

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 : Reply Brief of Appellant

Utah Supreme Court

Follow this and additional works at: 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.

RICHARD L. DEWSHUP, DENISE A. DRAGOO; ATTORNEYS FOR APPELLANT; MICHAEL M. DEAMER; ATTORNEY FOR RESPONDENT

Recommended Citation

Reply Brief, *Jensen v. Dinehart*, No. 16832 (Utah Supreme Court, 1980).
https://digitalcommons.law.byu.edu/uofu_sc2/2063

This Reply Brief 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.

IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD B. JENSEN, as State)
Auditor of the State of Utah)
Plaintiff and Appellant,)

REPLY BRIEF
OF APPELLANT

vs.)

WILLIAM K. DINEHART, as the)
Director of the Division of)
State Lands of the State of)
Utah,)
Defendant and Respondent.)

Case No. 16832

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

RICHARD L. DEWSNUP
Assistant Attorney General

DENISE A. DRAGOO
Special Assistant Attorney General

ATTORNEYS FOR APPELLANT
301 Empire Building
231 East Fourth South
Salt Lake City, Utah 84111

MICHAEL L. DEAMER
Deputy Attorney General

ATTORNEY FOR RESPONDENT
236 State Capitol
Salt Lake City, Utah 84114

June 13, 1980

FILED

JUN 13 1980

IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD B. JENSEN, as State)
Auditor of the State of Utah)
Plaintiff and Appellant,)

REPLY BRIEF
OF APPELLANT

vs.)

WILLIAM K. DINEHART, as the)
Director of the Division of)
State Lands of the State of)
Utah,)
Defendant and Respondent.)

Case No. 16832

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

RICHARD L. DEWSNUP
Assistant Attorney General

DENISE A. DRAGOO
Special Assistant Attorney General

ATTORNEYS FOR APPELLANT
301 Empire Building
231 East Fourth South
Salt Lake City, Utah 84111

MICHAEL L. DEAMER
Deputy Attorney General

ATTORNEY FOR RESPONDENT
236 State Capitol
Salt Lake City, Utah 84114

June 13, 1980

C O N T E N T S

	<u>Page</u>
I. PREFACE: SOME PERTINENT REMINDERS	1
II. RESPONSE TO POINTS I & III: ARTICLE X, SECTION 3, UTAH CONSTITUTION, IS WITHIN THE SCOPE OF THE UTAH ENABLING ACT AND THE ACT OF 1927.	4
III. RESPONSE TO POINT II: RENTALS, ROYALTIES AND BONUS FEES ARE "INCOME" RATHER THAN RECEIPTS FROM THE SALE OF CAPITAL ASSETS	7
CONCLUSION	9
CERTIFICATE OF SERVICE	9
APPENDIX	A-1

TABLE OF AUTHORITIES

I. CASES CITED:	<u>Page</u>
Andrus v. Utah, No. 78-1522, U.S. Law Week, Vol 48 p. 4562	1, 3, 4, 6
School District No. 23 v. Board of Commissioners of Land Office of Oklahoma, et al. 27 P.2d 149 (1933)	7, 8
Carroll, et al. v. Bowen, et al., 68 P.2d 773 (1937)	8
State ex rel. Dickgraber v. Sheridan, 254 P.2d 390 (1953)	8
II. STATUTES CITED:	
Utah Enabling Act, 28 Stat. 107	4, 5, 6
Act of 1927, 44 Stat. 1026, 43 U.S.C. §870- 871	4, 5, 6
Utah Constitution, Article X, Section 3	passim
Utah Constitution, Article X, Section 7	passim
Laws of Utah 1919, ch. 107, §1	5
III. TREATISES CITED:	
Thornton, Oil and Gas, Willis	8
Oil and Gas Law, Williams & Meyers	8

IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD B. JENSEN, as State Auditor of the State of Utah,)	
)	REPLY BRIEF
Plaintiff and Appellant,)	OF APPELLANT
)	
vs.)	
)	
WILLIAM K. DINEHART, as the Director of the Division of State Lands of the State of Utah,)	Case No. 16832
)	
)	
Defendant and Respondent.))	

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

The purpose of this reply brief is to clarify for the Court certain inaccurate statements set forth in the Brief of Respondent and to call to the attention of the Court the May 19, 1980 decision of the U.S. Supreme Court in Andrus vs. Utah, No. 78-1522 U.S. Law Week, Vol. 48, p. 4562 (May 19, 1980).

I. PREFACE: SOME PERTINENT REMINDERS

There are a few practical aspects of this case that deserve special emphasis, and which ought not be obscured in arcane speculation about contrived ambiguities.

First, every cent that the State of Utah has ever received from the sale of school trust lands has been placed in the permanent school fund. It is only the interest and other income from the permanent school fund and the retained trust lands that are deposited in the uniform school fund to meet current

expenses.

Second, the Respondent Director of State Lands is not being candid with the Court. He is not practicing in his office what he is preaching to this Court. His biennial reports show that he deposits grazing rentals, delay rentals, and lease bonus payments in the uniform school fund (as Art. X, §3 of the Utah Constitution requires), and that he deposits only production royalties in the permanent school fund (which is a violation of Art. X, §3). The pertinent point is that Respondent has set himself up as a law unto himself by deciding to disregard the Utah Constitution by depositing mineral production royalties in the permanent fund. If he is guided by his personal perception of what is right, rather than by what the Constitution says, then why hasn't his practice been in accordance with the argument he has urged on this Court?

Third, the judgment of the lower court actually repudiates the practice of Respondent more than it confirms it. It is not true, as Respondent argues at page 6 of his brief, that:

This legal action deals only with the narrow question of "whether proceeds from the mineral value of school land grants should go to the permanent school fund or the uniform school fund."

To the contrary, the lower court held that all proceeds derived from school trust lands, whether grazing fees or mineral royalties, must be deposited in the permanent school trust fund. Thus, though Respondent seems not to perceive it, the effect of the lower court's ruling necessarily means that there will have to be a complex audit and adjustment for all prior years

when grazing fees and other rentals have been deposited in the uniform school fund, in accordance with the Constitution, rather than in the permanent fund as now required by the lower court. This result is inescapable because Art. X, §7 declares that "All public School Funds shall be guaranteed by the State against loss or diversion." If funds have been unlawfully diverted, they must be restored.

Fourth, the lower court seemed not to notice that it was actually invalidating a fundamental part of the Utah Constitution. Respondent also seems not to notice, arguing that this case merely involves a "narrow question" with respect to the deposit of mineral proceeds. If Article X, §3 is to be invalidated, it should be for very sound reasons, and should not be based on some idle conjecture or speculation.

Indeed, on May 19, 1980, the U.S. Supreme Court held in Andrus v. Utah, supra, that the Secretary of Interior could, in his discretion, reject the acre-for-acre school indemnity selection rights of the State as granted by Utah's Enabling Act, and substitute tests of comparable value and other criteria to emasculate the statehood grant. This is not a "sore loser" reaction. It is plain fact. Justice Powell, speaking for the four dissenting Justices, called a spade a spade:.

Since the early days of the Republic, the Federal Government's compact with each new State has granted the State land for the support of education and allowed the State to select land of equal acreage as indemnity for deficiencies in the original grant. Today, the Court holds that the Taylor Grazing Act abrogated those compacts by approving selection requirements completely at odds with the equal acreage principle. Nothing in

the Court's opinion persuades me that Congress meant so lightly to breach compacts that it has respected and enforced throughout our nation's history. Therefore I dissent. (Andrus v. Utah, supra, Dissent, p. 1.)

It seems odd, indeed, that the United States Supreme Court should so easily shed the federal obligation to honor the equal acreage grant, and, at the same time, this Court should be asked to strain to create a reason where none exists—to void a fundamental part of the Utah Constitution on the ground that Utah has broken faith with the Federal Government. This is ironic—and difficult to understand and impossible to swallow.

The State of Utah filed a petition for rehearing in Andrus v. Utah on June 10, 1980, and pages 11 through 26 of that petition are attached as Appendix A to this reply brief, to illustrate to this Court the many ways in which the Federal Government has short-changed the State of Utah in its school land grant entitlements.

II. RESPONSE TO POINTS I & III: ARTICLE X, SECTION 3, UTAH CONSTITUTION, IS WITHIN THE SCOPE OF THE UTAH ENABLING ACT AND THE ACT OF 1927.

The basic issue in this case is whether depositing mineral proceeds from State school lands in the uniform school fund, as required by Article X, Section 3, of the Utah Constitution, is a violation of either the Utah Enabling Act, 28 Stat. 107, or the Act of January 25, 1927, 44 Stat. 1026, 43 U.S.C. §870. From the outset, Respondent in his Statement of Facts at page 5 misconceives and therefore mistates the issue:

The uniform school fund was designed to receive the

proceeds from the sale of State lands and minerals therein to be expended entirely within the year of receipt, if necessary.

But that is not true. Article X, Section 3, of the Utah Constitution establishes a permanent school fund to receive proceeds from the sale of school lands—not the sale of the mineral estate in such lands. The uniform school fund receives interest from the corpus of the permanent fund as well as proceeds from mineral and other leases on state school lands.

It is worthy of note that in 1919 the Utah Legislature enacted a law that required that "all coal and other minerals" in state lands be reserved from sale and made available for development exclusively by lease. Laws of Utah 1919, ch. 107, §1. This was, of course, eight years before Congress enacted the law of January 25, 1927, 44 Stat. 1026, 43 U.S.C. §§870-871, containing a similar requirement.

The relevant inquiry is whether the Utah Enabling Act or the Act of 1927, both supra, demonstrate a clear congressional intent to require the maintenance of mineral proceeds in a permanent fund. Both Respondent and Appellant agree that Section 6 of the Utah Enabling Act does not include known minerals within the scope of the original school land grant to the State. And, both parties agree that known mineral lands were extended to Utah only by the terms and conditions of the Act of 1927, supra. Despite these facts, and the lack of any statutory language requiring the deposit of mineral proceeds into a permanent fund, Respondent insists that Article X, Section 3,

of the Utah Constitution is unlawful because it requires deposit of mineral proceeds in the uniform school fund.

Respondent argues that it is possible that certain minerals not known to be valuable at the time of survey may have passed to the State by the Utah Enabling Act, and that mineral lands obtained under 1927 Act are governed by the terms of the original grant. As the Appellant has stated (Appellant's Brief, pp. 5 and 20), the failure of Congress to include known mineral lands within the scope of the Utah Enabling Act of 1894 conclusively rebuts any implication of any congressional intent that mineral proceeds be deposited in any particular fund. This fact is implied in the Court's language in Andrus v. Utah, supra.

The school land grants gave the States a random selection of public lands subject, however, to one important exception. The original school land grants in general, and Utah's in particular, did not include any numbered sections known to be mineral in character by the time of survey. United States vs. Sweet, 245 U.S. 563. This Court held so even though the Utah Enabling Act "neither expressly includes mineral lands nor expressly excludes them" Id., at 567. The Court's opinion stressed "the practice of Congress to make a distinction between mineral lands and other lands, to deal with them along different lines, and to withhold mineral lands from disposal save under laws specially including them." Ibid. Mineral lands were thus excluded not only from the original grants in place but also from indemnity selections. Since mineral resources provide both the most significant potential source of value and the greatest potential for variation in the generally arid western lands, the total exclusion of mineral lands from school land grants is consistent with an intent that the States' indemnity selection of equal acreage approximate the value of the numbered section lost. (Slip opinion at p. 8; emphasis added).

The 1927 Act was the first specific consideration which Congress gave to the inclusion of known mineral lands in the

State's school land grant, and therefore is the first and only indication of the intent of Congress with respect to mineral lands and mineral proceeds. The intent of Congress is clear from the express language of the Act which, rather than limiting mineral proceeds to a permanent fund, requires that the mineral estate be leased rather than sold, and allows the States to dispose of such lease proceeds in any manner they choose, so long as they are utilized "for the support or in aid of the common schools." Therefore, creation of a uniform school fund by the 1939 amendment of Article X, Section 3, of the Utah Constitution was well within the limits allowed the State under the 1927 Act. The uniform fund is used for direct legislative appropriations to support the public schools, and for no other purpose whatsoever, and therefore meets the conditions set forth by Congress in the 1927 Act.

III RESPONSE TO POINT II: RENTALS, ROYALTIES AND BONUS FEES ARE "INCOME" RATHER THAN RECEIPTS FROM THE SALE OF CAPITAL ASSETS

Despite the fact that known mineral lands were not within the initial Utah school land grant, Respondent relies on the broad interpretation given to the word "proceeds" in School District No. 23 (Mountain Grove School District of Okfuskee Co. v. Commissioners of Land Office of Oklahoma, et al., 168 Okla. 226, 27 P.2d 149 (1933). But Respondent's reliance is totally misplaced because the Oklahoma Supreme Court construed the term "proceeds" as including bonuses, royalties, and rentals

only because Sections 8 and 9 of the Oklahoma Enabling Act of June 16, 1906 (34 Stat. 267) expressly included known mineral lands. That case certainly offers no aid or comfort to Respondent.

Indeed, the Oklahoma Supreme Court has itself distinguished School District No. 23 v. Commr's of Land Office of Okla., supra, and the cases upon which that opinion relied, and has refused to apply the expansive interpretation of mineral proceeds to a traditional mineral conveyance. In Carroll et al., v. Bowen et al. 68 P.2d 773 (Okla. 1937), the Oklahoma Supreme Court held that words such as "bonus", "rental", "royalty", or other mineral "proceeds" are to be construed in the particular context in which they are used, and in doing so distinguished School District No. 23 v. Commr's of Land Office of Okla., supra.

The point is that the meaning of the word "proceeds" depends on the context in which it is used. The phrase "proceeds of lands" in the Utah Enabling Act certainly does not mean the same thing as "proceeds of lands and minerals" in the Oklahoma Enabling Act. Utah did not get known minerals. Oklahoma did. There is no magic, universal meaning of "proceeds" and it is absurd to argue that there is.

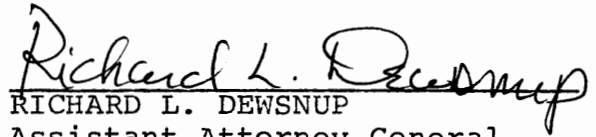
This is obvious and fundamental law. See, e.g., State ex rel. Dickgraber v. Sheridan, 126 Mo. 447, 254 P.2d 390 (1953); 2 Thornton Oil and Gas, Willis, Section 363, p. 644; and Oil and Gas Law, Williams and Meyers, Section 301, p. 434.

CONCLUSION

In sum, under the 1939 amendment to Article X, Section 3, of the Utah Constitution all mineral proceeds, be they sale, rental, royalty or bonus fees, must be deposited in the uniform school fund. That requirement does not violate either the Utah Enabling Act or the 1927 Act.

Therefore, the judgment of the lower court should be reversed and the constitutionality of Article X, Section 3, should be upheld.

DATED this 13th day of June, 1980.

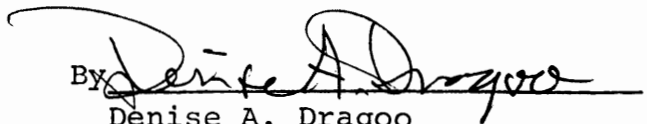

RICHARD L. DEWSNUP
Assistant Attorney General


DENISE A. DRAGOO
Special Assistant Attorney General

ATTORNEYS FOR APPELLANT
301 Empire Building
231 East Fourth South
Salt Lake City, Utah 84111

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Appellant was hand delivered this 13th day of June, 1980 to Respondent's counsel, Michael L. Deamer, Deputy Attorney General, 236 State Capitol, Salt Lake City, Utah 84114.

By 
Denise A. Dragoo
Special Assistant Attorney General
ATTORNEY FOR APPELLANT

D. *Applicability of NEPA*

An unfortunate complication arising from the Court's opinion is that the broad discretion accorded to the Secretary will trigger the provisions of NEPA, 42 U.S.C. §§4321 *et seq.*, and environmental impact statements will be required before the Secretary may issue clear lists.

The reason that the result is unfortunate is because any such environmental assessment will be extremely difficult, quite impractical, and in most instances entirely meaningless. States do not acquire school trust lands for a specific use—such as a highway, a dam, a park, or any other project or facility that would lend itself to environmental evaluation. Those lands are acquired plainly and simply for ownership, and for such subsequent uses or disposition that will best serve the financial interests of the permanent school trust fund. Under the clear holdings of *Payne v. New Mexico* and *Wyoming v. United States*, both *supra*, NEPA would not have been applicable because the Secretary's role was ministerial rather than discretionary.

III. THE SCHOOL INDEMNITY SELECTIONS RESULT IN NO WINDFALL TO UTAH

A. *Preface*

A careful reading of the Court's opinion, from beginning to end, indicates repeatedly that the controlling concern was to protect the integrity of the "rough equiv-

alency” of values and to prevent Utah from obtaining an unconscionable windfall in the present selection of oil shale lands.

Utah believes that the correct law is set forth in its Brief on the merits, in the Findings and Conclusions of the trial court, in the opinion of the Court of Appeals for the Tenth Circuit, and in the dissenting opinion of this Court. Nevertheless, Utah further realizes that those opinions are merely judicial history at this juncture, and the task at hand is to persuade at least one member who joined in this Court’s opinion that rehearing is appropriate. To do that, it appears appropriate to address the “windfall” issue that apparently was the controlling concern of the Court.

B. *A “Rough Equivalent”*

As the Court noted in the last paragraph of its opinion, and as the parties both agree, Congress intended that Utah receive a “rough equivalent” in value of the lands throughout the State. Sections 2, 16, 32, and 36 in each township would guarantee to Utah a rough equivalent of all types of land. Four sections in each township containing 36 sections would thus mean that Utah’s school land grant would approximate one-ninth of the total land value of the State. This would mean, for example, that Congress intended that Utah receive roughly one-ninth (11 1/9%) of the oil shale lands. And yet, even if the present school indemnity selections are recognized and honored, Utah would receive less than one percent of the oil shale reserves in

Utah.³ That is less than one-tenth of the intended "rough equivalent" for the Utah's school trust fund, and, if there is any windfall, it surely is in favor of the United States and not Utah.

C. *Present Value of Utah's School Land Grant*

Utah's school land grant of four sections in each township was approximately 7,500,000 acres. Today, that grant is comprised of (1) proceeds derived from school lands that have been sold (every penny derived from such sales has been deposited in a permanent fund and only the interest earned thereon has been spent to support the public schools), and (2) lands that have not been sold (where the rentals and royalties derived therefrom are spent to support the public schools).

Utah has sold approximately 4,000,000 acres of

³ The thickness and richness of oil shale deposits in Utah have not been determined with any high degree of accuracy, but it does seem clear that Utah's school indemnity selections would include less than one percent of recoverable deposits in Eastern Utah. Prototype tracts U-a and U-b were selected for lease because they were among the richest prospects, ranging from a deposit about 50 feet thick and averaging about 30 gallons per ton, to a deposit about 90 feet thick and averaging about 25 gallons per ton. The former deposit would contain an average of about 96,200 barrels per acre and the latter about 162,000 barrels, or a combined average of 129,000 barrels per acre.

If it is assumed, contrary to all expectations, that the entire 157,000 acres selected would contain deposits as rich as the proto-type tracts, the total reserves on the selected land would approximate 20 billion barrels, or slightly more than one percent of the estimated 1.82 trillion barrels of oil in the shales of the Green River Formation in Utah's Uinta Basin. If, more realistically, the selected lands average only 50 percent of the proto-type tracts, then the reserves in the selected land would only be slightly more than one-half of one percent of the total deposits in the Uinta Basin in Utah. See **Synthetic Fuels Data Handbook**, 2d. ed., p. 13 (Cameron Engineers, Denver, Colorado, 1978).

the Utah school land grant of 7,500,000 acres, or more than one-half. The total proceeds derived therefrom, from statehood (1896) to April 30, 1980, amount to exactly \$35,925,013.81. Rather shocking—less than 36 million dollars!

Utah has retained ownership of 3,480,696.79 acres (as of June 30, 1979) and the mineral estate only⁴ in an additional 786,370.09 acres (as of June 30, 1979). The value of the retained lands is not known, but the lands that were sold were at the time of sale the more desirable because purchasers asked to buy them; whereas, by and large, the lands retained were wall flowers—primarily desert lands valuable only for grazing where the present annual rental averages somewhere between 7 cents and 10 cents per acre (although in recent years mineral royalties have been received on some of those lands).

The best illustration of the present value and benefit of the school trust grant to Utah is the combined annual yield from interest on the permanent trust fund and from rentals and royalties from the retained lands. For the fiscal year ended June 30, 1979, interest and all other income on the permanent trust fund was \$1,867,908.59 and rentals and royalties derived from retained lands were \$6,993,506.75, for a combined total of \$8,861,415.34.

⁴ In 1919 the Utah Legislature enacted a law that required that "all coal and other minerals" in state lands be reserved from sale and made available for development exclusively by lease. Laws of Utah 1919, ch. 107, §1. This was eight years before Congress enacted the Law of January 25, 1927, 44 Stat. 1026, 43 U.S.C. §§870-871, containing a similar requirement.

Compare this with Utah's actual expenditures (State and counties) for the support of the common public schools for 1979: \$402,423,826.00. And that figure includes only maintenance and operation—not capital expenditures. Thus, the Federal grant for the support of Utah's public schools, intended to be equal to one-ninth of the total value of the State, now yields slightly more than two percent of the cost of supporting the public schools—and, as indicated, this does not include expenditures for land, buildings and other improvements. Unfortunately, the Federal school land grant to Utah for the support of the common schools never materialized as intended. So far, the economic benefits to Utah from the solemn public trust have been insignificant.

How can this be? The discussion which follows will show some of the ways in which the Federal Government has failed to keep its commitments to Utah and has unfairly and illegally diminished the original school land grant.

D. *Federal Violations of the Bilateral Compact*

1. *The 5% Violation*

This Court judicially knows that the firm policy of the United States in 1894 (date of Utah's Enabling Act) and 1896 (date of Utah's statehood) was to dispose of the unreserved public domain. Indeed, Section 9 of Utah's Enabling Act (28 Stat. 107) provided that the United States would dispose of the unreserved Federal lands and would pay to Utah, as an additional component of the school land grant, 5% of all proceeds

received from the sale of the public domain. Utah has not yet received one dime from that solemn Federal commitment.

2. *Failure to Dispose of Unreserved Public Domain*

Aside from the 5% violation, Utah has suffered economically by the failure of the United States to follow through with a program of disposing of unreserved Federal lands so that they would become privately owned and be subject to state and local taxes. When Utah, by virtue of its Enabling Act, was required to agree not to tax Federal lands, no one supposed that the United States would continue forever to own 67% of the State.

Not only was the established Federal policy of disposing of the unreserved public domain well known and in fact impliedly recited in Section 9 of the Enabling Act, but Article I, Section 8, Paragraph 17, of the United States Constitution provided that Congress shall have:

... Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

It thus was reasonable to assume that the lands to be retained by the United States would be limited to the nature constitutionally defined, or, at the most, to lands reserved for legitimate Federal purposes.

The switch in federal policy, whereby Congress decided to retain rather than dispose of the unreserved public domain was not finalized until 1976, in the enactment of the Federal Land Policy and Management Act, Act of October 21, 1976, PL 94-579, 43 U.S.C. §§1701, *et seq.*, wherein it was declared as Federal policy that, with few exceptions, "the public lands be retained in federal ownership."

3. *Failure to Disestablish Indian Reservations*

This Court also judicially knows that, by the latter part of the Nineteenth Century, Congress had established a firm policy of disestablishing Indian reservations and terminating the dependent status of Indians and assimilating them into the non-Indian culture and civilization. This policy was set forth in the General Allotment Act of February 8, 1887 (24 Stat. 388), and provided for allotments of reservation lands to individual Indians and then terminating the reservations and restoring the excess or surplus lands to the public domain, making it subject to settlement and entry by non-Indians under the public land laws.

Utah's Enabling Act (1894) was enacted seven years after the General Allotment Act, at a time when there was no question concerning planned termination of Indian reservations. Section 6 of the Enabling Act clearly confirms this by specifically providing that the school land grant of sections 2, 16, 32 and 36, and the indemnity grant, would not apply to reserved lands, including Indian reservations, "until the reservation shall

have been extinguished and such lands be restored to and become a part of the public domain." Act of July 16, 1894; 28 Stat. 107, §6.

It was not until 1906, some twelve years after the Enabling Act and ten years after Utah's statehood, that Congress decided to slow down—but to continue—the process of terminating Indian reservations and the dependent status of Indians. Congress enacted the Burke Act as the Act of May 8, 1906 (34 Stat. 182), which, among other things, amended the General Allotment Act by requiring that future allotments carry restrictions against alienation for a period of twenty-five years before fee simple patents would issue. Congress was prompted to adopt this procedure to give Indians a reasonable period of time to adapt to the non-Indian culture, because many Indians who had earlier received unrestricted allotments had imprudently sold them to non-Indians, and, in short order, had become impoverished.

It was not until the 1930's that Congress decided that the assimilation policy of the General Allotment Act and the Burke Act simply was not effective, and that it would be a better policy to retain, and in some instances enlarge or restore, reservation lands and continue the trust relationship and dependent status of Indians. Congress implemented such new policy in the Indian Reorganization Act of 1934, Act of June 18, 1934, 48 Stat. 984 *et seq.*

That bit of history simply shows that at the time of the bilateral compact between Utah and the United

States it was understood that Indian reservations were temporary and that lands embraced therein would become subject to state and local taxation through individual Indian allotments and through restoration of surplus reservation lands to the public domain for acquisition by non-Indians under the public land laws. When Congress later changed its mind and decided to maintain the dependent status of Indians, it once again breached the intent and spirit of the bilateral compact between sovereigns.

4. *Summary*

Neither Congress nor the State of Utah ever intended during 1894-1896 that nearly a century later two-thirds of the State would still be in Federal ownership and immune from state and local taxes. To the contrary, both parties to the bilateral statehood compact understood at that time that the unreserved public domain would be sold and that Indian reservations would be terminated, so that all land, except for reservations for national purposes, would be subject to state and local taxation. Congress' breach of the bilateral compact through a change in Federal policies not only denied to Utah a property tax base of more than one-half of the State, but also denied to Utah the 5% of all proceeds to be derived from the sale of the public domain.

E. *Congressional Adjustments*

Congress enacted various statutes which were designed to rectify some of the inequities that developed in the school land grants. Perhaps the two most sig-

nificant were the Act of January 25, 1927, 44 Stat. 1026, 43 U.S.C. §§870-871, which allowed the States to receive original school sections in place that were mineral in character, and the Act of August 27, 1958, 72 Stat. 928, amending 43 U.S.C. §852, which allowed the States to select indemnity lands that were mineral in character if the lost lands in place were mineral in character.

When Congress enacted the latter statute, it was emphasized that the Federal policy in the original school land grants had been to give the State a fair proportionate part of all classes of land within the State, and that the 1958 Amendment allowing mineral selections for mineral base lands furthered that policy. The Department of the Interior reported to Congress that:

In giving a State sections in place it was intended that a State would acquire a proportionate part of all classes of land within its boundaries and the authorization to make selections on the basis of equal acreage rather than equal value carries this policy forward. (1958 U.S. Code Cong. and Adm. News, p. 3965) (Emphasis added).

The House Committee on Interior and Insular Affairs emphasized that the 1958 Amendment, in allowing States to select, on an acre-for-acre basis, mineral land for mineral land, contained ample protections to the Federal interest:

The Federal interest is amply protected by S. 2517. Mineral lands may be selected as indemnity lands only for other mineral lands. Lands

on a known geological structure of an oil and gas field may be selected as indemnity only for lands similarly situated. And lands subject to mineral lease or permit may be selected only if all lands subject to the lease or permit are chosen and only if none of the lands is in a producing or producible status. The character of the lands for which indemnity is sought will be determined as of the date of application for selection. (1958 U.S. Code Cong. and Adm. News, p. 3964). (Emphasis added).

Perhaps Congress has not made full amends for the financial inadequacy of Utah's school land grant, but it has made a reasonable, clear and determined effort. The only trouble is, this Court has judicially vetoed what Congress has granted. This Court seemingly will not permit Congress to make amends.

F. *Value of Present Indemnity Selections*

No one knows, or can even estimate with any degree of accuracy, the approximate value of the oil shale lands selected as school indemnity. Estimates have been made of the volume of the oil shale reserves in eastern Utah, and it is believed there are 182 trillion tons containing 5 gallons or more of shale oil per ton. (*Synthetic Fuels Data Handbook*, 2d ed., p 13 (Cameron Engineers, Denver, Colorado, 1978)). But it is anybody's guess as to what portion of those reserves, if any, will ever be developed. Utah's reserves are rather low grade.

For example, one-third of Colorado's reserves contain 25 gallons or more of shale oil per ton, whereas

less than 5% of Utah's reserves have 25 gallons or more per ton. (*Synthetic Fuels Data Handbook, supra*, at p. 13).

The selected lands were not believed by anyone to have any substantial present value in 1965 when Utah filed its first selection lists. But then the Arab oil boycott came along in 1973-74, and at the height of that panic the proto-type tracts were bid for lease. Accordingly, the bonus bids were high — obviously higher than they would have been at any other time — before or since. The lessees of proto-type tracts U-a and U-b have recently filed suit against Utah and the United States in the federal district court in Utah, praying, *inter alia*, that the court declare a constructive eviction and return the lease rentals and bonus payments to the lessees (*Sohio Shale Oil Company, et al. v. Cecil D. Andrus, et al.*, Civil No. C-80-0240A, U.S. D.C. for Utah).

It is not yet known how much, if any, shale oil will ever be produced and marketed in Utah; and it is not yet known how many dollars, if any, will be realized as production royalties from such oil shales.

G. *Value of Lands Available for Selection*

If the subject school indemnity selections are invalidated or rejected, Utah has unsatisfied selection rights of approximately 225,000 acres. Why would Utah, after such a long period of time, still have such a large selection entitlement remaining? The answer is because there is very little unreserved public domain

available for selection in Utah that has more than a very low or marginal value.

Utah was granted four sections in each township, rather than the traditional two, because of the large areas of arid, barren desert. Title could not pass until the lands were surveyed. Surveys were delayed, and, in the meantime, the Federal Government reserved many choice areas for national parks (Utah have five national parks, which is more than any other State), national forests, reservoir sites, and other purposes. Lands that were near streams, or that were susceptible to irrigation or other development, were taken by private entry. Thus, by and large, when surveys were completed the school lands in *place* actually received by Utah were remote and barren lands that nobody wanted, ordinarily having no value except for marginal grazing.

While there are valuable minerals in much public domain land, they ordinarily are not available for selection. Coal is not available. Oil and gas are subject to the strict limitations of 43 U.S.C. §852. Lands containing minerals locatable under the general mining law of 1872 ordinarily have been blanketed with mining claims filed prior to October 21, 1976. As far as Utah's school indemnity selection options are concerned, the pickings were, and still are, very slim.

That is why, beginning in 1965, the public domain with some promise of potential oil shale development seemed to Utah to be the only land worth selecting—

since Congress had specifically provided in the 1958 Amendment to 43 U.S.C. §852 that oil shale deposits could be selected as school indemnity on an acre-for-acre basis.

However, this Court has now told Utah that it can no longer exercise the selection rights as set forth in the Utah Enabling Act and 43 U.S.C. §§851-852. On the other hand, the Air Force has told Utah that it may host the MX missile—like it or not! If current trends continue, Utah might have to select areas between MX shelters in order to satisfy the balance of its school indemnity selection rights.

H. *No Chance for Utah to Receive Fair Value*

Utah has been treated unfairly in the implementation of the school land grant created by the bilateral compact between sovereigns. Even if the present selections are honored as a matter of right—as they should be—Utah will never be able to come within a country mile of receiving a “rough equivalent” of one-ninth of the value of all lands in the State. The school land grant probably will never finance even 5% of the cost of supporting Utah’s common schools—but that would be twice the current level.

A final note! It is particularly galling that the Secretary’s comparative value policy operates only in favor of the United States and never in favor of Utah. For decades Utah was denied school sections in place if those lands were mineral in character. For decades more Utah was denied the right to select mineral lands

even though the base lands were mineral in character.

The historical pattern has been that Utah must accept lands of lower value in lieu of its original entitlement to lands of higher value. Congress finally fully rectified this at a rather tardy date, when there was very little land of value from which Utah could select—but the Secretary then frustrated the congressional grant by giving birth to his one-sided policy on comparative value, thus resurrecting the old unfairness laid to rest by Congress.

The Secretary may now reject mineral land indemnity selections when the selected land is more valuable than the base mineral lands—but the Secretary may approve selections where the base lands are more valuable than the selected lands—and, in that event, the Secretary needs make no adjustment to compensate the State for the Federal windfall. And it makes no difference how disparate the values may be—so long as it is the State, and not the United States, who comes out on the short end of the stick.

And this short-changing of Utah strikes at the very heart of state sovereignty. State government functions cannot be carried out without adequate funding. Providing a “free” education to the public through a system of common public schools is one of the most important governmental functions of the States. The general property tax, traditionally and historically, has been the financial foundation for support of the schools. The United States has kept two-thirds of the land in

Utah off the tax rolls—and has not kept faith with Utah under the bilateral compact which was to provide a land grant to yield full and fair revenue in lieu of tax receipts from Federal and Indian lands.

IV. *THE COURT'S OPINION WILL FAN THE FLAMES OF THE SAGEBRUSH REBELLION*

A. *Preface*

The remainder of this Statement will demonstrate that illegal, unfair and oppressive public land policies and practices by the United States have forced the Western States to a point of virtual rebellion—and that this Court's opinion is sure to worsen that situation. In a sense, these observations constitute sort of a modern day "Brandeis brief" in that they address social, economic and political considerations to supplement the earlier legal arguments—to show that this Court's opinion is not only unsound from the standpoint of legal analysis, but is unwise, unfair, and impractical.

But to the extent that this Statement appears to be critical of the Court's opinion in this case or earlier cases, Utah wishes to make clear that any such criticism is submitted with great respect for and deference to the Court—and is purely for the purpose of seeking justice.

It is important to emphasize the relevance of the present discussion, and perhaps that is best accomplished by drawing an analogy to NEPA. This Court has indicated that in certain circumstances it might be

