

1988

Mountain States Telephone and Telegraph Co. v. Garfield County : Reply Brief

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

DOCKET NO. 88-0435 IN THE SUPREME COURT OF UTAH

MOUNTAIN STATES TELEPHONE
AND TELEGRAPH CO.,

Appellant/Plaintiff,

v.

GARFIELD COUNTY; THE
GARFIELD COUNTY BOARD OF
COUNTY COMMISSIONERS;
THOMAS HATCH, SHERRELL OTT,
AND LOUISE LISTON, COUNTY
COMMISSIONERS; JUDY HENRIE,
COUNTY TREASURER; TOM
SIMKINS, COUNTY ASSESSOR;
THE UTAH STATE TAX
COMMISSION; R. H. HANSEN,
ROGER O. TEW, G. BLAINE
DAVIS AND JOE B. PACHECO,
UTAH STATE TAX COMMISSIONERS;
TOM L. ALLEN, UTAH STATE
AUDITOR; EDWARD T. ALTER,
UTAH STATE TREASURER,

Respondents/Defendants.

Case No. 88-0435

Priority 14B

ON APPEAL FROM THE SIXTH JUDICIAL DISTRICT
COURT FOR GARFIELD COUNTY, STATE OF UTAH

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INTRODUCTION

At the very conclusion of their brief, the Garfield County respondents finally address the operative impact of article XIII, section 5 of the Utah Constitution. They correctly note that it "is a constitutional principle which speaks of co-existence, a separation of responsibility and of direct accountability between local elected officials and their constituents for purely local decisions." Brief of Garfield County Respondents at 44 (hereafter "Resp. Br."). The remainder of the brief, however, either ignores this constitutional principle or construes it out of existence.

Utah Code Ann. § 17-19-15 (hereinafter the "Act") dramatically alters the local property tax levied by the 29 individual counties of the State.¹ Prior to the adoption of the Act, each county developed its own assessment budget, levied a tax to cover that budget, and was directly responsible to the local electorate for that budget. Brief of Appellant at 3-5; 13-31 (hereafter "App. Br."). These essential, constitutionally mandated components of local self-governance are destroyed by the Act. The counties no longer establish their own assessment budgets; that control instead is shifted to the State Auditor who develops "categories of allowable costs" and certifies that

1/ Respondents concede this point. Resp. Br. 17 ("The utilization of an equalized statewide levy approved during the 1986 general legislative session was a deviation from the previous authority of each county to levy a separate tax for the cost of assessing, collecting and distributing property taxes").

individual budgets comply with those "approved categories" of costs. Utah Code Ann. 17-19-15(2). The counties, moreover, no longer determine the amount of the tax levied to cover "local" collection costs. Garfield County, for example, does not set the "local levy" (Utah Code Ann. § 17-19-15(3)) imposed under the Act. The levy, instead, is set by the cumulative actions of 29 county commissions and is imposed by the State Tax Commission. Id.

Most importantly, however, the Act strips the electorate of any control over the local assessment budget. Taxpayers may, as the respondents note, "appear at budget hearings in any county" to protest the tax collection budget. Resp. Br. 40. What respondents fail to recognize is that any such appearance is unavailing. Why? Because the "local levy" ultimately assessed by the State Tax Commission (Utah Code Ann. § 17-19-15(3)) is based upon the actions of all 29 counties. Taxpayers in any one county, therefore, are powerless to control the "local levy" established by the Act. Article XIII, section 5 of the Utah Constitution was adopted precisely to prevent this intrusion upon the rights of the local electorate. The Best Foods, Inc. v. Christensen, 75 Utah 392, 285 P. 1001, 1004 (1930).

It is no wonder, then, that respondents virtually ignore article XIII, section 5 of the Utah Constitution in the body of their brief. Instead, respondents assert that article XIII, section 5 is irrelevant because Utah Code Ann. § 17-19-15 is indistinguishable from numerous other statutory provisions and, in any event, furthers a "state" purpose. Resp. Br. 11-33. They

next assert that the Act does not violate the constitutional prohibition against involuntary revenue sharing because it merely establishes consensual "state-wide funding." Resp. Br. 34. Respondents then submit that -- notwithstanding the absence of any discovery and the existence of factual disputes highlighted in their own brief -- the trial court properly granted summary judgment on appellant's due process, equal protection and takings claims. Resp. Br. 36-43. Respondents finally argue that appellant lacks standing to challenge the constitutionality of the Act. These submissions do not withstand scrutiny and will be addressed in turn.

I. THE ACT PLAINLY VIOLATES ARTICLE XIII, SECTION 5 OF THE UTAH CONSTITUTION; RESPONDENTS' CONTRARY READING RENDERS THE CONSTITUTIONAL PROVISION VIRTUALLY MEANINGLESS

Respondents first assert that the Act is simply another -- and unremarkable -- imposition of duties upon local government by the state legislature. Resp. Br. 11-17. Respondents continue by arguing that the duties imposed by the Act further a state purpose and therefore escape constitutional scrutiny. Id. at 17-33. The first submission ignores the fundamental differences between the Act and the legislative examples cited by respondents. The second argument sweeps too broadly: if the Act passes muster under article XIII, section 5 merely because it furthers a broadly defined "state purpose," the constitutional prohibition will have been rendered a virtual dead letter.

In attempting to establish that the Act is merely another legislative proscription affecting local government, respondents

point to several instances in Title 17 of the Utah Code that require the counties to discharge certain duties as agents of the state. Resp. Br. 27-28 (service of process by county sheriff when the state is party to a lawsuit; counties must prosecute state crimes and assist attorney general; county assessors must adhere to Tax Commission rules). Respondents continue by pointing out that "[t]he State of Utah has a long history of involvement in and supervision over property tax assessment and collection matters." Id. at 28; see also id. at 11-17 (citing statutes). The examples cited by respondents, however, differ from the Act in one critical aspect: in none of the cited examples -- except in the instance of the Uniform School Fund (which is constitutionally distinguishable and is addressed below) -- does the legislature impose a tax for local purposes.

Appellant does not dispute that the state may direct the actions of certain county officials. Nor does appellant dispute that, under article XIII, section 11 of the Utah Constitution, the State Tax Commission has authority to "revise the tax levies of local governmental units" and to "equalize the assessment and valuation of property within the counties." Appellant further recognizes that, in furtherance of this constitutional authority, the legislature has granted the Tax Commission broad oversight powers regarding assessment and equalization. See Resp. Br. at 12, 14. However, neither the state's authority over the actions of county sheriffs, attorneys and assessors, article XIII, section 11, nor the various statutes cited by respondents, authorize the legislature to actually impose a tax to fund the

operations of local governmental units. While the legislature may direct the expenditure and usage of local tax dollars (such as requiring county sheriffs to serve state process) and provide the Tax Commission with extensive oversight responsibilities, "[u]pon principle and the great weight of authority, section 5 of article 13 of the Utah Constitution precludes the Legislature from imposing a . . . tax upon the inhabitants of a city, town or county for the sole purpose of raising revenue for such city, town or county." The Best Foods, Inc. v. Christensen, 285 P. at 1004 (Utah 1930). That is precisely what the Act attempts to do. That is also precisely why it is unconstitutional.

The sole instance cited by respondents where the state legislature has imposed a tax upon local government is constitutionally distinguishable from the Act. In an attempt to validate the Act, respondents repeatedly invoke the Uniform School Fund, and various programs enacted pursuant thereto. E.g., Resp. Br. 13, 15, 18, 20, 33, 47, 48 (arguing that the Act is identical to the Uniform School Fund and related revenue raising and redistribution measures). The State of Utah does levy a state-wide property tax to fund the "basic state-supported school program." Utah Code Ann. § 59-2-902.5. The state accordingly establishes a state-wide mill levy, closely monitors the collection of that levy, and redistributes funds collected by the various school districts throughout the state. Id.² This

2/ School districts that collect revenues in excess of their allocated share of basic education revenues turn them over to the state for redistribution to less affluent school districts. Utah Code Ann. § 59-2-905. The state has also, as respondents note, ordered the

(Footnote 2 Continued on Next Page)

statutory scheme, of course, bears a significant resemblance to the structures established by the Act. But, rather than supporting the constitutionality of the Act, the Uniform School Fund illustrates the Act's patent unconstitutionality.

State-wide taxes to support public education stand upon entirely different constitutional grounds than state-wide taxes to defray local tax collection costs. Article X, section 1 of the Utah Constitution requires the legislature to "provide for the establishment and maintenance of a uniform system of public schools, which shall be open to all children of the State, and be free from sectarian control." To enable the State to establish and maintain a public school system, the Utah Constitution originally contained in article X, section 3, a clause establishing the State School Fund and Uniform School Fund. That clause specifically provided for the State to raise revenues for the school funds from various sources and subjected the State's power only to article XIII, section 7 of the Utah Constitution, which established a maximum mill levy rate on tangible property. See Utah Const. former article X, section 3 (amended and renumbered 1986). Article X, section 3, as amended and renumbered in 1986 expressly authorizes the legislature to impose a tax for schools, stating as follows:

There is established a Uniform School Fund which shall consist of revenue from the following sources: . . . (c) other revenues which the Legislature may appropriate.

(Footnote 2 Continued from Previous Page)
preparation of revised property tax plats to effectuate collection of the Uniform School Fund. Resp. Br. 15.

Utah Const. art. X, § 5. Thus, any tax imposed to support public education in the state is levied pursuant to this express constitutional directive to the legislature and is free of other constitutional limitations on taxation, such as article XIII § 5. The fact that the legislature can impose state-wide property taxes to support public education, therefore, lends absolutely no support to any claimed prerogative to "impose taxes for the purpose of any county, city, town or other municipal corporation." Utah Const. art. XIII, § 5. Indeed, while the legislature is constitutionally permitted to levy state-wide taxes in support of education, it is constitutionally proscribed from levying such taxes for local purposes. Id.³

There can be little doubt, moreover, that the tax levied by the Act is for a county purpose. Despite existing factual disputes regarding the actual impact of the Act (see Section III, below), it is apparent from the face of the Act that monies raised by the "local levy" will be used to pay salaries and other costs and to finance capital expenditures incurred by local

3/ The distinction between the legislature's authority to levy state-wide taxes for public education and its inability to levy local taxes for local purposes is also reflected in the Utah Code. Utah Code Ann. § 53-7-15 recites that "the establishment of an educational system is primarily a state function." Because "local school districts should be required to participate on a partnership basis [with the state] in the payment of a reasonable portion of the cost of a minimum program" (id.), the Code establishes the board of education of each school district as separate and independent taxing districts. Utah Code Ann. § 53-7-9. The education taxes imposed by the state and the school districts, however, are clearly distinguishable from taxes levied for local purposes. The Utah Code makes clear that "funds for county purposes" are raised by the "governing body of each county." Utah Code Ann. § 59-2-909.

county officials in assessing and collecting the local property tax. Nothing in respondents' brief refutes the general rule, explicated in appellant's opening brief (at 19-28), that "the payment of . . . general expenses of local government is a corporate purpose within the meaning of constitutional limitations upon the taxing power of legislatures in regard to county . . . purposes." 106 A.L.R. 906, 914 (1937). Indeed, despite respondents' highly technical quibbles with several early decisions of this Court (Resp. Br. 18-23),⁴ respondents virtually concede that these decisions support the

4/ E.g., B; State v. Eldredge, 27 Utah 477, 76 P. 337 (1904); Bailey v. Van Dyke, 66 Utah 184, 240 P. 454 (1925); The Best Foods, Inc. v. Christensen, 75 Utah 392, 285 P. 1001 (1930); Smith v. Carbon County, 90 Utah 560, 63 P.2d 259 (1936).

Respondents' attempts to avoid the plain impact of this Court's earlier decisions are disingenuous at best. For example, respondents attempt to distinguish State v. Stanford, supra, by suggesting that the legislation challenged in that case was found unconstitutional because it lacked a legislative explication of a "state purpose." Resp. Br. at 19-20. Nothing in Stanford, however, suggests that the legislature could have required counties to hire fruit tree inspections if it had simply taken the time to recite that the state had a substantial interest in furthering the economy or protecting public health. Article XIII, section 5 of the Utah Constitution does not simply disappear when the legislature drafts an appropriate legislative preamble. Similarly, even though the constitutional provision at issue in State v. Eldredge, supra, has been amended since the decision in that case (Resp. Br. at 20-21), nothing in those amendments detracts from this Court's observation that "section 5, art. 13 . . . directs the Legislature to vest in the corporate authorities the power to assess and collect taxes for local purposes." 76 P.2d at 340. Bailey v. Van Dyke, 240 P. 454, moreover, stands for the proposition that, although the legislature may authorize counties to incur certain expenses, it cannot impose taxes upon the counties. App. Br. 18. It does not stand for the unsupportable proposition that "the Legislature in furtherance of a statewide purpose may require the imposition of local tax levies." Resp. Br. 22. Indeed, the only such "statewide levy" identified by respondents is the supposedly "analogous Uniform School Fund Levy." Id. As noted above, the Uniform School Fund is simply not "analogous" to the Act.

unconstitutionality of the Act. Resp. Br. at 23 (the Court's "early decisions . . . strictly construed the constitutional restriction on the Legislature vis-a-vis local governments' sovereignty").⁵

The supposedly "far more pragmatic approach" of this Court's later cases, furthermore, does not -- as respondents' submit -- support the constitutionality of the Act. Resp. Br. 23. This Court's decisions in Tribe v. Salt Lake City Corp., 540 P.2d 499 (Utah 1975), and Salt Lake County v. Murray City Redevelop., 598 P.2d 1339 (Utah 1979), do not grant the legislature the authority to impose a tax upon local governments any time it wishes to "resolve identified statewide concerns." Resp. Br. 25. Indeed, the Court did not uphold the Utah Neighborhood Development Act in Tribe and Murray City on the broad ground asserted by respondents: i.e., that because the legislation served a "state purpose" it was (without more) constitutional. Resp. Br. at 23-27. Rather, the Court upheld the legislation because: (1) it

5/ Respondents, moreover, mislead the Court when they assert that the Court in Smith v. Carbon County, 63 P.2d 259, did not address the article XIII, section 5 issue. Resp. Br. 22 ("the article XIII section 5 issues were not briefed and the Court didn't address them"). This assertion is flatly erroneous. This Court declined to address the precise question whether the legislature may "impose an inheritance tax for county purposes without offending article 13, section 5, of our State Constitution." 63 P.2d at 262 (emphasis added). The Court, however, did find that certain statutorily imposed probate fees were in fact taxes, and that they therefore "must be uniform and may not be levied by the Legislature for the use and benefit of a county." Id. The Court expressly found "that the law fixing the schedule of fees . . . must fail because in [sic] conflict with the constitutional provisions [including article XIII, section 5] relied upon by plaintiff." Id. Smith unequivocally addressed the limitations placed upon the legislature by article XIII, section 5 and this Court struck down the statute because it transgressed those limitations.

merely redirected funds within a county, and (2) it was a value increment financing program that did not, in fact, even impose a tax for local purposes. Salt Lake County v. Murray City, 598 P.2d at 1342 & n. 8; see also Tribe, 540 P.2d at 506 (Crockett, J., specially concurring)(a value increment financing scheme is constitutional because it does not divest the county of the right to set its own mill levy rate). In short, the legislation passed constitutional muster because it left the counties with full "vested authority to 'collect taxes for all purposes of such corporation.'" Salt Lake County v. Murray City, 598 P.2d at 1342. The same cannot be said regarding the Act. See App. Br. 33-34 (setting forth in detail the differences between the Act and the legislation upheld in Tribe and Murray City).

The Act, therefore, differs greatly from the supposedly "analogous" provisions invoked by respondents. In no other instance -- except for the completely distinguishable Uniform School Fund -- has the legislature ever imposed an identifiable tax upon county governments to defray the costs of local government. The Act, furthermore, is not supported by precedent, whether construed "strictly" or "pragmatically." Resp. Br. 23. As a result, respondents' submission reduces to the stark proposition that, if the state legislature identifies a state purpose for a given enactment, the enactment -- without more -- passes constitutional scrutiny under article XIII, section 5 of the Utah Constitution. This Court cannot adopt such a slack reading of the Utah Constitution.

Respondents' "state purpose" argument fails because it simply proves too much. As noted in appellant's opening brief (at 28-30), "[s]ince counties are political subdivisions of the state . . . , any person or problem of 'interest' to local jurisdictions is also of 'interest' to the state." Thus, if any legislation that furthers a "state purpose" automatically passes muster under article XIII, section 5 of the Utah Constitution, the Utah Constitution would give way any time the legislature incanted a "state purpose" in a legislative preamble. Indeed, if respondents' "state purpose" submission is correct, it is hard to conceive of any legislation that would ever transgress the strictures of article XIII, section 5. The constitutional provision would be essentially meaningless.

This Court has recently rejected the identical "state purpose" argument now propounded by respondents, albeit in a different constitutional context. In Utah Technology Finance Corp. v. Wilkinson, 723 P.2d 406 (Utah 1986), the Attorney General argued that the Utah Technology and Innovation Act, which appropriated state funds for use as venture capital, violated article VI, section 29 of the Utah Constitution, which prohibits the state from "lend[ing] its credit or subscrib[ing] to stock or bonds in aid of any . . . corporate enterprise or undertaking." Although the Court concluded that the lending of public monies did not violate the "lending of credit" clause, the Court nevertheless held that the state could not subscribe to stock in private corporations. The Utah Technology Finance Corporation, arguing the contrary, sought "judicial approbation on the ground

that the subscription to stock in fledgling businesses has been found by the legislature to have a public purpose." 723 P.2d at 413. This Court rejected this submission in language that is directly applicable to this case (id. at 414):

[T]he legislature's findings of a public purpose are of no avail in this instance. The constitutional convention in promulgating section 29 and its subsequent adoption by the electorate of this state have foreclosed any speculation or further debate on that issue. Clearly, the subscription to stock in emerging business is to aid them. Whether the public benefits thereby is of no consequence. This means of assistance is forbidden by section 29. . . . The state is foreclosed from subscribing, even though the legislature may determine that public benefits will flow therefrom.

In Utah Technology Finance Corp. v. Wilkinson, 723 P.2d 406 (Utah 1986), the state legislature attempted to enact legislation that was forbidden by the plain language of the Utah Constitution. This Court refused to permit such action, despite an acknowledged "state purpose" behind the legislation. The same result is mandated here. Article XIII, section 5 prohibits the legislature from imposing a tax for the purposes of local government. The promulgation of this constitutional provision "and its subsequent adoption by the electorate of this state have foreclosed any speculation or further debate on that issue." Utah Technology Finance Corp. v. Wilkinson, 723 P.2d at 413-414. Whatever the wisdom, efficiency or supposed benefits of collecting local governmental costs on a state-wide basis (Resp. Br. 11-33), the legislature -- no matter how badly it desires to do so -- is constitutionally proscribed from imposing a tax upon the counties to defray local tax collection costs.

Respondents state -- and appellant agrees -- that the standard for finding a statute unconstitutional is high. A legislative enactment will be found unconstitutional only where "it clearly and manifestly violates some provision of the Constitution of the state." Resp. Br. 9-10 (quoting Thomas v. Daughters of Utah Pioneers, 114 Utah 108, 197 P.2d 477, 499 (1948)). The Act, as demonstrated above and in appellant's opening brief, meets that high standard. The Act is "unconstitutional and must fail." Utah Technology Finance Corp. v. Wilkinson, 723 P.2d at 414.

II. THE ACT TRANSGRESSES THE CONSTITUTIONAL PROHIBITION AGAINST INVOLUNTARY REVENUE SHARING

Forced horizontal revenue sharing has always been held to be in violation of Article XIII, section 5. E.g., State v. Stanford, 66 P. at 1063. Indeed, prior to 1983, it was thought that the Utah Constitution prohibited even voluntary revenue sharing. App. Br. 32 & n. 18. Article XIII, section 5, therefore, was amended in 1983 to "allow local governments at their option to share tax revenues." Impartial Analysis, 1982 Voter Information Pamphlet, Office of Legislative Research and General Counsel (emphasis added). Respondents attempt to avoid the plain impact of these facts with a series of insubstantial arguments.

First, in a blatant example of "double speak" that would make George Orwell blush, respondents argue that, even though the Act mandates redistribution of local tax revenues, it "does not

necessarily constitute revenue sharing." Resp. Br. 34. What it does constitute, respondents assert, is "merely a state-wide funding approach to a matter of statewide concern." Id. Simply calling a pig a cow, however, will not permit you to milk it. The "state-wide funding approach" mandated by the Act is unequivocally revenue sharing.

Next, assuming that the Act does constitute revenue sharing, respondents argue that appellant lacks standing to challenge the Act and that the county has, in any event, consented to the revenue sharing. The standing argument will be addressed in Section IV of this Reply Brief. The "consent" argument rests upon resolutions passed by governmental associations not directly answerable to the electorate. This claimed "consent" is insufficient for reasons already set out at footnote 20 on pages 35 and 36 of appellant's opening brief. That reasoning will not be repeated here.

Respondents next argue that, even if the Act constitutes involuntary revenue sharing, it does not violate article XIII, section 5 "when a statewide purpose is involved." Resp. Br. 35. This assertion, of course, merely repeats the "state purpose" argument addressed above and is insufficient for the reasons already noted.

Finally, respondents argue that the 1983 amendment of article XIII, section 5 somehow validates the Act. According to respondents, the 1983 amendment to article XIII, section 5 "allows local governments to voluntarily share their revenues," but is "silent as to whether the legislature is prohibited from

diverting or reallocating revenues between local subdivisions." Resp. Br. 35. The constitutional silence invoked by respondents, however, hardly aids their cause. The 1983 amendment is silent regarding legislatively mandated local revenue sharing precisely because such action has always been prohibited under article XIII, section 5. The 1983 amendment permits the counties -- "at their option" (Impartial Analysis, 1982 Voter Information Pamphlet) -- to share their revenue. The amendment says nothing about legislatively mandated revenue sharing because such legislative action always has been -- and still is -- prohibited by article XIII, section 5. State v. Stanford, 66 P. at 1063 ("Under the constitution the state has no power to make a disposition of county funds, and require that they be appropriated for other and different purposes than those for which by authority of the county they were collected"). Constitutional "silence" will not save respondents from the operative force of plain constitutional language.

III. THE TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT ON APPELLANTS' DUE PROCESS, EQUAL PROTECTION AND TAKINGS CLAIMS PRIOR TO THE CONCLUSION OF DISCOVERY

In addition to the facial challenges addressed above, on which appellant, not respondent, is entitled to summary Judgment, appellant contends that the Act -- as applied -- violates state and federal due process, equal protection and takings provisions. These latter constitutional issues are rife with factual issues improperly ignored by the trial court. Summary judgment of these claims, therefore, was improper. Bowen v. Riverton City, 656

P.2d 434 (Utah 1982) (summary judgment is appropriate only where there is no genuine issue of material fact).⁶

Respondents' own brief highlights and emphasizes the factual disputes that remain on this record. Based on data largely obtained from the State Auditor's Office, appellant compiled information showing a tremendous increase in tax collection costs since the passage of the Act. See Exhibit D to the Complaint; App. Br. 5, 15 & n.7. In Davis County alone, appellant's data demonstrates a five-fold increase in tax collection costs. Respondents, for their part, assert that the "uncontroverted" evidence shows a mere 16% increase in tax collection costs in Davis County. Resp. Br. 4. The sole basis for respondents' factual submission, however, is an affidavit prepared by Brent Gardner that was admittedly based upon the out-of-court declarations of county auditors. Affidavit of Brent Gardner at ¶ 5 (R. 202-210). Accordingly, the affidavit is clearly hearsay. Utah Rules of Evidence 801(c). An affidavit submitted in support of or opposition to a motion for summary judgment must consist of testimony that would be admissible at trial. Walker v. Rocky Mt. Recreation Corp., 29 Utah 2d 274, 508 P.2d 538 (1973). Moreover,

6/ As addressed in appellant's opening brief, the article XIII, section 5 facial challenges may also benefit from further factual development. App. Br. 39. Summary judgment may be granted in favor of appellant, however, if the Court concludes that the Act conflicts with the plain language of the Utah Constitution.

appellant timely moved to strike the affidavit of Brent Gardner.⁷ Respondents allegedly "uncontroverted" evidence regarding the impact of the Act on tax collection costs, therefore, is inadmissible and cannot be used to support the lower court's entry of summary judgment.

The truth of the matter is that no one knows -- at this point -- what the actual impact of the Act has been. Respondents have not produced to date any admissible evidence demonstrating the impact of the Act on tax collection costs, and discovery in cases in other counties has been halted pending the decision of this Court. App. Br. 40 & n. 23. Appellant, accordingly, has been unable to obtain the information needed to verify the results of its pre-complaint investigation. See Exh. D to the Complaint. The necessary evidence, moreover, is in the sole control of respondents and the defendants in the 29 other lawsuits challenging the Act. On this record -- where very few of the facts relevant to appellant's due process, equal protection and takings claims have been ascertained -- summary judgment was decidedly premature.

Respondents' sole response is that discovery is unnecessary because the Act imposes a "tax" and not a "fee" and therefore any factual development is irrelevant. Resp. Br. 37-44. This assertion, however, either ignores or seriously misconstrues established law. As set out in appellant's opening brief, the

7/ Appellant also filed a timely motion to strike the Gardner affidavit on September 1, 1988. A copy of that motion is attached hereto as Exhibit A.

due process, equal protection and takings claims turn, in large measure, upon whether the amount of the local levy imposed by the Act bears a reasonable relationship "to the services rendered." App. Br. 40-43; Commonwealth Edison Co. v. Montana, 453 U.S. 609, 622 n. 12 (1981). This "reasonable relationship" requirement, moreover, does not -- as respondents submit -- disappear simply because the Act imposes a "tax" rather than a "fee." Resp. Br. 39-43.

Commonwealth Edison Co. v. Montana, supra, cited by respondents (Resp. Br. 41-42), demonstrates the lower court's plain error in granting summary judgment on the present record. Commonwealth Edison holds that "there is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity." 453 U.S. at 621 (emphasis added).⁸ The Supreme Court emphasized, however, that as for special purpose taxes -- i.e., taxes "assessed to reimburse the state for the costs of providing a specific quantifiable service" (453 U.S. at 622 n. 12) -- an entirely different rule applies (id.):

As the Court has stated, "such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes."
Interstate Transit, Inc. v. Lindsey, 283 U.S. 183,

8/ Respondents quote other portions of Commonwealth Edison at length to support their argument that a factual inquiry into the relationship between the amount of a tax and the cost of providing services is irrelevant. Resp. Br. at 41. Those quotations, however, do not support respondents' argument because the quoted language addresses the Constitutional analysis of a general revenue tax, not a special purpose tax.

190 (1931). Because such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services, we have required a showing, based on factual evidence in the record, that "the fees charged to not appear to be manifestly disproportionate to the services rendered" Clark v. Paul Gray, Inc., 306 U.S., at 599. See id., at 598-600; Ingels v. Morf, 300 U.S., at 296-297.

See also Nollan v. California Coastal Comm'n, 483 U.S. 825 n.4 (1987) (validity of special assessment taxes depends upon whether they result in the imposition of unfair or discriminatory burdens on a class of taxpayers).

There can be little doubt but that the Act creates a special purpose tax. Indeed, the very title of the legislation states that it is "An Act Relating To Counties" which "Provid[es] for the Collection, Assessment, and Distribution Costs Charged by the County." Senate Bill No. 151. The tax established under the Act is included upon tax notices as "a separately listed and identified local levy." Utah Code Ann. § 17-19-15(3) (emphasis added). Respondents, moreover, have never disputed that the "local levy" imposed by the Act is designed to cover only local tax collection costs. As such, the final determination of appellant's due process, equal protection and takings claims requires "a showing, based on factual evidence in the record," regarding the actual relationship between the tax imposed and the costs incurred. Commonwealth Edison Co. v. Montana, 453 U.S. at 622 n.12. Appellant improperly has been denied the opportunity to develop that factual record by the lower court's premature grant of summary judgment. The lower court's summary disposition

of the due process, equal protection and takings challenges, therefore, must be reversed.⁹

IV. APPELLANT HAS STANDING TO CHALLENGE THE VALIDITY OF THE ACT

Contrary to respondents' assertion (Resp. Br. 44-46), appellant plainly has standing to challenge the constitutionality of the Act. This Court, in Terracor v. Utah Board of State Lands & Forestry, 716 P.2d 796, 799 (Utah 1986), summarized the rules that confer standing upon a litigant in state court (citations omitted):

The first general criterion is that the "[p]laintiff must be able to show that he has suffered some distinct and palpable injury that gives him a personal stake in the outcome of the legal dispute."

Second, if a Plaintiff does not have standing under the first criterion, he may have standing if no one else has a greater interest in the outcome of the case and the issues are unlikely to be raised at all unless that particular Plaintiff has standing to raise the issue.

Third, even though standing is not found to exist under the first two criteria, a Plaintiff may nonetheless have standing if the issues are unique and of such great public importance that they ought to be decided in furtherance of the public interest.

Appellant has standing under the first Terracor criterion. Moreover, even if standing is not conferred by the first criterion alone, appellant undoubtedly has standing under the second and third criteria.

9/ The due process, equal protection and takings challenges to the Act are not insubstantial. One taxpayer in Millard County, for example, paid a "local levy" of over \$1 million even though the county's entire tax collection budget was only \$400,000. App. Br. 45).

Appellant is directly affected by the redistribution plan established by the Act. As an owner of real property in Garfield County, appellant must pay whatever assessment is levied under the Act by the State Tax Commission. Because that levy is established by the actions of other counties in which appellant may have no political input, appellant suffers a "direct and palpable injury" that certainly gives it "a personal stake in the outcome of the legal dispute." Terracor, 716 P.2d at 799.

Indeed, the law is well established in Utah that taxpayers have standing to challenge illegal expenditures and illegal uses of public funds. Olson v. Salt Lake City School District, 724 P.2d 960, 962 n.1 (Utah 1986); Jenkins v. Swan, 675 P.2d 1145, 1153 (Utah 1983). A taxpayer need show no injury other than an increased tax liability borne by all taxpayers alike. Jenkins v. Swan, 675 P.2d at 1153. As the Jenkins Court explained (id.) (citations omitted):

"[A] taxpayer should be permitted to enjoin the unlawful expenditure of tax monies in which he has a pecuniary interest, or to prevent increased levies for illegal purposes." In arriving at this conclusion we quoted with approval the following language of the Illinois Supreme Court: "We have repeatedly held that taxpayers may resort to a court of equity to prevent the misapplication of public funds, and that this right is based upon the taxpayers' equitable ownership of such funds and their liability to replenish the public treasury for a deficiency which would be caused by the misappropriation."

Article XIII, section 5 of the Utah Constitution prohibits the legislature from imposing a tax for the purpose of a county and prohibits forced revenue sharing without the consent of the

governmental entities involved. Appellant has standing to challenge the Act's contrary command.¹⁰

Even if appellant did not have standing under the first Terracor criterion, standing would be appropriate under the second factor. The primary impact of the Act is on counties and their taxpayers. It appears, however, that the counties have no interest in challenging the Act. See Resp. Br. 34-35. There is, moreover, no group or persons in Garfield County that has a greater interest in challenging the Act than appellant.¹¹ Indeed, the amount of tax paid by most county taxpayers pursuant to the Act would not justify the expense of litigating its validity. Accordingly, it is reasonable to conclude that, if appellant does not pursue this action, no one will. Appellant, therefore, has standing under the second Terracor criterion.

Standing is also appropriate under the third Terracor factor. The Act affects virtually every taxpayer within the state by

10/ Respondents submit that appellant's standing is adversely affected by the fact that "Appellant paid less in Garfield County for costs of assessing and collecting property taxes than if Garfield County had been obligated to rely solely on its own tax base." Resp. Br. 45. Even if this submission were accurate (which cannot be determined at this point because discovery has not been completed), it is unavailing. The Act subjects appellant's property to an unlawful tax levy. A taxpayer is entitled to bring an action to enjoin the collection of an unlawful tax as well as to recover taxes unlawfully collected. Jenkins v. Swan, 675 P.2d at 1153. Thus, whether appellant paid more or less tax in Garfield County as a result of the Act is irrelevant to appellant's standing.

11/ Appellant owns substantial property in Garfield County and pays a significant amount of tax pursuant to the Act. Most other taxpayers in the county own property having an assessed valuation substantially less than that of appellant's property and pay a significantly lower tax under the Act.

providing a financing method for the assessment and collection activities of every county in the state. Thus, the issues involved in this litigation are unique and of great public importance. Whether the method of financing local assessment and collection activities established by the Act is constitutional is an issue of major importance that should be decided by this Court.

At bottom, respondents' standing argument is that Garfield County (along with the other 28 counties in the state) is quite fond of the Act and does not wish it to be challenged. Resp. Br. 44-46.¹² This assertion is plainly insufficient to abrogate appellant's standing to press its constitutional complaint. Constitutional strictures often place tight and uncomfortable demands on governmental bodies. As a result, legislation designed to evade constitutional strictures -- such as the Act -- may well be warmly received by affected governmental entities. If technical "standing" requirements prevented citizen suits in such circumstances, constitutional guarantees would be eviscerated. Respondents' standing arguments, if accepted by

12/ Importantly, the counties' affection for the Act has not been shared by the state's top law enforcement officer. The State of Utah has not defended the constitutionality of the Act, and the Attorney General has previously concluded that the "Act unconstitutionally intrudes on the right of local self-government vouchsafed to the counties under Article XIII, Section 5 . . ." (Resp. Br. at 31). While the Attorney General has acknowledged in this case that the Attorney General's opinion is not binding on the Court and not an absolute determination of unconstitutionality, the Attorney General's opinion is not, as respondents claim, equivocal. (Resp. Br. at 4-5.)

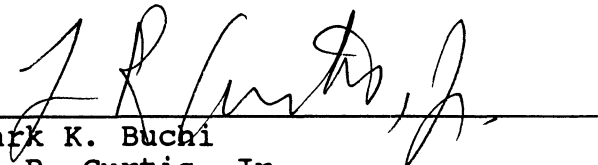
this Court, would eviscerate article XIII, section 5 of the Utah Constitution. Those arguments, therefore, should be rejected.

CONCLUSION

To the extent the constitutional issues presented are ripe for summary disposition, applicable law requires the entry of summary judgment in favor of appellant. If the Court concludes that the present claims require further factual development, the judgment below must be reversed and remanded for further proceedings.

Respectfully submitted this 17th day of July, 1989.

HOLME ROBERTS & OWEN



Mark K. Buchi
L. R. Curtis, Jr.
Richie D. Haddock
Richard G. Wilkins

IPAP/AH3

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of July, 1989,
I caused to be hand-delivered, four true and correct copies of
the Reply Brief of Appellant to each of the following:

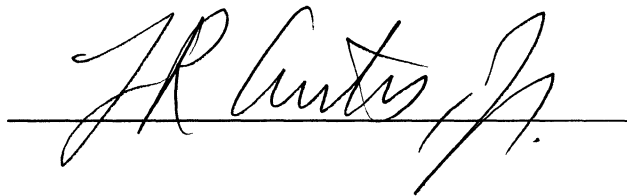
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Salt Lake City, Utah 84111

ATTORNEY GENERAL OF THE STATE OF UTAH
R. Paul Van Dam, Attorney General
Ralph Finlayson, Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

I further certify that I caused to be mailed in the
United States mail, postage prepaid, four true and correct
copies of the Reply Brief of Appellant, to:

GARFIELD COUNTY ATTORNEY
Patrick Nolan
55 South Main Street
Panguitch, Utah 84759

DATED this 17th day of July, 1989.

A handwritten signature in cursive script, reading "J.R. Antos, Jr.", is written over a horizontal line.

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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
IN AND FOR GARFIELD COUNTY, STATE OF UTAH

MOUNTAIN STATES TELEPHONE)	
AND TELEGRAPH CO.,)	
)	MOTION TO STRIKE
Plaintiff,)	
)	
v.)	
)	
GARFIELD COUNTY; THE)	
GARFIELD COUNTY BOARD OF)	
COUNTY COMMISSIONERS;)	
THOMAS HATCH, SHERRELL OTT,)	Case No. 3273
AND LOUISE LISTON, COUNTY)	
COMMISSIONERS; JUDY HENRIE,)	Judge Don V. Tibbs
COUNTY TREASURER; TOM)	
SIMKINS, COUNTY ASSESSOR;)	
THE UTAH STATE TAX)	
COMMISSION; R. H. "HAL")	
HANSEN, ROGER O. TEW,)	
G. BLAINE DAVIS AND JOE B.)	
PACHECO, UTAH STATE TAX)	
COMMISSIONERS; TOM L. ALLEN,)	
UTAH STATE AUDITOR; EDWARD T.))	
ALTER, UTAH STATE TREASURER,)	
)	
Defendants.)	

Plaintiff, Mountain States Telephone and Telegraph
Company ("Mountain Bell"), respectfully moves the court to
strike the Affidavit of L. Brent Gardiner submitted in
connection with Defendants' Opposition to Plaintiff's Cross-

Motion for Summary Judgment (the "Gardiner Affidavit"). The bases for this motion are as follows:

A. The Gardiner Affidavit is Based on Hearsay.

The Gardiner Affidavit contains representations concerning the "costs" of assessment, collection and distribution of property taxes. Affidavits submitted in support and opposition of a motion for summary judgment must contain testimony that would be admissible at trial. Walker v. Rocky Mt. Recreation Corp., 29 Utah 2d 274, 508 P.2d 538 (1973). As paragraph 5 of the Gardiner Affidavit admits, the allegations covering the cost of assessing, collecting, and distributing, property taxes were provided by the County Auditors. The allegations are therefore hearsay. See U.R. Evid. 801(c). The County Auditor's cost figures likewise are hearsay because he must have relied on the statements of other county employees.

The Gardiner Affidavit contains no allegations that would place either Mr. Gardiner's representations or the representations of the county auditors on which he relies within any exception to the hearsay rule. The allegations contained in the body of the Gardiner Affidavit are based on the exhibits attached to the Gardiner Affidavit. The attached exhibits are also hearsay and the Gardiner Affidavit does not establish sufficient foundation for those exhibits to come in as business records. The Gardiner Affidavit contains no

allegation that those exhibits were prepared at or near the time the costs were incurred, at or near the time the county auditors prepared their reports, or even at or near the time the county auditors provided Mr. Gardiner with the underlying data. Moreover, the Gardiner Affidavit does not establish that the Utah Association of Counties has a regular practice of keeping compilations of counties' tax collection costs. Rather, the Gardiner Affidavit admits that the exhibits were prepared for presentation to the legislature in connection with the Utah Association of Counties' lobbying efforts. Therefore, the exhibits are not admissible as business records. See U.R. Evid. 803(6). Cf. Kehl v. Schwendiman, 735 P.2d 413 (Utah 1987). (Business record exception inapplicable where there is no evidence that the activity was regularly conducted or that the compilation was contemporaneous with the relevant transaction). See also Adams v. New Jersey State Fair, 71 N.J. Super. 528, 177 A.2d 486 (1962) (error to admit accounting compilations prepared from previous year's ledger). The Gardiner Affidavit must therefore be stricken because it is based on hearsay.

The Gardiner Affidavit also fails to establish that the county auditors' representations concerning "costs" fall within an exception to the Hearsay Rule. The affidavit provides no explanation whatsoever of the basis of the county

auditors' representations. The Gardiner Affidavit must therefore be stricken because it contains hearsay within hearsay.

B. There is not Sufficient Foundation for the Conclusions Contained in the Gardiner Affidavit.

The Gardiner Affidavit is also inadmissible because it contains conclusory allegations which lack adequate foundation. The alleged "cost" of assessment, collection and distribution is a meaningless conclusion. Whether each of the specific line items that Garfield County claims constitute its "cost" is truly a cost of collection, assessment and distribution is a contested issue in this case. Other counties in this state have admitted that they are "padding" their collection and assessment budgets with items that are not truly costs of property tax collection. Defendants cannot now present such conclusory allegations in an attempt to prevent Plaintiff from conducting discovery to ascertain what line items Garfield County is claiming as costs. The Court must, therefore, strike the Gardiner Affidavit.

RESPECTFULLY SUBMITTED this 31st day of August, 1988.

HOLME ROBERTS & OWEN

By: 

Ronnie D. Haddock

krhp/dd0