission of this state into the Union, shall be and remain a permanent fund, to be called the State School Fund, the interest of which only, shall be expended for the support of the common schools. The interest on the State School Fund, the proceeds of all property that may accrue to the state by the escheat or forfeiture, all unclaimed shares and dividends of any corporation incorporated under the laws of this state, the proceeds of the sales of timber, and the proceeds of the sale or other disposition of minerals or other property from school and state lands, other than those granted for specific purposes, shall, with such other revenues as the Legislature may from time to time allot thereto, constitute a fund to be known as the Uniform School Fund, which Uniform School Fund shall be maintained and used for the support of the common and public schools of the state and apportioned in such manner as the Legislature shall provide. (Emphasis added).

It is thus clear beyond controversy that all proceeds from the "sale or other disposition of minerals" from "school" lands shall be deposited in the uniform school fund and "used for the support of the common and public schools of the state." Thus, the third and final requirement of the 1927 Act is satisfied. As an aside, it might be noted that Article X, Section 3, quoted above, is broad

enough to permit a "sale or other disposition" of minerals, but the relevant state statutes prohibit sales and conveyances of mine and authorize leases only, as shown in Section II.B.1 of this Brief supra at page 12.

III. Other Legal and Practical Considerations Support Deposit of Revenues from Mineral Leases in Uniform School Fund

A. Congressional Acquiescence in the 1939 Amendment to Article X

Under the 1927 grant of minerals in school lands, Congress expressly declared that:

. . . any lands or minerals disposed of contrary to the provisions of this Act shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States district court for the district in which the property or some part thereof is located. (43 U.S.C. §870(b)).

The statutory mandate quoted above is similar to the judicial admonition given in Lassen v. Arizona, 385 U.S. 458 (1962), wherein the Supreme Court said that the United States Attorney General was obligated "to maintain whatever proceedings may be necessary" to protect the integrity of the school trust grant to Arizona.

Lassen involved a grant of certain rights-of-way and material sites for highway purposes without cash consideration to the school trust fund. The Supreme Court said the grants were illegal since full cash value had to be paid to the trust. There was no issue with respect to whether such consideration was to be deposited in a permanent fund or an operating fund.

A case somewhat closer to the case at bar is Oklahoma ex rel. Mac O. Williamson, Attorney General v. Commissioner of Land Office, 301 P.2d 655 (1956), wherein the Oklahoma Supreme Court held that a 1955 constitutional amendment to its state constitution was in conflict with the Oklahoma Enabling Act and therefore invalid when it purported to authorize mineral royalties to be deposited in an operating fund rather than a permanent fund.

That case is clearly distinguishable, however, because Oklahoma, unlike Utah, received lands that were mineral in character by virtue of the statehood grant (sections 16 and 36 in each township) (see 34 Stat. 267). In Utah, as has been seen, it is the 1927 grant—and not the statehood grant—that governs the grant of mineral lands, lease of mineral interests, and use and disposition of mineral lease revenues.

Thus, the Oklahoma case is readily distinguishable on its facts. Further, the case would be of limited precedential value even if the facts were close, because it represents the views of a state court on a question of federal law without any reliance on controlling federal precedents (there were none).

In the case at bar, Utah's constitutional amendment has been in effect for more than 40 years. Congress has, in that time span, amended the 1927 Statute and other school land grant legislation a number of times. Yet, Congress has never criticized or questioned Utah's 1939 amendment to Article X, Section 3. The United States Attorney General has never brought suit, or threatened suit, to

"forfeit" Utah's mineral lands received under the 1927 grant. In such circumstances, congressional acquiescence in Article X, Section 3, as being consistent with both the 1927 Act and the statehood grant, is presumed. Train v. Colorado Public Int. Research Group, 426 U.S. 1 (1976); Rosado v. Wyman, 397 U.S. 397 (1970); Udall v. Tallman, 380 U.S. 1 (1965); Andrus v. Shell Oil Co., 591 F.2d. 597 (10th Circ. 1979).

B. Ambiguities or Doubts to be Resolved in Favor of Constitutionality

While Appellant believes that the law is clear and free of doubt to the effect that the judgment of the lower court should be reversed, it is fundamental "black letter" law that any doubts or ambiguities that might exist should be resolved in favor of the validity of Article X, Section 3.

If two alternative constructions of a statute are plausible, and one construction would render the statute unconstitutional while the other would sustain the statute as valid, then the court will adopt the construction that will sustain the validity of the statute. Further, if the court can find a reasonable construction of a statute that will avoid reaching a question as to its constitutionality, then that course of action will be followed. A fortiori, the same would be true in interpreting provisions of a state constitution. United States v. Hayman, 342 U.S. 205 (1952); Barr v. Matteo, 355 U.S. 171 (1958); Snyder v. Clune, 15 Utah 2d. 254, 390 P.2d 915 (1964); see Parkinson v. Watson, 4 Ut.2 191, 291 P.2d 400; 2A Sutherland on Statutory Construction, Sands §45.11 and 45.12.

C. Practical Distinction Between "Lands" and the "Income" Derived Therefrom

As a practical matter, it seems clear that Congress assumed at the time of the statehood grant that Utah would sell the school lands thereunder granted and place the proceeds from such sales in a permanent trust fund and use only the income derived from the permanent fund for the support of the common public schools. That undoubtedly is why there are no references in the Enabling Act to income from the school lands themselves. Further, the fact that Congress did not intend known mineral lands to pass under the statehood grant explains why there are no references in the Act to leases, bonuses, rentals or royalties.

Thus, the only "proceeds" which are clearly required to be invested in permanent trust funds under the Utah Enabling Act are proceeds from the sale of school trust lands. This requirement is set forth in Section 8 of the Enabling Act with respect to school land grants to the University of Utah and to the Agricultural College, as follows:

. . . the proceeds of the sale of said lands, or any portions thereof shall constitute permanent funds, to be safely invested and held by said State; and the income thereof to be used exclusively for the purposes of such university and agricultural college, respectively. (Emphasis added).

Although Section 6 and Section 8 create separate grants within the Utah Enabling Act, Section 8 makes clear that Congress considered "proceeds" to be those generated from the sale of grant lands, rather than income from rentals and leases of such lands. This construc-

tion is consistent with the practice of the Utah Division of State Lands of depositing all proceeds generated from grazing leases, timber sales, and other uses (other than sale) of state school land in operating funds rather than permanent funds.

But there is an inescapable analogy that must be drawn between the corpus of the permanent fund and the interest earned thereon, on the one hand, and the remaining school trust lands and the income derived therefrom, on the other hand. The basic concept of the Enabling Act was to forever preserve the cash value of the lands granted thereunder in a permanent fund and to spend only the earnings thereon to support the common public school. Since Utah has adopted a policy of retaining some school lands and leasing them to produce income, it seems clear that the income earned thereon is equivalent to the interest income earned by the permanent fund.

For example, grazing leases do not diminish the value of the land—they merely provide for the harvest of the annual forage produced thereon. Timber sales do not diminish the permanent value of the land, but it will take a number of years before the timber so harvested will be replaced by Nature.

Mineral leases may or may not represent a diminution in the value of the mineral estate. Delay rentals and cash bonuses do not diminish the mineral estate because they must be paid whether or not minerals are ever discovered or extracted. Production royalties do represent a diminution in the mineral estate in that the

particular mineral must be extracted and sold before the production royalty is paid. But, as will be seen in the next section of this Brief, there are no legal or practical reasons to support placing production royalties in permanent funds.

D. Potential Practical and Legal Nightmare

To require mineral production royalties to be deposited in permanent funds would be to open a most ominous Pandora's Box. And there is no legal necessity for doing so.

First, as has been shown, the Enabling Act contemplated only (1) that designated lands without known mineral value be transferred to the State, (2) that such lands be sold and the proceeds of sale deposited in permanent funds, and (3) that only the income derived from the permanent funds be used to support the public schools. It is nothing short of sheer fantasy to assume that Congress had some scheme in mind in 1894 for Utah's use of mineral proceeds from minerals which Congress did not intend to grant to the State.

The first word Congress gave to Utah concerning minerals was in 1927, and that grant, with accompanying conditions and restrictions, was entirely clear—and Utah has at all times strictly complied with those conditions and restrictions. And there is no requirement that any mineral proceeds be deposited in any permanent fund. See Section II of this Brief, supra.

However, it is possible that Utah received title to some minerals by virtue of the Enabling Act and without the aid of

the 1927 Act. This result could occur if Utah received title to designated school sections when they had no known mineral value, and valuable minerals were later discovered on such lands. It could then be argued—tenuously—that the inadvertent and unintended conveyance of unknown minerals to Utah magically created some congressional intent requiring proceeds from such minerals to be deposited in permanent funds. But any such argument would soon evaporate in the face of scrutiny—because, if it had any validity at all, it would be directly contrary to the 1927 Act. The 1894 Act provides that all lands granted thereunder may be sold; the 1927 Act provides that all minerals granted must be reserved from sale and be subject to lease only. If there is any pertinent relationship between the two Acts with respect to use of mineral proceeds, it must be that the 1927 Act creates, clarifies or confirms the intent of Congress with respect to any minerals that might theretofore have passed to Utah inadvertently under the Enabling Act—i.e., that such minerals must be reserved from sale and made available for lease only, and proceeds derived from mineral leases be used exclusively for the support of the public schools—whether by deposit in permanent funds or operating funds.

Aside from the legal implications, practical considerations strongly favor deposit of mineral proceeds in operating funds. It would be impractical, if not impossible, to segregate minerals

in school lands into two categories—those that passed solely by virtue of the Enabling Act and those that passed under the Enabling Act as supplemented and aided by the 1927 Act. Since 1927 it has been unnecessary to consider whether designated school sections in place were known to contain minerals. If such lands were unappropriated, they simply passed to Utah at the date of survey. If valuable minerals were to be discovered next year on a parcel of land surveyed and transferred to Utah in 1945, then it would be necessary to speculate as to whether such land could have passed solely by virtue of the 1894 Act, or whether the assistance of the 1927 Act is required. And this answer could be found only by making a guess in 1981 as to whether the parcel was known to be valuable for minerals in 1945.

Even in the unlikely event that such conjecture could be meaningful, the result would be most awkward. The Division of State Lands would have to keep elaborate records and make technical and unrealistic distinctions—all toward the end that some production royalties would be deposited in permanent funds and some in operating accounts. The public interest would be frustrated, rather than well served, by such a charade.

E. Greater Earnings in Uniform School Fund

It is immaterial and irrelevant from the standpoint of legal analysis as to which of two alternative interpretations of a statute would result in the greater amount of revenue to the State. With that disclaimer, it is noted that Appendix A is a

letter from the Utah State Auditor concluding, inter alia, that Utah has lost enough money in just the last five years—by depositing mineral proceeds in permanent funds rather than operating funds—to build more than 73,000 square feet of classroom space; and that making the correction now and depositing such proceeds in operating accounts would "provide approximate 270,000 square feet of badly needed school space that legislators and school boards will not need to tax for."

F. Lower Court Judgment Vague

The exact implications of the lower court's judgment are not clear. The only rationale for the decision is set forth in a Memorandum Opinion dated November 19, 1979, as follows:

This action concerns the proper disposition of proceeds of mineral lands which passed to the State of Utah under the Enabling Act of July 16, 1894, by virtue of the fact that the lands were not known to be valuable for minerals at the time. The Enabling Act provided that the proceeds of land granted for public school purposes should constitute a "permanent school fund". This Court is persuaded that Congress did not modify or alter that grant by subsequent acts or statutes, or by implication therein and that the Utah Legislature violated the terms of the Enabling Act by amending its Constitution in 1939 to provide that mineral proceeds from state public school lands should go to the uniform school fund for operational use. Pursuant to the binding terms of the Enabling Act, the proceeds of public school lands which come from revenue from minerals in the lands should be maintained in a permanent school fund. Defendant's Motion For Summary Judgment is therefore granted, and Plaintiff's denied. Counsel for Defendant should prepare an appropriate Order for submission to the Court.

The court then entered a formal Order that simply declared:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT defendant's Motion for Summary Judgment on all issues be and the same is hereby granted, and plaintiff's Motion for Summary Judgment be and the same is hereby denied, in accordance with the Memorandum Opinion filed by the Court.

What mineral proceeds are covered by the court's Order?

Defendant contended in his Answer and Motion for Summary Judgment that all mineral proceeds were required by law to be deposited in permanent funds. But that is not the Defendant's practice—he deposits only production royalties in permanent funds. He deposits delay rentals, cash bonuses and other receipts from mineral leases—where there is no depletion of the mineral estate—in operating accounts.

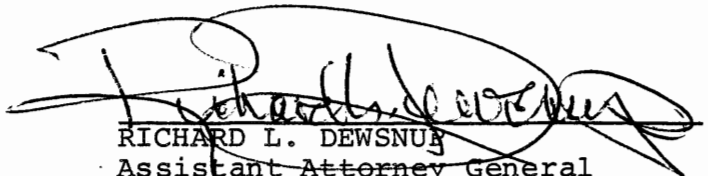
What has the lower court done? If the effect of the Order is broad enough to require delay rentals and cash bonuses to be deposited in permanent funds, it is a giant step backwards with no theoretical or practical justification. If the Order means something short of that, just what is it? What does it mean? How is the Order to be applied and implemented?


The rationale and prose of the court below are awfully weak stuff for invalidating a fundamental provision of the Utah Constitution that has been in effect for more than 40 years.

CONCLUSION

It is respectfully submitted that the decision of the lower court should be reversed and Article X, Section 3, of the Utah Constitution should be declared valid.

DATED this 29th day of February, 1980.



RICHARD L. DEWSNUP
Assistant Attorney General

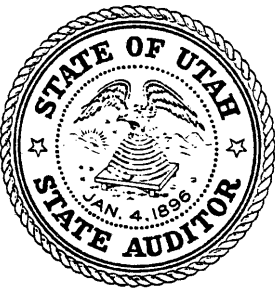

DENISE A. DRAGOO
Special Assistant Attorney General

301 Empire Building
231 East Fourth South
Salt Lake City, UT 84111

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief of Appellant were delivered to Michael L. Deamer, Deputy Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, Attorney for Respondent, this 29th day of February, 1980.


DENISE A. DRAGOO



STATE OF UTAH
Office of the State Auditor

SALT LAKE CITY, UTAH 84114

801 533-5361

Richard G. Jensen, C.P.A.
STATE AUDITOR

February 28, 1980

Mr. Richard Dewsnap
Deputy Attorney General
236 State Capitol Bldg.
Salt Lake City, Utah 84114

RE: Case No. 16832

Dear Mr. Dewsnap:

Please use all reasonable efforts to complete this case as soon as possible. I have verified that the cost of new building construction has exceeded the rate of return on Land Board invested funds. Land Board investments have averaged 6.2 percent over the past five years. The cost per square foot of new school construction has averaged 13.0 percent over the past five years.

The net result is that the State of Utah has lost the capacity to build approximately 73,305 square feet of school building space. If the State had followed my position, we could now have had in place enough additional space for approximately 1000 elementary school students. Making this money available now will provide approximately 270,000 additional square feet of badly needed school space that legislators and school boards will not need to tax for.

It is in the interest of the taxpayers, the students, the school administrators, and the court to affirm our position as soon as possible.

Sincerely,

Richard G. Jensen, C.P.A.
UTAH STATE AUDITOR

APPENDIX B

IDENTIFICATION OF FUNDS AND ACCOUNTS IN CONTROVERSY

<u>OPERATING FUNDS INTO WHICH MINERAL PROCEEDS SHOULD HAVE BEEN DEPOSITED</u>	<u>AMOUNTS WHICH SHOULD HAVE BEEN DEPOSITED TO OPERATING FUNDS</u>
Uniform School Fund for public schools	\$ 14,814,150
Utah State Hospital operating fund	297,627
University of Utah operating fund	218,142
Normal School operating fund	180,575
Miners Hospital operating fund	173,946
State Industrial School operating fund	128,729
School of Mines operating fund	127,839
Utah State University operating fund	114,948
School for the Deaf operating fund	98,879
Reservoirs	98,726
School for the Blind operating fund	82,748
Public Buildings	44,702
	<u>\$ 16,381,011</u>

