

2009

# Marion Energy, Inc. and State of Utah School and Institutional Trust Lands Administration v. KFJ Ranch Partnership : Brief of Appellee

Utah Supreme Court

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**IN THE SUPREME COURT OF THE STATE OF UTAH**

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**MARION ENERGY, INC.**, a Texas  
corporation; and **STATE OF UTAH**  
**SCHOOL AND INSTITUTIONAL**  
**TRUST LANDS ADMINISTRATION**,

Plaintiffs and Appellants,

vs.

**KFJ RANCH PARTNERSHIP**, a  
business association of unknown type,

Defendant and Appellee.

Case No. 20090796-SC

**BRIEF OF APPELLEE**

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**APPEAL FROM THE SEVENTH DISTRICT COURT, IN AND FOR CARBON  
COUNTY, THE HONORABLE GEORGE M. HARMOND CIVIL NO. 090700027**

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**UTAH APPELLATE COURTS**

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## TABLE OF CONTENTS

I.	STATEMENT OF JURISDICTION.....	1
II.	STATEMENT OF ISSUES .....	1
III.	STANDARD OF REVIEW .....	1
IV.	CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS.....	2
V.	STATEMENT OF CASE .....	3
VI.	SUMMARY OF ARGUMENTS.....	5
	ARGUMENT.....	10
A.	THE TRIAL COURT CORRECTLY FOUND THAT MARION/SITLA DOES NOT HAVE AUTHORITY TO TAKE KFJ’S PRIVATE LAND UNDER THE CONDEMNATION STATUTE. ....	10
1.	The Condemnation Statute Should Be Strictly Construed in Conferring the Power of Eminent Domain.....	10
2.	Roads for Access to Oil and Gas Leases Are Not an Express Public Use Under the Condemnation Statute.....	14
3.	Examination of the Plain Language Further Shows that the Condemnation Statute Does Not Authorize the Taking. ....	17
4.	Application of Standard Rules of Statutory Construction Also Support the Trial Court’s Ruling. ....	21
5.	Legislative History Further Supports the Trial Court’s Ruling. ....	23
6.	The Trial Court’s Ruling Is Not an Unfair or Unexpected Result. ....	26
B.	THE AUTHORITY CITED BY MARION/SITLA DOES NOT SUPPORT THE CLAIM THAT “MINERAL DEPOSITS” IN THE CONDEMNATION STATUTE INCLUDES OIL AND GAS.....	26
C.	THE AUTHORITY CITED BY THE UPA DOES NOT SUPPORT THE VIEW THAT IN UTAH “MINERALS” INCLUDES OIL AND GAS.....	32



D.	THE UPA HAS IMPROPERLY RAISED AN ISSUE THAT WAS NOT ARGUED TO THE TRIAL COURT AND SHOULD NOT BE CONSIDERED ON APPEAL.....	37
E.	FINANCIAL CONSIDERATIONS OF OIL AND GAS OPERATIONS IN UTAH ARE IRRELEVANT TO THE STATUTORY CONSTRUCTION OF SUBSECTION 501(6)(A).....	42
F.	THE AUTHORITY TO EXERCISE EMINENT DOMAIN IS NOT BASED ON THE CHANGING PERCEPTIONS OF THE SO-CALLED COMMON MAN. ....	42
G.	PRIOR VERSIONS OF THE CONDEMNATION STATUTE DO NOT ESTABLISH THAT “MINERAL DEPOSITS” UNDER SUBSECTION 501(6)(A) WAS INTENDED TO INCLUDE OIL AND GAS. ....	44
H.	THE OUTCOME OF OTHER UTAH DISTRICT COURT CASES CITED BY THE UPA IS OF NO CONSEQUENCE. ....	45
I.	THE ABSURD RESULTS DOCTRINE DOES NOT APPLY UNDER THE CIRCUMSTANCES. ....	47
VI.	CONCLUSION.....	49
VII.	ADDENDUM .....	51

## TABLE OF AUTHORITIES

### CASES

<i>Amoco Prod. Co. v. Guild Trust</i> , 636 F.2d 261 (10th Cir. 1980) .....	35
<i>Anschutz Land &amp; Livestock Co., Inc. v. Union Pac. R.R. Co.</i> , 820 F.2d 338 (10th Cir. 1987) .....	27, 29, 31
<i>Bertagnoli v. Baker</i> , 215 P.2d 626 (Utah 1950).....	11, 25
<i>Burke v. S. Pac. R.R. Co.</i> , 234 U.S. 669 (1914).....	38
<i>Carrier v. Salt Lake County</i> , 2004 UT 98, 104 P.3d 1208 .....	15, 17, 18, 19, 20, 31, 40
<i>Carter v. Phillips</i> , 212 P. 747 (Okla. 1923).....	39
<i>Coquina Oil Corp. v. Harry Kourlis Ranch</i> , 643 P.2d 519 (Colo. 1982).....	36
<i>Cornwell v. Buck &amp; Stoddard, Inc.</i> , 82 P.2d 516 (Cal. Dist. Ct. App. 1938).....	39
<i>Coronado Oil Co. v. Grieves</i> , 603 P.2d 406 (Wyo. 1979).....	32, 33, 34, 35, 36
<i>Cortelyou v. Baker</i> , 187 P. 417 (Cal. 1920) .....	39
<i>CP Nat’l Corp. v. Pub. Comm’n of Utah</i> , 638 P.2d 519 (Utah 1981).....	17, 18, 19, 21
<i>Detlor v. Holland</i> , 49 N.E. 690 (Ohio 1898).....	39
<i>Ellis v. Estate of Ellis</i> , 2007 UT 77, 169 P.3d 441 .....	1
<i>Freeman Gulch Mining Co. v. Kennecott Copper Corp.</i> , 119 F.2d 16 (10th Cir. 1941) .....	14

<i>Funk v. Haldeman</i> , 53 Pa. 229 (Pa. 1866).....	39
<i>G.O. Patterson v. Wilcox</i> , 358 P.2d 88 (Utah 1961).....	30, 31
<i>Great Salt Lake Auth. v. Island Ranching Co.</i> , 414 P.2d 963 (Utah 1966).....	10, 11
<i>Great Salt Lake Auth. v. Island Ranching Co.</i> , 421 P.2d 504 (Utah 1966).....	10
<i>Guffey Petroleum Co. v. Murrell</i> , 53 So. 705 (La. 1910) .....	39
<i>Highland Boy Gold Mining Co. v. Strickley</i> , 78 P. 296 (Utah 1904).....	13
<i>Hollingsworth v. Berry</i> , 192 P. 763 (Kan. 1920).....	39
<i>In re M.E.P.</i> , 2005 UT App. 227, 114 P.3d 596 .....	20
<i>In re Z.C.</i> , 2007 UT 54, 165 P.3d 1206 .....	48
<i>Jacob v. Bezzant</i> , 2009 UT 37, 212 P.3d 535 .....	12, 32
<i>Kinney-Coastal Oil Co. v. Kieffer</i> , 277 U.S. 488 (1928).....	39
<i>Kysar v. Amoco Prod. Co.</i> , 93 P.3d 1272 (N.M. 2004) .....	26
<i>Lambert v. Pritchett</i> , 284 S.W. 2d 90 (Ky. 1955).....	39
<i>Luse v. Boatman</i> , 217 S.W. 1096 (Tex. Civ. App. 1919).....	43
<i>McCabe Petroleum Corp. v. Easement and Right-of-Way</i> , 87 P.3d 479 (Mont. 2004).....	27, 28, 35, 36
<i>McKemie v. City of Griffin</i> ,	

537 S.E.2d 66 (Ga. 2000).....	48
<i>Meagher v. Uintah Gas Co.</i> , 185 P.2d 747 (Utah 1947).....	39
<i>Monetaire Mining Co. v. Columbus Rexall Consol. Mines Co.</i> , 174 P. 172 (Utah 1918).....	13, 37
<i>Nash v. Clark</i> , 75 P. 371 (Utah 1904).....	12
<i>Nephi Plaster &amp; Mfg. Co. v. Juab Co.</i> , 93 P. 53 (Utah 1907).....	26, 27
<i>Pub. Citizen v. United States Dep't of Justice</i> , 491 U.S. 440 (1989).....	48
<i>Soriano v. Graul</i> , 2008 UT App. 188, 186 P.3d 960 .....	20, 37
<i>State Land Bd. v. State Dept. of Fish and Game</i> , 408 P.2d 707 (Utah 1965).....	15, 21
<i>State v. Paul</i> , 860 P.2d 992 (Utah App. 1993).....	20, 43
<i>Uintah Basin Med. Ctr. v. Hardy</i> , 2005 UT App. 92, 110 P.3d 168 .....	44
<i>Utah Copper Co. v. Montana-Bingham Consol. Mining Co.</i> , 255 P. 672 (Utah 1926).....	26, 28
<i>Utah Copper Co. v. Stephen Hayes Estate, Inc.</i> , 31 P.2d 624 (Utah 1934).....	14
<i>Utah State Road Comm'n v. Friberg</i> , 687 P.2d 821 (Utah 1984).....	46

## STATUTES

1896 Utah Laws 316 .....	23
1907 Utah Laws 143 .....	23
1969 Utah Laws 1004 .....	24

Comp. Laws 1907 .....	13
Utah Code Ann.	
§ 40-8-4(14) .....	2, 7, 40
§ 53C-1-101 .....	16
§ 53C-1-103(4).....	3, 16, 40
§ 53C-2-401 .....	4, 47
§ 78B-6-501(6)(a) .....	2, 4, 6
Utah Comp. Laws § 7330(6) (1917).....	24

## OTHER AUTHORITIES

26 Am. Jur. 2d <i>Eminent Domain</i>	
§ 24 (2004).....	11
§ 30 (2004).....	48
73 Am. Jur. 2d <i>Statutes</i>	
§ 172 (2009).....	49
<i>Annotation, What are Minerals within Deed, Lease or License,</i>	
86 ALR 986 (1933).....	30

## **I. STATEMENT OF JURISDICTION**

This Court has jurisdiction pursuant to Utah Code Ann. section 78A-3-102(3)(j) as this matter is a direct appeal from a final judgment of the Seventh District Court.

## **II. STATEMENT OF ISSUES**

Did the trial court correctly conclude that Marion/SITLA are not authorized, under the plain language of the condemnation statute, to take KFJ's private property to construct permanent roads across KFJ's land to access oil and gas wells they propose to place on their SITLA mineral leases (i) when the plain language of the condemnation statute shows the legislature expressly conferred authority to take private property for pipelines, tanks and reservoirs in connection with oil and gas, but omitted any reference to oil and gas when conferring authority to take land for roads, and (ii) when the legislative history of the condemnation statute shows that in spite of numerous revisions to the statute, the legislature did not add "oil and gas" to the provision relating to roads, and that introduction of a bill to amend the statute to specifically include "oil and gas" relating to roads was not adopted?

## **III. STANDARD OF REVIEW**

A trial court's grant of a motion to dismiss based on its interpretation of a statute is a question of law, which the trial court reviews for correctness. *Ellis v. Estate of Ellis*, 2007 UT 77, ¶ 6, 169 P.3d 441.

#### **IV. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS**

**Utah Code Ann. Section 78B-6-501(6)(a):** Subject to the provisions of this part, the right of eminent domain may be exercised on behalf of the following public uses:

- (6) (a) roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting, or other reduction of ores, or the working of mines, quarries, coal mines, or mineral deposits including minerals in solution;

**Utah Code Ann. Section 78B-6-501(6)(d):**

- (d) gas, oil or coal pipelines, tanks or reservoirs, including any subsurface stratum or formation in any land for the underground storage of natural gas, and in connection with that, any other interests in property which may be required to adequately examine, prepare, maintain, and operate underground natural gas storage facilities;

**Utah Code Ann. Section 40-8-4(6)(b):** “Deposit” or “mineral deposit” excludes sand, gravel, rock aggregate, water, geothermal steam, and oil and gas as defined in Title 40, Chapter 6, Board and Division of Oil, Gas and Mining, but includes oil shale and bituminous sands extracted by mining operations.

**Utah Code Ann. Section 40-8-4(14)(b):** “Mining operation” does not include:

- (ii) the extraction of oil and gas as defined in Title 40, Chapter 6, Board and Division of Oil, Gas, and Mining;

**Utah Code Ann. Section 53C-1-103(4):** As used in this title:

(4) “Mineral” includes oil, gas, and hydrocarbons.

## **V. STATEMENT OF CASE**

The KFJ Ranch Partnership (“KFJ”) is the owner of the KFJ Ranch, which is located in the Nine Mile Canyon area near Price, Utah. (R.00002, ¶ 4) The ranch consists of approximately 6,600 acres of property owned in fee simple, 1,500 acres that are leased from the state government, and 1,300 acres that are leased from the federal government. (R.000224, 3 (second page 3))

Marion Energy, Inc. (“Marion”) is the holder of two state oil and gas leases, some of which underlie the KFJ Ranch. (R.00003, ¶ 10) Marion intends to place two oil wells on the KFJ Ranch property and is attempting to take KFJ’s private property to construct permanent roads to access these proposed wells, including transporting oil and gas from those wells by road unless and until Marion decides to construct a pipeline for such purpose. (R. 00005, ¶¶ 13-14)

The land Marion/SITLA wants to take is a thirty-foot strip over an existing dirt road built by KFJ on its property (the “access road”), and another thirty-foot strip over a currently existing cow path (the “Pole Canyon road”). (R.00005, ¶14) The proposed access road is four miles long and involves a permanent taking of nearly 15 acres of KFJ’s private property. (R.000224, 15) It would run from the Nine Mile Canyon road to one proposed well site and then run past that well site to the border of the KFJ Ranch property, where Marion holds another state mineral lease. (R.000224, 15 & 81-85) The proposed Pole Canyon road is 1.81 miles long, running from the Nine Mile Canyon road



to the other proposed well site, and involves a permanent taking of approximately six and a half acres. (R.000224, 15) Marion would use the roads for trucking people and products to and from the proposed wells. (R.00005, ¶¶13-14) If the wells prove productive, Marion may, at a later date, build a pipeline. (R.00005, ¶13) Until such time, all access to drill and work the wells and to remove any product from the wells would be by the proposed roads. (R.00005, ¶¶13-14) KFJ's counsel has prepared a demonstrative map to illustrate the parties' various ownership interests.<sup>1</sup> (R.000092)

Because the SITLA statute grants a lease holder only the limited right to enter upon the land on which SITLA owns the mineral rights, and not any right of access over private land on which SITLA does not own the mineral rights, *see* Utah Code Ann. section 53C-2-401 et seq., Marion offered KFJ some minimal compensation for the rights to construct permanent roads over KFJ's property. (R.000020–R.000023) KFJ, not wanting the disturbance and impact this would cause to its land, refused Marion's offer. Marion, together with SITLA, then initiated a Complaint in condemnation in the Seventh District Court, seeking to take the land under Subsection 501(6)(a) of the condemnation statute.<sup>2</sup> (R.00001–R.000070)

On the basis that the condemnation statute does not confer authority to take private land for roads to work oil and gas leases, KFJ responded by bringing a motion to dismiss. (R.000073—R.000113) Marion/SITLA opposed the motion and also brought a motion for summary judgment seeking entry of judgment in the event they were successful in

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<sup>1</sup> The map was created by counsel for illustrative purposes only.

<sup>2</sup> Utah Code Ann. § 78B-6-501(6)(a) (West 2009)

opposing the motion to dismiss. (R.000119—000150) KFJ opposed the motion for summary judgment and brought a Rule 56(f) motion requesting that, in the event its motion to dismiss is denied, it be given the opportunity to conduct discovery before a decision on Marion/SITLA’s motion for summary judgment is rendered. (R.000167—R.000190)

The trial court considered the language of the condemnation statute and found Marion/SITLA did not have authority under Subsection 501(6)(a) to take KFJ’s land for their proposed roads. (R.000225, 23-25) The trial court, noting that as a taking of private property the statute should be strictly construed, correctly recognized that the legislature’s use of the terms oil and gas in its grant of power under Subsection 501(6)(d) of the condemnation statute, and the absence of those terms in its grant of power under Subsection 501(6)(a), clearly indicated that the legislature did not intend to include oil and gas within the term “mineral deposits” under Subsection 501(6)(a). (R.000225, 23-24) Having granted KFJ’s motion to dismiss, the trial court denied Marion/SITLA’s motion for summary judgment, thereby rendering KFJ’s Rule 56(f) motion moot. (R. 000225, 24-25) Marion/SITLA brings this appeal claiming the trial court’s decision was in error. Concurrent with the filing of Marion/STILA’s brief, the Utah Petroleum Association (“UPA”) requested leave to file an amicus brief, which leave was granted.

## **VI. SUMMARY OF ARGUMENTS**

The exercise of eminent domain, being in derogation of the rights of individual ownership in property, must derive from legislative grant that is given in clear, express terms or by necessary implication. Private corporations, like state agencies, have no

inherent power of eminent domain, and their authority must derive from the highest and clearest of legislation. The legislature's grant of the eminent domain power must be strictly construed. The right to exercise the power of eminent domain does not exist when made out only by argument or inference. The trial court's conclusion that Subsection 501(6)(a) of the condemnation statute (Utah Code Ann. section 78B-6-501 seq.) does not give Marion/SITLA the authority to take KFJ's land for roads in connection with its oil and gas leases was correct and entirely consistent with these principles. Private property can only be taken when clearly authorized by statute.

The plain language of the condemnation statute shows that Subsection 501(6)(a) does not confer authority to take private land for roads in connection with oil and gas. In Subsection 501(6)(a), the legislature sets out the public uses for which land may be taken for roads — those uses do not expressly reference access to oil and gas deposits. Rather, the legislature refers to “the milling, smelting, or other reduction of ores, or the working of mines, quarries, coal mines, or mineral deposits ....” In comparison, in the closely associated Subsection 501(6)(d), the legislature specifically dealt with a public use for which land may be taken in the context of oil and gas extraction – through oil and gas pipelines.<sup>3</sup> Thus, the plain language of the eminent domain statute shows the legislature specifically dealt with the public purposes for which land can be taken with respect to oil and gas, and those uses do not include taking private property for exploration and extraction of oil and gas through roads.

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<sup>3</sup> In that context, the legislature also refers to “coal” together with oil and gas, i.e., “gas, oil or coal pipelines.” When it refers to “coal” in Subsection 501(6)(a), it omits any reference to oil and gas.

Furthermore, application of standard rules of statutory construction supports the trial court's conclusion that the legislature did not intend the term "mineral deposits" under Subsection 501(6)(a) to include oil and gas. The trial court properly examined the language of the condemnation statute and relied on the presumptions that each term is used advisedly and that an omission is presumed purposeful. Based on these presumptions, the trial court properly determined that the legislature's omission of oil and gas in Subsection 501(6)(a) dealing with roads, while expressly including oil and gas in the related Subsection 501(6)(d) dealing with pipelines, indicated a legislative intent not to include oil and gas in connection with roads. Moreover, application of the well-recognized rule of *ejusdem generis* shows the term "mineral deposits" in Subsection 501(6)(a) should be interpreted in accordance with the character and meaning of the surrounding words, which would limit that term to mineral deposits that are generally developed by milling, smelting, and reduction of ore, or the working of mines, quarries and coal mines. Oil and gas, however, is not extracted through the mining operations referred to in Subsection 501(6)(a). Moreover, the legislature has defined "mining operations" in Title 40, Mines and Mining, as not including the extraction of oil and gas. *See Utah Code Ann. § 40-8-4(14)(b)(ii)* (West 2004). It simply cannot be said that the legislature has clearly intended to include oil and gas in Subsection 501(6)(a) through examination of the words surrounding the term "mineral deposits."

The legislative history of the condemnation statute also supports the conclusion that oil and gas are not covered by Subsection 501(6)(a). In the laws of Utah, 1896, the legislature originally declared the "mining, milling, smelting or other reduction of ores ...

to be for the public use,” but the legislature broadened its declaration repeatedly over the years. In spite of numerous revisions to the statute, however, the legislature never added “oil and gas” to the provision dealing with roads that ultimately became Subsection 501(6)(a), even though it made the effort to add “oil” and “coal” to the authority to condemn for pipelines, and even though it added “coal mines” to the mining language relating to roads. Finally, in 1997, Senator Dmitrich introduced a bill in the Senate proposing that Subsection 501(6)(a) be amended to specifically include oil and gas deposits within the definition of “mineral deposits,” but the bill was not enacted.

Moreover, the trial court’s finding that Marion/SITLA does not have authority under the condemnation statute to take KFJ’s private land is not an unfair or unexpected result. As an experienced lessee of mineral rights, Marion should be well aware that courts do not allow federal lease holders rights of access across private land, and should be familiar with the necessity of negotiating with private land owners to ensure access to their leases; it is not unfair or unexpected to require Marion to do the same with respect to its state leases. Moreover, it is absolutely clear from the amicus briefing of the UPA that what the petroleum industry is seeking through this lawsuit and appeal is for this Court to provide its members with “the big stick” for their use when they are negotiating with private property owners.<sup>4</sup>

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<sup>4</sup> In its initial brief, filed February 4, 2010, the UPA stated, “Oil miners [sic] would much prefer to negotiate themselves onto their leaseholds or mineral estates. Coming to terms with surface owners far surpasses the costs in time and expense of litigating access. *But when the big stick is needed it is nice to have it available.*” (UPA Br. 21-22, filed Feb. 4, 2010.) When the UPA filed its Corrected and Amended Brief, this language was deleted.

The arguments by Marion/SITLA and the UPA, that the trial court erred because the term “mineral” always includes oil and gas, deliberately ignore this Court’s recent statement to the contrary finding that the term “mineral” has no fixed and definite meaning and that it is necessary to look to the context in which it is used to determine its scope and meaning.<sup>5</sup> The differing definitions of the term “mineral” in other Utah statutes further evidences this fact. The authority cited by Marion/SITLA fails to support its position to the contrary.

Finally, the trial court’s interpretation of the statute is not contrary to any public policy of this state and does not produce any absurd or unintended result. The trial court’s ruling does not – as Marion/SITLA argue – prevent all forms of access to Marion’s lease. Marion/SITLA want to take KFJ’s property in order to gain the least expensive form of access, but the statute does not give them that right. Neither does the ruling circumvent SITLA’s ability to obtain full value from the lease. SITLA can still receive all rent and royalty payments to which it is entitled.

Accordingly, the trial court correctly concluded Marion/SITLA does not have authority under Subsection 501(6)(a) of the condemnation statute to take KFJ’s land for roads in connection with its oil and gas leases. The only way to establish the power to condemn that Marion/SITLA seeks is through argument and inference, and therefore the

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<sup>5</sup> Marion/SITLA is clearly aware of this statement of law as KFJ cited to and relied on this authority in its briefing before the trial court. (R.000081–R.000082) Marion/SITLA’s and the UPA’s complete failure to address this highly relevant authority in its briefing on appeal is suprising.

power does not exist. Marion/SITLA and the UPA should be asking the legislature – not the courts – to insert the terms oil and gas into Subsection 501(6)(a). The trial court’s ruling should be affirmed.

## **ARGUMENT**

### **A. THE TRIAL COURT CORRECTLY FOUND THAT MARION/SITLA DOES NOT HAVE AUTHORITY TO TAKE KFJ’S PRIVATE LAND UNDER THE CONDEMNATION STATUTE.**

#### **1. The Condemnation Statute Should Be Strictly Construed in Conferring the Power of Eminent Domain.**

As eloquently stated by Chief Justice Henriod, “In our American system a person’s private property is supposed to be inviolable, unless the taking of it is urgent and for the commonwealth, is designated with exactitude, and proven to be absolutely necessary by the highest type of evidence, backed by the highest type and clearest of legislation.” *Great Salt Lake Auth. v. Island Ranching Co.*, 414 P.2d 963, 967 (Utah 1966) (Henriod, C.J., dissenting), rehearing granted and decision reversed, 421 P.2d 504 (Utah 1966). In the same context, Justice Callister stated, “The exercise of the power of eminent domain, being contrary to the inherent rights of property ownership by individuals cannot be implied or inferred from vague or doubtful language in a statute, but must be given in express terms or by necessary implication. When the right to exercise the power can only be made out of argument and inference, it does not exist.” *Id.* at 968-69 (Callister, J. dissenting) (citation omitted).

Because Marion/SITLA contend that Subsection 501(6)(a) of the condemnation statute gives them the power to take KFJ’s private property for a road in connection with

the extraction of oil and gas, the parameters of that provision must be read restrictively. *See Bertagnoli v. Baker*, 215 P.2d 626, 627-28 (Utah 1950) (“When the power of eminent domain is given by statute, it is a well settled principle of law amply supported by cases from many jurisdictions in this country, that the extent to which the power may be exercised is limited to the express terms and clear implication of the statute....The right of eminent domain, being in derogation of the rights of individual ownership in property, has been strictly construed by the courts so that no person will be wrongfully deprived of the use and enjoyment of his property.”)(citations omitted). *See generally* 26 Am. Jur. 2d *Eminent Domain* § 24 (2004).

Subsection 501(6)(a) does not expressly authorize a taking of private property for the use of roads in connection with oil and gas. Moreover, as discussed below, authority for such a taking is not necessarily implicit in the statute, particularly given that oil and gas are expressly referred to in a related subsection of the statute in connection with taking of private property for pipelines but not in connection with roads, and also given that “mineral deposits” has been defined elsewhere by the legislature to expressly exclude “oil and gas.” *See infra* at Sections A.2 & A.3, pages 15-21.

Thus, in the words of Justice Callister, “when the right to exercise the power [to condemn] can only be made out of argument and inference, it does not exist.” *Great Salt Lake Auth.*, 414 P.2d at 968-69.

The UPA misses the point when it argues that Subsection 501(6)(a) should be construed expansively in determining whether that provision grants the particular condemnation authority claimed by Marion/SITLA. The UPA overstates the language



from *Nash v. Clark*, 75 P. 371 (Utah 1904). That case involved the question of whether the construction and operation of irrigation ditches is a public use. *Id.* at 373. In construing the constitutional language that “private property shall not be taken or damaged for public use without just compensation,” the Court noted two divergent lines of decisions – one holding that “public use” meant a use by the public or its agencies, and the other holding that it is a public use when the taking is for a use that will promote the public interest. *Id.* at 373. The Court opted to follow the latter, more liberal interpretation. *Id.* The Court, however, did not depart from the long-established rule that condemnation statutes will be construed restrictively to ensure that citizens will not be deprived of the use and enjoyment of their private property, nor did the Court undermine the notion that the authority to take private property must be expressly stated or necessarily implied in the language of the eminent domain provisions. Rather, the Court was concerned with the constitutional validity of the condemnation provision itself – not with the construction of the provision dealing with ditches.<sup>6</sup> *Id.* at 373-75.

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<sup>6</sup> The issue of whether “mines” or “minerals” is a public purpose was not raised before the trial court, and the Supreme Court does not address arguments brought for the first time on appeal unless the trial court committed plain error or exceptional circumstances exist. *Jacob v. Bezzant*, 2009 UT 37, ¶ 34, 212 P.3d 535 (citing *State v. Nelson-Waggoner*, 2004 UT 29, ¶ 16, 94 P.3d 186). See also *infra* Section D, page 38. Moreover, the UPA’s entire Section I of its brief, entitled “Eminent Domain Statutes Should Be Construed Expansively,” is inapposite. (UPA Br. 3-4.) The issue in this case is not the constitutionality of the public uses in the condemnation statute – where the public versus private use should be given a liberal construction – but rather whether those public uses clearly express the authority for the taking proposed by Marion/SITLA, i.e., taking of private property for roads to gain access to oil and gas leases related to other property – the statutory language in determining whether the authority has been granted should be construed restrictively.

Nor do the “three major cases” cited by the UPA depart from these principles. (UPA Br. 3.) In *Highland Boy Gold Mining Co. v. Strickley*, 78 P. 296, 297-99 (Utah 1904), at issue was the constitutionality of the legislature’s determination that a tramway is a public use. The Court concluded that it was, ruling that unless it clearly appears that the use in question is private and in no sense public, the validity of the statute must be upheld. *Id.* at 297. Again, the Court was not dealing with the construction of the condemnation statute itself, and the Court’s opinion did not diverge from the notion of strict construction of such statutes.

In *Monetaire Mining Co. v. Columbus Rexall Consol. Mines Co.*, the Court examined the language of the condemnation statute to determine whether the particular purpose in question had been granted by the legislature, and ruled that once “the right of eminent domain is granted for a *particular* purpose, *then* the statute must be given a liberal construction in furtherance of such purpose.” 174 P. 172, 175 (Utah 1918) (emphasis added). In that case, the court held that the statute clearly conferred the authority to take private property for a tunnel to facilitate the working of mines.<sup>7</sup> *Id.* at 175. Rather than taking land to build a new tunnel to transport ore from the mines, the court allowed the plaintiff to exercise that authority to take an easement in the defendant’s existing tunnel and jointly use that tunnel with the defendant. *Id.* at 174-77. This is liberal construction of how the authority is *exercised*, once the authority has been

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<sup>7</sup> Indeed, the statute provided then, as it does now: “(6) Roads, railroads, tramways, *tunnels*, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting, or other reduction of ores, or the working of mines, quarries, coal mines, or mineral deposits ....” *Monetaire Mining Co.*, 174 P. at 174-75 (citing Comp. Laws 1907, section 3588, as amended by chapter 47, laws of Utah 1909, page 501.) (Emphasis added.)

granted – not liberal construction of the language to determine whether the authority has been granted.

Finally, in *Utah Copper Co. v. Stephen Hayes Estate, Inc.*, 31 P.2d 624, 628 (Utah 1934), the authority sought by the condemnor was for a use clearly within the express language of the statute, being a natural outlet for water from the condemnor's works for the reduction of ores. The Court merely restated that the condemnation statute must be liberally construed to effect the purpose expressed by the legislature, which in this instance was that "the right of eminent domain may be exercised in behalf of ... outlets, natural or otherwise, for the deposit or conduct of tailings, refuse or water from mills, smelters, or other works for the reduction of ores ...." *Id.* at 627. Similarly, *Freeman Gulch Mining Co. v. Kennecott Copper Corp.*, 119 F.2d 16, 19-20 (10th Cir. 1941), cited by the UPA, involved a case in which the condemnation statute clearly conferred authority for the taking and merely stands for the proposition, like *Monetaire Mining Co.*, that where the authority to condemn for a particular purpose is expressly conferred, courts can be liberal in determining how the authority is exercised in furtherance of that purpose. Here, however, the authority Marion/SITLA seeks to exercise has not been clearly conferred. In fact, it has not been conferred at all. The cases cited by the UPA, therefore, are inapposite.

**2. Roads for Access to Oil and Gas Leases Are Not an Express Public Use Under the Condemnation Statute.**

On its face, Utah Code Ann. section 78B-6-501(6) does not expressly provide for the taking of private property for permanent roads to access oil and gas leases. Nor is

such authority necessarily implied from the language of Subsection 501(6)(a). The Court would have to interpret the term “mineral deposits” to include oil and gas in order for Marion/SITLA to have the power to condemn KFJ’s private property. But one cannot merely conclude that the term “mineral deposits” necessarily includes “oil and gas” for at least two independent reasons. First, the term “mineral deposits” does not always include “oil and gas.” Indeed, the legislature has specifically defined “mineral deposit” in Title 40, Mines and Mining, to *exclude* oil and gas: “‘Deposit’ or ‘mineral deposit’ excludes sand, gravel, rock aggregate, water, geothermal steam, and *oil and gas* ....” Utah Code Ann. § 40-8-4(6)(b) (West 2004) (emphasis added).

Second, this Court has specifically held that the term “mineral” has no fixed or definite meaning, and what the term actually means depends on the context:

‘[M]ineral’ is a word of general language, and not per se a term of art. It does not have a definite meaning. It is used in many senses. It is not capable of a definition of universal application, but is susceptible to limitation or expansion according to the intention with which it is used in the particular instrument or statute. Regard must be had to the language of the instrument in which it occurs, the relative position of the parties interested and the substance of the transaction which the instrument embodies.

*Carrier v. Salt Lake County*, 2004 UT 98, ¶ 32, 104 P.3d 1208 (citing *Bumpus v. United States*, 325 F.2d 264, 266 (10th Cir. 1963)). The Court in *Carrier* applied basic principles of statutory construction and determined that although “[i]n its broadest sense, the term ‘mineral’ necessarily encompasses the term ‘gravel,’” the context in which it was used showed that it was not intended to include gravel in that particular ordinance. *Id.* at ¶¶ 32-38. Similarly, in *State Land Bd. v. State Dept. of Fish and Game*, 408 P.2d

707, 708 (Utah 1965), this Court concluded that although in its broadest sense “other minerals” could include sand and gravel, in that context “other minerals” was limited to “something of the same general character as coal or minerals which are usually the subject of prospecting and mining,” which are precious substances or substances of value.

These cases clearly demonstrate there is no fixed legal definition of the term “mineral.” Marion/SITLA’s argument that the definition of “mineral” in the School and Institutional Trust and Land Management Act (Utah Code Ann. section 53C-1-101 et seq. – the “SITLA statute”) does not establish that the term always includes oil and gas, and therefore that “mineral deposits” under Subsection 501(6)(a) necessarily includes oil and gas. (App. Br. 19-20.)

While the SITLA statute provides that “Mineral includes oil, gas, and hydrocarbons,”<sup>8</sup> the statute is not the condemnation statute, and Marion/SITLA still must have clear authority under the condemnation statute in order to take KFJ’s private property. Moreover, the legislature’s addition of “oil and gas” to the definition of “mineral” under the SITLA statute underscores that the legislature did *not* add “oil and gas” to the definition of “mineral deposits” under the condemnation statute, and also that the legislature knows how to add “oil and gas” to the term “mineral” when it intends to do so. Further, there is nothing in the SITLA statute that gives SITLA or its mineral lessees the right of eminent domain, which the legislature could have done if it wanted to do so.

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<sup>8</sup> Utah Code Ann. § 53C-1-103(4) (West 2004).

Finally, what the definition in the SITLA statute also does, along with the legislature's definition of "mineral deposits" in the Mines and Mining statute excluding oil and gas, is add further support to the notion, specifically recognized by this Court, that the term "mineral" has no fixed meaning. *See Carrier*, 2004 UT 98 at ¶ 32.

Thus, the language of Subsection 501(6)(a) does not clearly provide Marion/SITLA with the power to take KFJ's private property, and that power cannot necessarily be implied from the term "mineral deposits." Where the power of eminent domain is limited to the express terms and clear implication of the condemnation statute, and where the legislature has not clearly included oil and gas in this provision dealing with roads, the authority claimed by Marion/SITLA simply does not exist, and the trial court's ruling, therefore, should be affirmed.

**3. Examination of the Plain Language Further Shows that the Condemnation Statute Does Not Authorize the Taking.**

"The fundamental consideration which transcends all others in regard to the interpretation and application of a statute is: What was the intent of the legislature?" *CP Nat'l Corp. v. Pub. Comm'n of Utah*, 638 P.2d 519, 522 (Utah 1981) (citing *Johnson v. State Tax Comm'n*, 411 P.2d 831 (Utah 1966)). In determining that intent, courts consider the language of the statute and attempt, where possible, to give effect to "every word, clause and sentence of a legislative enactment." *Id.* at 523 (citing *Durfey v. Bd. of Educ.*, 604 P.2d 480 (Utah 1970)). Indeed, in considering the meaning of the term "mineral," as used in a zoning ordinance, this Court recently stated:

In interpreting the meaning of a statute or ordinance, we begin first by looking to the plain language of the ordinance. When examining the plain

*language, we must assume that each term included in the ordinance was used advisedly. Additionally, ‘statutory construction presumes that the expression of one should be interpreted as the exclusion of another.’ Thus, we should give effect to any omission in the [statute’s] language by presuming that the omission is purposeful.*

*Carrier*, 2004 UT 98 at ¶ 30 (citations and quotations omitted, emphasis added). This is exactly what the trial court did when it gave effect to the fact that oil and gas uses are dealt with specifically under Subsection 501(6)(d) and not specifically included in Subsection 501(6)(a). Precedent from this Court shows the trial court’s approach was correct.

The Court in *Carrier* applied the required assumptions that each term is used advisedly and that each omission is purposeful, and concluded that gravel pits were not included under the term “mineral excavation.” *Id.* at ¶ 35. In reaching this conclusion, the Court found that the specific inclusion of the term “gravel pit” in other zoning ordinances issued by the same county, while omitting that term in the ordinance in question, showed a “gravel pit” was not a permitted use under the ordinance and not intended to be included under that term. *Id.*

Similarly, in *CP Nat’l Corp.*, this Court found that the plaintiff had no authority to take private property under the same condemnation statute considered here. 638 P.2d at 522-24. The Court concluded that the statute did not confer authority to take an ongoing public utility business under the general term “all other public uses” because the public utility use was dealt with intentionally in another subsection, and the provision in question did not specifically include the authority to take an existing public utility business:

The public utility use appears to have been considered and dealt with intentionally. Section 78-34-1(8) specifically provides that ‘electric light and electric power lines and sites for electric light and power plants’ are subject to condemnation for public use. Nowhere is this basic grant broadened by other statutory authority. Clearly, [section] 78-34-1(8) contemplates a condemnation limited to the ‘lines and sites’ for a power plant.

*Id.* at 524. The Court went on to recognize that if the legislature had intended to include broader authority, it would have done so expressly in that section or in another statutory instrument. *Id.*

Likewise in this case, as the trial court correctly concluded, oil and gas is intentionally dealt with under Subsection 501(6)(d) of the condemnation statute, and that section does not include a right to take private property for a road. Rather, that subsection only authorizes the taking of private property for “gas, oil or coal *pipelines, tanks or reservoirs ....*” Utah Code Ann. § 78B-6-501(6)(d) (emphasis added). By dealing specifically with oil and gas uses in Subsection 501(6)(d), it is clear the legislature knew how to provide for oil and gas uses, and the omission of roads in Subsection 501(6)(a) must be assumed purposeful. *See Carrier*, 2004 UT 98 at ¶ 30. If the legislature had intended to include the authority to take private land for a road to facilitate the working of oil and gas deposits, it would have included that authority in Subsection 501(6)(d) or specifically included oil and gas in Subsection 501(6)(a). It did neither.

Additionally, in Subsection 501(6)(a), the legislature has referred expressly to “roads” to facilitate the working of “coal mines” without making any reference to “oil and gas,” yet in Subsection 501(6)(d), the legislature expressly referenced “gas, oil or



coal pipelines.” Again, the legislature’s omission of oil and gas when referring to “coal” in one context, and then referring to oil and gas together with coal in the other context, demonstrates an intention on the part of the legislature to differentiate between “roads” on the one hand and “pipelines” on the other in this regard.

Moreover, where, as here, a term is not included, courts refrain from rewriting the statute to include that term. *See, e.g., State v. Paul*, 860 P.2d 992, 995 (Utah App. 1993) (declining to “rewrite section 76-5-102.6 to include actions that are not expressed in the statute since it is the legislature’s job .... Judicial responsibility to construe statutes must not be confused with legislative responsibility to enact them.”); *In re M.E.P.*, 2005 UT App. 227, ¶ 11, 114 P.3d 596 (refuting defendant’s position and stating that “Defendant’s argument essentially asks this court to take on the role of the legislature and insert the term ‘overly’ into the statute. We cannot do this.”). Marion/SITLA and the UPA should be asking the legislature – not the courts – to insert the terms oil and gas into Subsection 501(6)(a).<sup>9</sup> *See Soriano v. Graul*, 2008 UT App. 188, ¶10 n3, 186 P.3d 960 (noting, “our responsibility is to interpret the language of the statute and that matters of policy such as this one are best resolved through the legislative process.”)

Thus, as the trial court correctly concluded, the plain language shows that the legislature did not provide express authority in Subsection 501(6)(a) to take private property to construct permanent roads to facilitate the drilling and extraction of oil and gas by way of those roads.

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<sup>9</sup> As discussed below, a bill was introduced in the legislature in 1997 to amend Subsection 501(6)(a) to include oil and gas in that subsection, but the bill was not passed. *See infra* at Section A.5, page 23.

**4. Application of Standard Rules of Statutory Construction Also Support the Trial Court's Ruling.**

Application of the rule of *ejusdem generis* further supports the trial court's conclusion that Marion/SITLA does not have the authority to take KFJ's land, and that the legislature's use of the term "mineral deposits" under Subsection 501(6)(a) was not intended to include oil and gas deposits. "[E]*jusdem generis* requires that 'when general words or terms follow specific ones, the general must be understood as applying to things of the same kind as the specific.'" *CP Nat'l Corp.*, 638 P.2d at 523 (citing *Heathman v. Giles*, 374 P.2d 839, 840 (Utah 1962)). The term "mineral" is general in nature, and use of the rule is appropriate here. *See Carrier*, 2004 UT 98 at ¶ 32.

In *CP Nat'l Corp.*, this Court applied *ejusdem generis* to determine whether the provision "all other public uses for the benefit of any county, city or incorporated town, or the inhabitants thereof" conferred the authority to take an ongoing public utility business. 638 P.2d at 521-523. The court concluded the language did not confer such authority because the language came at the end of a series of uses limited to real property, and the taking of a public utility, which is an ongoing business, is more than just real property and not included within that term. *Id.* at 523.

Further, in *State Land Bd.*, 408 P.2d at 708, this Court applied the same principles of construction and found the term "other minerals" did not include gravel and sand because the term "other minerals" was associated with the term "coal," which indicated it was intended to refer to "something of the same general character as coal or minerals which are usually the subject of prospecting and mining." *Id.*

Similarly, interpreting the term “mineral deposits” in accordance with the character and meaning of the surrounding words would limit that term to minerals that are generally developed by “milling, smelting, or other reduction of ores,” or by “mines, quarries, [and] coal mines.” Utah Code Ann. § 78B-6-501(6)(a). Oil and gas deposits are developed using drills and wells and, therefore, under *ejusdem generis*, roads in connection with oil and gas wells would not be of the same general character. Accordingly, the rule of construction *ejusdem generis* also supports the trial court’s conclusion.

Furthermore, the cases cited by Marion/SITLA for the proposition that *ejusdem generis* should not be used where a term is not ambiguous, where it is difficult to know what characteristic of the listed items should be compared, and where it would give narrower limits to a term than those intended by lawmakers are not applicable or relevant to the issue in this case. (App. Br. 15-16.)

As clearly set forth in the transcript of proceedings, the trial court examined the language of the statute and relied on the presumption that each term is used advisedly and that an omission is presumed purposeful. (R.000225, 23 and R.000216) Based on those assumptions, the trial court found that use of the terms “oil” and “gas” in Subsection 501(6)(d), while those terms were omitted in Subsection 501(6)(a), was determinative of the legislature’s intent. (R000225, 23-25 and R.000216) The court apparently did not rely on the doctrine of *ejusdem generis* in reaching its conclusion. Nevertheless, Marion/SITLA ignore the trial court’s analysis in this regard and engage in a lengthy

discussion of why the doctrine of *ejusdem generis* does not apply, without showing why they believe the trial court's decision was unsupported.

#### **5. Legislative History Further Supports the Trial Court's Ruling.**

The condemnation statute's legislative history provides further support for the trial court's conclusion that Subsection 501(6)(a) does not confer authority to take private property for roads to access oil and gas deposits. Indeed, the legislature has had numerous opportunities to amend the eminent domain statute to provide expressly the power to condemn private property for roads to facilitate oil and gas development but has not done so.

Under the laws of Utah, 1896, the legislature declared the "mining, milling, smelting or other reduction of ores ... to be for the public use" and stated that "the right of eminent domain may be exercised in behalf thereof." 1896 Utah Laws 316.

In 1898, the legislature synthesized various provisions into one section and allowed the use of eminent domain "to facilitate the milling, smelting or other reduction of ores, or the working of mines ...." Utah Rev. Stat. § 3588(6) (1898). Also, in 1898, the word "oil" was added to "gas" for the purpose of permitting condemnation for "gas or oil pipe lines, tanks, or reservoirs ...." *Id.* At the same time, the legislature did not clarify the working of mines to express that such mining included oil and gas operations.

In 1907, the legislature amended Subsection 6 to allow the power of eminent domain for the "working of mines, quarries or mineral deposits ...." 1907 Utah Laws 143. The legislature amended that language in 1917 to allow for the "working of ... coal mines," amending Subsection 6 to read: "roads ... to facilitate the milling, smelting, or

other reduction of ores, or the working of mines, quarries, coal mines, or mineral deposits ....” Utah Comp. Laws § 7330(6) (1917). Thus, the 1907 language was not considered broad enough to permit the power of condemnation for the working of a coal mine. Yet the legislature did not add “oil and gas mines.”

In 1963, the legislature amended Subsection 6 to allow condemnation for “coal pipe lines,” along with oil and gas pipe lines. 1963 Utah Laws 632. Although “coal” was added to oil and gas pipe lines in Subsection 6, the legislature did not add oil and gas to the express reference to “coal mines” in that subsection. *Id.*

In 1969, the legislature amended the statute to add “minerals in solution” to the term “mineral deposits.” 1969 Utah Laws 1004. Importantly, the legislature expressly added “minerals in solution” – it did not leave the power to condemn private property for roads in this regard to be inferred from the statutory language.

In 1997, Senator Mike Dmitrich introduced Senate Bill 156, which proposed Utah Code Ann. section 78-34-1(6) – now Utah Code Ann. section 78B-6-501(6)(a) – be amended to specifically include authority to take land for roads to access oil and gas deposits, as follows:

Subject to the provisions of this chapter, the right of eminent domain may be exercised on behalf of the following public uses:

(6) Roads . . . to facilitate the milling, smelting or other reduction of ore, or working of mines, quarries, coal mines, mineral deposits including ***deposits of oil, gas and hydrocarbons***, minerals in solution, ***and geothermal steam***.

(R.000097 – S. B. 156, 1997 Leg., Gen. Sess. (Utah 1997)). Even though the bill was not enacted into law and was struck at the end of the congressional session (R.000094), there

would not have been any need to introduce the bill in the first place if the legislature had already provided that “mineral deposits” included oil and gas deposits. This further corroborates the already obvious intent of the legislature – demonstrated through the language of Subsection 501(6)(a), with its omission of oil and gas, and Subsection 501(6)(d), with its inclusion of oil and gas – that Subsection 501(6)(a) was not intended to confer authority to take land for roads in connection with oil and gas mineral leases.

Moreover, by seeking to add the authority to take land for roads to access oil and gas deposits, the legislature must have recognized that authority was not included under the terms of the current statute. For example, in *Bertagnoli*, this Court concluded that the legislature, by remaining silent on the matter, had not impliedly intended to confer extraterritorial powers of condemnation on the boards of education. 215 P.2d at 629-30. The Court concluded that in light of subsequent enactments, which conferred the disputed authority, the boards did not previously possess this authority because the enactments would have been unnecessary. *Id.* Likewise, if oil and gas had been included within the term “mineral deposits,” Senator Dmitrich’s proposed bill, which specifically included oil and gas, would have been unnecessary.

Despite ample opportunity to do so, the legislature has not provided the power or authority for oil and gas companies to condemn their way across private property to gain road access to proposed oil and gas wells under their leases. The legislative history of the statute, including introduction of S.B. 156, therefore, further supports the trial court’s conclusion that Marion/SITLA did not have authority under Subsection 501(6)(a) to take KFJ’s private land.

**6. The Trial Court's Ruling Is Not an Unfair or Unexpected Result.**

The trial court's finding that Marion/SITLA does not have authority under the condemnation statute to take KFJ's land is not an unfair or unexpected result. As an experienced lessee of mineral rights, Marion should be well aware that courts do not allow federal lease holders rights of access across private land to access or transport product to or from areas subject to pooling or unitization agreements, unless the federal lease or an agreement expressly provides for such access. *Kysar v. Amoco Prod. Co.*, 93 P.3d 1272, 1283-86 (N.M. 2004) (denying oil company rights to use roads on landowner's ranch that were not subject to the pooling or unitization agreement to access the producing well in the area subject to the agreement). Just as it would in connection with a mineral lease on federal lands, Marion should have ensured that it had road access to its SITLA leases by negotiating with KFJ prior to purchasing those lease rights. Marion is certainly not new to the oil and gas industry, and is familiar with the necessity of negotiating with private land owners for access to its federal leases and the cost and expense associated with obtaining that access. It is not unfair to require Marion to do the same here with its state leases.

**B. THE AUTHORITY CITED BY MARION/SITLA DOES NOT SUPPORT THE CLAIM THAT "MINERAL DEPOSITS" IN THE CONDEMNATION STATUTE INCLUDES OIL AND GAS.**

In an attempt to support their contention that the term "mineral" has a fixed and definite meaning that includes oil and gas, Marion/SITLA rely on four cases, *Nephi Plaster & Mfg. Co. v. Juab Co.*, 93 P.53 (Utah 1907), *Utah Copper Co. v. Montana-Bingham Consol. Mining Co.*, 255 P. 672 (Utah 1926); *Western Dev. Co. v. Nell*, 288

P.2d 452 (Utah 1955); and *Anschutz Land & Livestock Co., Inc. v. Union Pac. R.R. Co.*, 820 F.2d 338 (10th Cir. 1987). These cases are inapposite because they deal with transactions between private parties or statutes totally unrelated to the condemnation statute. Moreover, the cases do not establish that the term “mineral” has a fixed and definite meaning or that the trial court in this case erred by looking to the language of the condemnation statute to determine its meaning. Indeed, the cases either fail to address the issue or merely recognize, at least impliedly, that the term “mineral” is defined by the context in which it is used. Finally, the courts in these cases also looked to the language of the documents to establish the scope and meaning of the term “mineral.”

For example, in *Nephi* the court considered whether gypsum – not oil and gas – was included under the phrase “other valuable mineral deposits.” 93 P. at 54-55. Whether the term “mineral” included oil and gas was not even at issue, nor did the case establish that the term “mineral” is unambiguous and has a universal meaning that includes oil and gas. *Id.* at 55-58. *Nephi* is only useful in this case, if at all, to demonstrate that the court’s role is to determine the intent of the legislature in drafting the statute, and that rules of statutory construction, where applicable, are a means of establishing that intent. Even Marion/SITLA admit the case does not support their conclusion, stating that they are relying on it solely because the Court in that case adopted an “expansive definition” of the term “minerals.” (App. Br. 12.)

Indeed, the purported “expansive definition” of “minerals” was not in the context of eminent domain, where the right to take private property is strictly construed, but in the context of a taxing statute. *See, e.g., McCabe Petroleum Corp. v. Easement and*



*Right-of-Way*, 87 P.3d 479, 482 (Mont. 2004) (“our characterizations of an oil well as a mine were made within the context of tax litigation, not eminent domain statutes which expressly enumerate the public uses for which condemnation proceedings can be maintained”). Definitions from other contexts are not readily imported into the eminent domain arena. *Id.*

Marion/SITLA rely on *Utah Copper* for the proposition that this Court conceded that the term “mineral” includes “oil and gas.” (App. Br. at 12.) Marion/SITLA overstate the Court’s ruling. In *Utah Copper*, the Court was required to determine the ownership of rain water that contained copper – the actual definition of “mineral” was not even at issue. 255 P. at 673-74. The Court held that “the waters carrying copper or other minerals in solution, so long as they are in the dump and thus a part of it, ... are, like the dump itself, the property of the plaintiff ....” *Id.* at 674. The Court added:

The cases cited by the appellant do not, as we think, make against this holding. The case of *Nephi Plaster Co. v. Juab County* ... is cited to the effect that the term ‘mineral’ is not limited to metal or metaliferous deposits but also includes petroleum and other liquids. *That may be conceded.* The point made in such respect is that copper in solution is a mineral, and, though the dump on the defendant’s ground is the property of the plaintiff, nevertheless the mineral in solution is the property of the defendant. *But* the defendant makes no claim to any of the ore or other material deposited on the dump; and, since the copper in solution is from the dump and from the ore and material deposited thereon and therein and not otherwise, it would seem that the defendant has no better claim to the mineral in solution, so long as it is in the dump, than to the ore or other material in the dump.

*Id.* at 674-5 (emphasis added). Clearly, the Court was not conceding that the term “mineral” includes “petroleum and other liquids;” rather, the Court was making it clear

that even if it does, this would not affect the Court's ruling as to ownership. *Utah Copper* has no relevance to this case, and Marion/SITLA's use of the case is misleading.

Finally, Marion/SITLA's reliance on the decisions in *Nell* and *Anschutz* is unavailing. In those cases, the courts were required to examine the language of deeds of conveyance – not statutes – to determine the scope and meaning of the term “mineral” as used in those deeds. *Nell*, 288 P.2d at 453-55; *Anschutz*, 820 F.2d at 340-43. In both these cases, the court recognized the “majority rule” that when considering the term “mineral” as used in a deed, lease or license, a conveyance or exception of ‘minerals’ is to be understood to include oil and gas, unless a contrary intent is manifested. *See Nell*, 288 P.2d at 454; *Anschutz*, 820 F.2d at 342. Having adopted this rule, the courts looked to the language of the deeds to determine if a contrary intent was manifested. *Nell*, 288 P.2d at 454-55; *Anschutz*, 820 F.2d at 342-43.

In *Nell*, the court determined that the language of the deed gave rise to ambiguities in the meaning of the term “mineral,” and considered extrinsic evidence of the circumstances at the time the deed was executed to determine the parties' intent. 288 P.2d at 454-55. In *Anschutz*, the court determined that the parties' intent was clear from the language of the document and did not look to extrinsic evidence to determine that intent.<sup>10</sup> *Anschutz*, 820 F.2d at 342-43. These cases show nothing more than an

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<sup>10</sup> The court found no ambiguity as to whether the deeds reserved rights to oil and gas deposits because Reservations B and C expressly reserved those rights and Reservation A reserved “all minerals” “prospected for,” which the court determined included oil and gas because oil and gas are usually “prospected for.” *Anschutz*. 820 F.2d at 342-43. The Court did not, as Marion/SITLA claim, find that the term “mineral” includes oil and gas as a matter of law. (App. Br. 14.)

examination by the court of the language of the deeds and, where appropriate, extrinsic evidence of the intent of the parties to determine what they intended to convey when drafting those deeds. The cases do not establish a universal definition of the term “mineral” that includes oil and gas, nor do they in any way alter the principle of strict construction of statutes granting the power of eminent domain.

Marion/SITLA place great importance on the *Nell* court’s reference to the “majority rule” that a conveyance or reservation of minerals is presumed to include oil and gas. (App. Br. 13-14.) That “majority rule,” however, is a rule of construction limited to interpretation of the scope and meaning of the term “mineral” in deeds, leases and licenses when a deed, lease or license conveys or reserves a right or interest in “minerals.” *See Annotation, What are Minerals within Deed, Lease or License*, 86 ALR 986 (1933). It is not a rule to establish the meaning of the term “mineral” in all circumstances. Indeed, the paramount concern in considering the language of deeds is to determine the intention of the parties to the deed, which controls. As discussed above, however, grants of eminent domain must be strictly construed against the condemnor, and if the authority to condemn is not clearly expressed or necessarily implied, the right does not exist. *See supra* at Sections A.2. & A.3, pages 15-21. These cases are simply inapposite here, where the issue is construction of the eminent domain statute.

Furthermore, even if these cases were apposite, there is authority to the contrary that the term “minerals” as used in a deed was *not* intended to include oil and gas. Indeed, in *G.O. Patterson v. Wilcox*, 358 P.2d 88, 89-91 (Utah 1961), the Court was again required to determine the scope and meaning of the term “mineral” as used in a

deed of conveyance. In that case the Court came to the contrary conclusion, finding that the term “mineral” was not intended to include oil and gas. *Id.* The Court specifically noted that although it had come to a conclusion contrary to the one reached in *Nell*, the decision in *Nell* was “justified under the facts of that case.” *Id.* at 91.

*Nell*, *Anschutz*, and *G.O. Patterson* all concern a determination of the term “mineral” in a deed conveying or reserving an interest in “minerals” and rules relevant only to determination of that term in those types of contracts. They provide little, if any, assistance in determining the intent of the legislature in its use of the term “mineral deposits” in Subsection 501(6)(a) of the condemnation statute or even the interpretation of the term “mineral” in statutes generally. If anything, these cases again highlight both the ambiguity of the term “mineral” and the importance of looking to the context in which the term is used to determine its scope and meaning.

Again, the existence of contradictory authority interpreting the term “mineral” as either including or excluding a certain material reinforces the conclusion that its meaning is uncertain and defined by the context in which it is used. *See Carrier*, 2004 UT 98 at ¶ 34 (recognizing that the parties’ citation to contradictory authority in support of their position that “mineral” either includes or excludes gravel “merely reinforce[d] the conclusion that whether gravel is appropriately deemed a mineral depends on the context in which the term is used”). Accordingly, the authority cited by Marion/SITLA does not establish that “mineral” has a fixed and definite meaning, and the trial court was correct to examine the language of the condemnation statute to determine the scope and meaning of that term under Subsection 501(6)(a) of the condemnation statute.

**C. THE AUTHORITY CITED BY THE UPA DOES NOT SUPPORT THE VIEW THAT IN UTAH “MINERALS” INCLUDES OIL AND GAS.**

As it did with respect to the cases discussed above in Section A.1, the UPA overstates the significance of the Wyoming case of *Coronado Oil Co. v. Grieves*, 603 P.2d 406 (Wyo. 1979). (UPA Br. at 4-6.) Obviously, *Coronado* is not binding authority in Utah, but importantly the court’s analysis is not persuasive because it is clearly inconsistent with Utah Supreme Court jurisprudence. Moreover, as the UPA belatedly pointed out in its Corrected and Amended Brief, there is other, far more persuasive authority in Colorado and Montana that, more recently, runs counter to *Coronado*.

In *Coronado*, a split court held that the exploration for oil and gas is “mining” within the meaning of the Wyoming condemnation statutes in question dealing with the right to condemn a way of necessity over land in connection with mining. 603 P.2d at 412. At the outset, KFJ should point out that the UPA misstates the premise of *Coronado* when it states that “the Wyoming Supreme Court held that a power of condemnation for ‘minerals’ – in a statute very similar to the Act – included power to access an oil and gas well-site.” (UPA Br. at 5.) (Emphasis added.) Contrary to the UPA’s description of this case, the case involved a power of condemnation of “mining” – not of “minerals,” which is closer to what is at issue in this case.<sup>11</sup> *Coronado*, 603 P.2d at 411-12. Moreover, the

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<sup>11</sup> As noted above in footnote 6, page 12, the issue of whether “mining” includes exploration for oil and gas was not raised before the trial court, and this Court does not address arguments brought for the first time on appeal unless the trial court committed plain error or exceptional circumstances exist. *Jacob*, 2009 UT 37 at ¶ 34. See also *infra* Section D, page 38.) Marion/SITLA did not argue below that the language in the condemnation statute relating to “mining” (as opposed to “mineral deposits”) gives rise to their power to condemn KFJ’s property for road access.

Wyoming statute is not “very similar” to the Utah condemnation statute at issue. Indeed, the Wyoming condemnation statute does not concern “minerals” or “mineral deposits” at all, and it does not involve the construction of the language at issue in this case under Utah Code Ann. section 78B-501(6)(a).<sup>12</sup>

The Wyoming court acknowledged the principle, followed in Utah, that “[a]s a general rule, statutes conferring the power of eminent domain are to be strictly construed in favor of landowners, so that no person will be deprived of the use and enjoyment of his property except by a valid exercise of the power.” *Coronado*, 603 P.2d at 410. But the court departed from this general principle and from Utah law by determining that “this doctrine does not preclude the reasonable and sound construction of such statutes in light of the objectives and purposes sought to be attained.” *Id.* at 410-11. The court noted that, at least in 1979, there was a “great public interest in an imminent need for energy,” stating, “[w]hile at the time of adoption of the constitution the concern was one of developing the economy and settlement of the state, the urgency has now become one of survival.” *Id.* at 411. On that basis, the court stated, “[w]e think it plain beyond any doubt that the intended purpose of the cited constitutional provision and statutes was to

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<sup>12</sup> The UPA’s statement that “Wyoming’s eminent domain statutes like Utah’s do not identify minerals by type, but did refer to ‘mining’ and ‘minerals’” (UPA Br. at 5) is, at best, mistaken. The statute deals with the condemnation of a way of necessity over property as necessary for the use of tramways or mine truck haul roads required in the course of the business of mining or for the transportation of coal from any coal mine or railroad line. The only reference to “minerals” in the statutes addressed by the court was the provision that any way of necessity appropriated under the statute is for a surface easement only – it does not include any interest in the underlying minerals or mineral estate. *Coronado*, 603 P.2d at 408.

facilitate the development of our state's resources. We will hereafter construe the word 'mining' to include the exploration for oil and gas ....” *Id.*

In abandoning the principle that other courts, including Utah, have long followed, the Wyoming court ignored time-honored rules of statutory construction and the principle that courts have no authority to substitute their views for those expressed by the legislature in establishing public purposes for the exercise of eminent domain. While the UPA would have this Court follow the Wyoming Supreme Court in this regard, the court's ruling flies in the face of Utah jurisprudence to the effect that the condemnation statute must be strictly construed, that it is for the legislature to determine the public purposes for which the power of eminent domain may be exercised, that courts should follow time-honored rules of statutory construction, and that the term “minerals” in Utah has no fixed or definite meaning and what the term actually means depends on the context.

Not surprisingly, there was a dissent in which Justice Rooney attempted to remind the court of certain well-established principles it was flouting:

The power of eminent domain is one of the most harsh proceedings known to the law. Consequently, when the sovereign delegates this power to a political unit or agency, a strict construction must be given against the agency asserting the power.

*Id.* at 422. Further, the dissent noted:

[W]e cannot overlook the importance of private ownership of property in the maintenance of the capitalistic system under which this country operates. Indeed, such ownership is one of the fundamental differences between our democracy and communism. Although federal and eastern corporate ownership, as distinguished from local and family unit ownership, of Wyoming real property may have already 'steamrolled' to a

point wherein it is inevitable, and although full-scale development and utilization of the minerals and other natural resources of our state may be desirable and necessary, these ends should be attained within the scope of law and with full recognition of property and constitutional rights of others.

*Id.* at 417.<sup>13</sup>

Other neighboring states have not followed *Coronado*. In *McCabe*, for example, the Supreme Court of Montana recently was confronted with the same issue as that in *Coronado* – whether the exploration and development of a federal oil and gas lease is a “mine” that constitutes a “public use” for eminent domain purposes. 87 P.3d at 480. The court held that oil wells are not. *Id.* at 483. In distinguishing *Coronado*, the court noted that the eminent domain provision of Montana’s constitution – like Utah’s – does not allow the taking of private property for private ways of necessity, which may be obtained only by satisfying several criteria. *Id.* at 482.

Pertinent to this case, the Montana Supreme Court addressed the interpretation of powers of eminent domain, citing long-standing judicial authority, consistent with Utah jurisprudence, that “the eminent domain power being against common right, [] cannot be implied or inferred from vague or doubtful language, and that the right to exercise that power does not exist when made out only by argument or inference.” *Id.* at 481. Describing earlier Montana precedent, the court stated, “[t]here, a unanimous Court stated clearly and without equivocation that ‘[t]he legislature’s grant of the eminent

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<sup>13</sup> The UPA also cites to *Amoco Prod. Co. v. Guild Trust*, 636 F.2d 261 (10th Cir. 1980), in support of its contention that a power of condemnation for “minerals” included power to access an oil and gas site. (UPA Br. at 5.) This case is merely another inapposite case involving the interpretation of a reservation of “minerals” in a railroad deed. *Amoco Prod.*, 636 F.2d at 263. See also *supra* at Section B, page 27.



domain power ... must be strictly construed.” *Id.*, (citing *City of Bozeman v. Vaniman*, 869 P.2d 790, 792 (Mont. 1994)). The court continued, “[b]ecause private real property ownership is a fundamental right under the Montana Constitution, ‘any statute which allows [the taking of] a person’s property must be given its plain interpretation, favoring the person’s fundamental rights.’” *Id.* See also *Coquina Oil Corp. v. Harry Kourlis Ranch*, 643 P.2d 519, 522 (Colo. 1982) (“[w]e have often held that narrow construction is the rule in determining the scope of the condemnation power delegated pursuant to legislative enactment.... ‘The authority to exercise (the power of condemnation), being against the common right to own and keep property, must be given expressly or by clear implication; it can never be implied from doubtful language.’”).

In analyzing the plain language of the Montana condemnation statute, the court determined that no public uses contained explicit language relating to oil and gas wells. *McCabe*, 87 P.3d at 483. The only eminent domain provisions relating to oil and gas were contained in the statutes governing oil and gas exploration, which involve underground storage of natural gas. *Id.* The court noted, “[h]ad the Montana Legislature intended to extend the power of eminent domain to encompass the development of oil wells, it easily could have done so in the portions of [the statutes] which apply to the oil and gas industry. It also could have done so in [the eminent domain statute].” *Id.* Thus, the court held that oil wells are not “mines” for purposes of eminent domain in Montana. *Id.*

KFJ contends that *McCabe* is far more persuasive authority in this case than *Coronado* for a number of reasons, not the least of which are (i) that the statutory scheme

in Montana is more similar to that of Utah's, in that there was no mention of oil and gas in the pertinent eminent domain statute addressing roads, yet there was a reference to authority to exercise eminent domain for oil and gas purposes in another statutory context addressing pipelines; and (ii) that the pertinent eminent domain principles relied upon and followed by the Supreme Court of Montana are in-step with Utah's, while Wyoming departs from those principles because of a perceived urgent need for imminent energy development at the time the case was decided that the court believed threatened the state's very survival.

Finally, the UPA argues that public policy considerations support the result the oil and gas industry seeks in this appeal, baldly stating, "The Act's articulated policy encourages the development of oil and gas." (UPA Br. at 6.) KFJ has been unable to locate any such policy articulated in the eminent domain statute. Furthermore, the UPA should raise its public policy considerations with the legislature because it is the legislature – not the courts – that, through the legislative process, should consider matters of public policy in this regard. *See Soriano*, 2008 UT App 188 at ¶ 10, n3. Indeed, this Court has long adhered to the principle that "if the right [to eminent domain] is not granted, either in terms or by necessary implication, then the courts are powerless to grant the relief [requested] ...." *Monetaire Mining Co.*, 174 P. at 175.

**D. THE UPA HAS IMPROPERLY RAISED AN ISSUE THAT WAS NOT ARGUED TO THE TRIAL COURT AND SHOULD NOT BE CONSIDERED ON APPEAL.**

Marion/SITLA's argument to the trial court below was that the term "mineral deposits" in Utah Code Ann. section 78B-6-501(6)(a) includes "oil and gas" and provides

the authority to take KFJ's property to gain access to oil and gas leases. Marion/SITLA did not make the arguments below, as the UPA does in its amicus brief, that "mining" includes oil and gas operations and that the language "the working of mines" in Subsection 501(6)(a) also authorizes the taking power Marion/SITLA seek. Indeed, the UPA devotes several pages of its amicus brief to the history of mining and argues that oil and gas is susceptible to "mining," citing and addressing numerous historical cases and authorities in that regard. (UPA Br. at 7-18.)

The Court should not address the new arguments raised by the UPA for the first time on appeal, and KFJ should not be required to expend the cost associated in addressing these arguments. *See supra* at n.6 & n.11, pages 12 & 33. Furthermore, the cases cited by the UPA outside of the context of eminent domain are inapposite, and do not establish an "American Rule" that "mineral" always includes oil and gas and that "mining" includes oil and gas operations.

As discussed above, there is a rule of interpretation that finds the term "mineral," as used in a reservation of rights in a license, lease or deed, is presumed to include oil and gas, unless there is ambiguity on the face of the document. *See supra* at Section B, page 27. There is not, as the UPA argue, an "American Rule" that the term "mining" includes oil and gas operations or that oil and gas is universally considered a "mineral" in all circumstances, and particularly not as used in Utah's condemnation statute.

Indeed, with the exception of *Burke v. S. Pac. R.R. Co.*, 234 U.S. 669 (1914), the cases cited by the UPA in support of this proposition do not even consider the terms "mining" or "mineral" and whether oil and gas are included in those terms. At best, the

cases are merely instances where a court has used the phrase “oil and gas mining” when resolving a completely separate issue and in no way show the term “mining” includes oil and gas operations,<sup>14</sup> much less in all circumstances.<sup>15</sup> Moreover, none of the cited cases concern interpretation of condemnation statutes, and many of them concern licenses, leases or deeds – not statutes – where different considerations and standards apply.

Although the UPA does cite *Burke*, a 1914 decision in which the United States Supreme Court considered whether petroleum or mineral oil was included within the term

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<sup>14</sup> *Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488 (1928), concerned a dispute between a landowner and a holder of a federal lease. The federal lease holder wished to enjoin the surface owner from platting and selling the surface area above its lease, where the federal lease holder had the right to use whatever surface area above its lease was necessary to extract oil and gas. *Id.* at 496. The UPA cited this case merely for the proposition that “[t]hroughout the case, the Court identifies the extraction operations as ‘mining operations’ and the equipment and facilities as ‘mining equipment’” – nothing more. (UPA Br. 8.)

Similarly, *Funk v. Haldeman*, 53 Pa. 229 (Pa. 1866), concerns a dispute between two parties regarding a private agreement that gave plaintiff the right to explore for oil and gas on defendant’s property and whether that right was (1) an exclusive right, and (2) whether the plaintiff had forfeited his rights by subletting those rights to other parties. The case can stand for nothing more than that the court refers to the parties’ activities as “oil and gas mining.”

Likewise, *Meagher v. Uintah Gas Co.*, 185 P.2d 747 (Utah 1947), which the UPA so emphatically argues shows Utah adopts the American rule that development of oil and gas is mining, (UPA Br. 13), concerns title to a mineral lease and whether the holder had abandoned the lease. Again, it is cited merely because the language of the case references development of oil and gas as “mining for oil and gas” – nothing more.

<sup>15</sup> Although this issue is not properly before this court, it is notable that there are in fact numerous cases where courts have specifically found the term “mining” does not include oil and gas. See, e.g., *Guffey Petroleum Co. v. Murrell*, 53 So. 705, 711-712 (La. 1910); *Cornwell v. Buck & Stoddard, Inc.*, 82 P.2d 516, 518 (Cal. Dist. Ct. App. 1938); *Carter v. Phillips*, 212 P. 747, 749-50 (Okla. 1923); *Hollingsworth v. Berry*, 192 P. 763, 763-65 (Kan. 1920); *Cortelyou v. Baker*, 187 P. 417 (Cal. 1920); *Lambert v. Pritchett*, 284 S.W. 2d 90, 91 (Ky. 1955); *Detlor v. Holland*, 49 N.E. 690, 692-93 (Ohio 1898).

“mineral” as used in a federal law reserving “all minerals” from land grants to railroads, this Court has much more recently determined that the term “mineral,” as used in Utah legislation, is general in nature, and has no fixed meaning. *See Carrier*, 2004 UT 98 at ¶ 32.

Thus, even if the UPA had established there is a “general rule of American oil and gas jurisprudence” that the terms “mineral deposits” and “mining” include oil and gas, (UPA Br. 12), which it did not, it is clear that this “general rule” does not apply in Utah. Not only has this Court determined as recently as 2004 that the term “mineral” has no fixed meaning, *see Carrier*, 2004 UT 98 at ¶ 32, the legislature does not treat those terms as though they necessarily include oil and gas – in the SITLA statute the legislature specifically defined “mineral” as including oil and gas,” but Title 40, specifically governing mines and mining, defines “mining operation” and “mineral deposits” as specifically excluding oil and gas. *See Utah Code Ann. § 53C-1-103(4)* (2005); *Utah Code Ann. §§ 40-8-4(6)(b) & (14)(a)*. Accordingly, the legislature must expressly include “oil and gas” in connection with the use of the term “mineral deposits” if it wants to ensure oil and gas is included.

Given that the legislature clearly includes oil and gas within the term “mineral” on some occasions and excludes it in others, all that can be presumed, if anything, is that the term “mineral” is ambiguous and where, as here, it has not been defined, no power for a taking in relation to oil and gas is conferred.

Moreover, if, as the UPA argues, the legislature was so clearly aware of the oil and gas industry at the time the condemnation statute was enacted, (*see, e.g., UPA Br. 18*),

the fact that the legislature did not refer to oil and gas in the context of “mineral deposits,” while referring to oil and gas in the same condemnation statute in another context, demonstrates – consistent with the trial court’s ruling – a lack of intent on the part of the legislature to subject private property to taking for roads in connection with purported “oil and gas mining.”<sup>16</sup>

UPA’s citation to the 1872 Mining Law also fails to provide support for the fact that oil and gas has always been considered a mineral subject to the mining laws. (UPA Br. 15-16.) As highlighted by the UPA’s own point, the Petroleum Placer Act was passed to clarify that the mining law was to apply to petroleum minerals. (UPA Br. 15.) If it was so clear that “mining” included oil and gas development, the legislature would have had no need for such a clarification.

Finally, in an effort to force some association between oil and gas development and the term “working of mines,” as used in Subsection 501(6)(a) of the condemnation statute, the UPA argues that oil and gas development is achieved through “boring, digging and sinking,” which have their origins in the mining vernacular. (UPA Br. 13.) This argument is of no assistance to the UPA, however, because those terms do not appear in Subsection 501(6)(a) or anywhere else in the condemnation statute.

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<sup>16</sup> Again, the legislature’s addition of “coal mines” to the language “working of mines,” without adding “oil and gas mining” also would be relevant to construction of the statute. *See supra* Section A.5., page 23. The UPA, however, does not address this in its brief. Indeed, the UPA does not address the arguments relating to the presence of oil and gas language in connection with pipelines but the omission of oil and gas in connection with roads, or the addition of both “coal mines” to the language relating to roads and “coal” relating to pipelines.

**E. FINANCIAL CONSIDERATIONS OF OIL AND GAS OPERATIONS IN UTAH ARE IRRELEVANT TO THE STATUTORY CONSTRUCTION OF SUBSECTION 501(6)(A).**

The financial considerations and contributions, including the number of jobs provided by the oil and gas industry, raised by the UPA are simply not relevant considerations to a court's construction of the condemnation statute. (UPA Br. 18-20.) The UPA has not cited any authority to the effect that such considerations are relevant to a court's strict construction of the plain language of a statute to determine whether the legislature has intended to authorize the taking of private property. The mere interests of the oil and gas industry are not determinative.

**F. THE AUTHORITY TO EXERCISE EMINENT DOMAIN IS NOT BASED ON THE CHANGING PERCEPTIONS OF THE SO-CALLED COMMON MAN.**

The UPA's contention that the law should change to adapt to changed conditions demonstrates clearly that the UPA fails to appreciate the purpose underlying the strict construction of eminent domain statutes.<sup>17</sup> (UPA Br. 20-21.) Because private real property ownership is a fundamental right, its taking by oil companies is only permitted by the clearest of legislation. While the intent of "the common man in Eastland, Texas,"

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<sup>17</sup> As an initial point, the UPA begins Section V. of its brief by misstating KFJ's argument to the trial court. (UPA Br. 20.) KFJ argued in the trial court that the omission of oil and gas from Subsection 501(6)(a) of the condemnation statute and its inclusion in Subsection 501(6)(d) showed that the legislature was aware of oil and gas development, knew how to provide for oil and gas uses, and clearly chose not to include oil and gas uses in Subsection 501(6)(a) under the term "mineral deposits." KFJ did not, as UPA misstates, argue that the term "mining" under Subsection 501(6)(a) cannot have been intended to include oil and gas. *See id.* As set forth above, that argument was raised for the first time by the UPA in its amicus brief.

as a party to a lease, might be interpreted one way in 1887 and another way twenty years later, the intent expressed by the legislature in an eminent domain statute should not be subject to such whim and caprice.<sup>18</sup> The legislature is free to change the language in section 78B-6-501(6) – and in fact has on several occasions done so<sup>19</sup> – but unless and until it does, a court should not interpret that language according to changing public perceptions on the part of the “common man” or even what the court believes a legislature might intend currently if it were confronted with so-called “changed conditions.” *See, e.g., Paul*, 860 P.2d at 995 (“Judicial responsibility to construe statutes must not be confused with legislative responsibility to enact them.”). Indeed, if the authority to take private property has to be interpreted through argument, the authority does not exist. *See supra* Section A.1., pages 10-11. If the UPA believes that the law should be changed in this regard, the UPA should go to the legislature to have that change made.

Notably, the *Luse* court’s approach of looking to the changing perceptions of the common man is not the approach adopted by Utah courts to interpret an ambiguous term in a deed, or the approach of courts in any other American jurisdiction of which counsel is aware. Not only does *Luse* concern interpretation of a term in a deed, not a statute, when interpreting ambiguous terms in contracts, Utah courts look to the intent of the parties at the time of entering into the contract — not the changing concepts of the

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<sup>18</sup> The cases cited by the UPA do not pertain to eminent domain statutes. *See Luse v. Boatman*, 217 S.W. 1096 (Tex. Civ. App. 1919)(reservation of coal and minerals in deed); *Nephi Plaster & Mfg. Co.*, 93 P. 53 (Utah 1907)(taxing statute).

<sup>19</sup> *See supra* at Section A.5, page 23.



common man. *See, e.g., Uintah Basin Med. Ctr. v. Hardy*, 2005 UT App. 92, ¶ 12, 110 P.3d 168.

Finally, the UPA's argument in Section V of its brief is completely contrary to the arguments made throughout its brief that minerals and mining have always included oil and gas, and that they were understood at the time the condemnation act was first enacted to include oil and gas.

**G. PRIOR VERSIONS OF THE CONDEMNATION STATUTE DO NOT ESTABLISH THAT "MINERAL DEPOSITS" UNDER SUBSECTION 501(6)(A) WAS INTENDED TO INCLUDE OIL AND GAS.**

Marion/SITLA's reference to previous versions of the condemnation statute does not show that the term "mineral deposits" was intended to include the authority to take land for roads to access oil and gas leases. (App. Br. 17-19.) As with the current condemnation statute, the previous versions do not contain a definition of the term "mineral deposits," and the only express reference to oil and gas is to provide authority to take land for pipelines, tanks and reservoirs – not roads.<sup>20</sup> While Marion/SITLA also refer to other provisions of the condemnation statute describing, for example, the classification of the estates and rights in land subject to be taken in connection with a public use, such provisions do not express what the legislature has authorized by law as a public use. The issue still remains whether the right sought by Marion/SITLA has been granted in section 78B-6-501(6)(a).

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<sup>20</sup> Unlike previous versions of the statute, the current version organizes the public uses in Subsection 501(6) into distinct subsections – a fact the trial court found noteworthy. (R.000225, 24)

## **H. THE OUTCOME OF OTHER UTAH DISTRICT COURT CASES CITED BY THE UPA IS OF NO CONSEQUENCE.**

In its brief, the UPA cited eight district court cases, including this case, spanning the past nearly 40 years involving eminent domain rights in connection with oil and gas operations. (UPA Br. 21-23.) The UPA cited the cases as “history, not precedent,” to show that this case is not an isolated one. (UPA Br. 23.) But the UPA then proceeded to comment specifically on the various cases, to which KFJ Ranch will respond briefly.

In *The Anschutz Corp. v. Cunningham Ranches, Inc.*, Case No. 3793 (Seventh Dist. Ct., filed June 17, 1977), the court ruled, like the trial court in this case, that the condemnation statute did not permit the oil and gas company to take the defendant’s private property to construct a road in connection with its drilling for oil and gas. Like the trial court, the court expressly determined that the term “minerals” in Utah Code Ann. section 78-34-1(6) – now section 78B-6-501(6)(a) – does not include oil and gas.

Two other cases cited by the UPA – *ANR Prod. Co. v. Burkley*, Case No. 950800003 (Eighth Dist. Ct., filed Jan. 12, 1995), and *Amerada Hess Corp. v. Thousand Peaks Ranches, Inc.*, Case No. 7482 (Third Dist. Ct., filed Aug. 10, 1983) – settled before the respective courts made any determination as to immediate occupancy.

In the remaining four cases, the district courts entered orders of immediate occupancy,<sup>21</sup> but the granting of a motion for immediate occupancy does not establish

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<sup>21</sup> *Mountain Fuel Supply Co. v. Smith*, Case No. 4645 (Fourth Dist. Ct., filed Dec. 28, 1971); *Richardson Operating Co. v. Thousand Peaks Ranches, Inc.*, Case No. 950600082 (Third Dist. Ct., filed July 11, 1995); *El Paso Prod. Oil & Gas Co. v. Stricklen*, Case No. 010800547 (Eighth Dist. Ct., filed Oct. 4, 2001); *FIML Natural Res.*,

authority to condemn under the statute. Indeed, to obtain such an order, a condemnor need only make a prima facie showing of the right to condemn, the value of the property to be taken, the damage to the property to be taken, and the reason for a speedy taking. *See, e.g., Utah State Road Comm'n v. Friberg*, 687 P.2d 821, 833 (Utah 1984). If immediate occupancy is granted, the condemnor is required to post a bond, assuming the risk of paying for damage to the land in the event condemnation ultimately is not granted. *Id.*

Even in these four cases in which the courts granted motions for immediate occupancy, at least two of the cases settled before any ultimate determination was made as to condemnation. *FIML Natural Res., LLC v. The Estate of Robert C. Phyles*, Case No. 060800183 (Eighth Dist. Ct., filed Nov. 29, 2006); *Richardson Operating Co. v. Thousand Peaks Ranches, Inc.*, Case No. 950600082 (Third Dist. Ct., filed July 11, 1995) (granted motion for immediate occupancy as to taking of an ATV trail for maintaining oil and gas pipeline, but denied as to roads proposed for hauling equipment to and from oil wells.)

In sum, the only value in citing a smattering of district court cases is to show that periodically this issue has arisen in the courts below, and more often than not the matters are concluded through voluntary settlement among the parties.

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*LLC v. The Estate of Robert C. Phyles*, Case No. 060800183 (Eighth Dist. Ct., filed Nov. 29, 2006).

**I. THE ABSURD RESULTS DOCTRINE DOES NOT APPLY UNDER THE CIRCUMSTANCES.**

Marion/SITLA contend that even if the plain language interpretation of Subsection 501(6)(a) results in the conclusion that the legislature did not intend to authorize the taking of private property to construct permanent roads to facilitate the working of oil and gas wells, this would work an “absurd result” such that the Court should not follow the plain language of the statute. (App. Br. 21-22.) More specifically, Marion/SITLA contend that, under the trial court’s interpretation, SITLA could store its oil and gas under Subsection 501(6)(d) but could not produce it under Subsection 501(6)(a). (App. Br. 22.) These contentions are not true, ignore the principles under the condemnation statute, and unfairly characterize the statutory scheme set up by the legislature to take those principles into account.

It is not true that Marion/SITLA are prevented from accessing SITLA’s oil and gas deposits. Through the SITLA statute, the legislature has granted a lease holder like Marion the limited right to enter upon the land on which it holds SITLA mineral leases. *See* Utah Code Ann. § 53C-2-401, et seq. While the SITLA statute does not give a lease holder any right of access over, or right to exercise eminent domain with respect to, private property on which SITLA does not hold the mineral rights, the lease holder – just like with mineral leases on federal lands – may negotiate its own access rights over the adjoining private property to gain access to the lease property. *See supra* Section A.6., page 26. Once such access is secured, the condemnation statute provides the right to take

private property for purposes of oil and gas pipelines. *See* Utah Code. Ann. § 78B-6-501(6)(d).

There is nothing “absurd” about this statutory scheme – unless, like Marion, the lease holder is interested only in gaining access to and transporting the oil and gas out from its wells in the absolutely most economical way practicable, i.e., by operating vehicles over private property to transport the oil and gas. But in defining the public uses for which the right of eminent domain may be exercised, the legislature has not stated that the right of condemnation may be used in whatever manner would ensure that the most cost-effective means can be employed. Indeed, eminent domain should only be used when necessary to accomplish a clearly stated public goal – not as a means to establish the most cost-effective method of obtaining that goal. *See McKemie v. City of Griffin*, 537 S.E.2d 66, 68 (Ga. 2000); *see generally* 26 Am. Jur. 2d *Eminent Domain* § 30 (2004).

Moreover, the absurd results doctrine is a narrow exception to the normal rule of statutory construction that courts do not intrude upon the lawmaking powers of the legislature. *See In re Z.C.*, 2007 UT 54, ¶ 12, 165 P.3d 1206 (citing *Pub. Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring)). Indeed, this canon of statutory interpretation applies only where the result is so absurd that the legislature could not possibly have intended it. *Id.*<sup>22</sup> Such is not the case here,

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<sup>22</sup> The rule should be applied “only where the absurdity is so gross as to shock the general moral or common sense; it is not enough that absurd consequences which were probably not within the contemplation of the legislature are produced.” 73 Am. Jur. 2d *Statutes* § 172 (2009) (citing *Crooks v. Harrelson*, 282 U.S. 55, 59-60 (1930)).

where means to access and transport oil and gas from leases are available. There is simply nothing absurd or irrational about the result flowing from the plain language interpretation of the statute in this instance.

Finally, if SITLA and members of the oil and gas industry desire to use eminent domain to take private property to construct permanent roads over private property rather than use pipelines, they have the right to go to the legislature to amend the condemnation statute, as was attempted at least once before through the Senate Bill introduced by Senator Dmitrich.

## **VII. CONCLUSION**

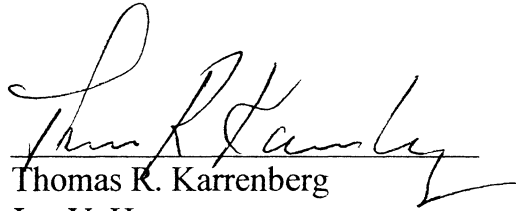
For the foregoing reasons, KFJ respectfully requests that this Court affirm the decision of the trial court and find that Marion/SITLA does not have authority under Subsection 501(6)(a) of the condemnation statute to take KFJ's land for roads in connection with their oil and gas deposits.<sup>23</sup>

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<sup>23</sup> If this Court should find the trial court's determination was in error – which KFJ strongly believes is not the case – automatic granting of Marion/SITLA's motion for summary judgment is inappropriate. In addition to opposing Marion/SITLA's motion for summary judgment, KFJ brought a Rule 56(f) motion requesting the opportunity to conduct additional discovery before a decision is made regarding Marion/SITLA's ability to condemn KFJ's land. (R.000167—R.000185) On determining the term “mineral” did not include oil and gas, the trial court denied Marion/SITLA's motion for summary judgment thus rendering KFJ's Rule 56(f) motion moot. (R.000216) Before a decision can be entered on Marion/SITLA's motion for summary judgment, KFJ's Rule 56(f) motion should be decided.

DATED: March 19, 2010.

ANDERSON & KARRENBURG

A handwritten signature in cursive script, appearing to read "Thomas R. Karrenberg", written over a horizontal line.

Thomas R. Karrenberg

Jon V. Harper

Samantha J. Slark

*Attorneys for Defendant/Appellee*

## **VIII. ADDENDUM**

1. 1896 Utah Laws 316
2. Utah Rev. Stat. § 3588(6) (1898)
3. 1907 Utah Laws 143
4. Utah Comp. Laws § 7330(6) (1917)
5. 1963 Utah Laws 632
6. 1969 Utah Laws 1004
7. S. B. 156, 1997 Leg., Gen. Sess. (Utah 1997)



Tab 1

# LAWS OF UTAH.

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PASSED AT THE SPECIAL SESSION OF THE FIRST  
LEGISLATURE OF THE STATE OF  
UTAH, 1896.

---

AN ACT to fix the time for the convening in regular session of the First  
Legislature of the State of Utah.

*Be it enacted by the Legislature of the State of Utah:*

That the first regular session of the Legislature of the State of Utah shall commence on Tuesday the seventh day of January A. D. 1896, at the hour of four o'clock p. m. of said day.

Time of  
meeting of  
Legislature.

This act shall take effect immediately.  
Approved January 7. 1896.

## CHAPTER XCIV.

## TERMINATION OF THE FIRST SESSION OF THE LEGISLATURE.

H. J. R. Resolution fixing the Termination of the First Session of the Legislature.

*Be it resolved and enacted by the Legislature of the State of Utah:*

That the first regular session of the Legislature of the State of Utah expires by limitation of law on the fifth day of April, A. D. 1896, and that legislative sessions may and should be held, and executive action upon pending measures had, upon said day to the same extent and with the same effect as though said day were not Sunday, and that this resolution shall take immediate effect.

Approved April 4, 1896.

## CHAPTER XCV.

## EMINENT DOMAIN.

AN ACT to encourage the Irrigation of Land, the Mining, Milling, Smelting and other reduction of Ores, and the use and application of the Unappropriated Waters of Natural Streams and Water-courses to the Generation of Electrical Force and Energy, and to provide for the exercise of the right of Eminent Domain therefor.

*Be it enacted by the Legislature of the State of Utah:*

SECTION 1. The cultivation and irrigation of the soil, the production and reduction of ores, are of vital necessity to the people of the State of Utah; are pursuits in which all are interested and from which all derive a benefit; and the use and application of the unappropriated waters of the natural streams and water-courses of the State to the generation of electrical force or energy to be employed in industrial pursuits are of great public benefit and utility. So irrigation of land, the mining, milling, smelting or other reduction of ores,

Legislature  
may hold ses-  
sion on Sunday.

Irrigation of  
and, mining,  
milling, smelt-  
ing, etc., of  
ores, and  
generation of  
electric power  
a public use.

and such use and application of such waters for the generation of electrical power to be employed as aforesaid are hereby declared to be for the public use, and the right of eminent domain may be exercised in behalf thereof. Eminent domain.

Sec. 2. Any person, company or corporation which may be prior to the commencement of the special proceedings in this act provided for, engaged in the irrigation of lands, or in mining, milling, smelting or other reduction of ores may acquire real estate or the right of way through the same, when necessary, or any right, title, interest, or estate or claim therein, which may be necessary, for the purposes of any such business; and any association, company or corporation which may be prior to the commencement of the special proceedings of this act provided for, formed or organized for the purpose of using and applying any of the unappropriated waters of any natural stream or water-course in the State, to the generation of electrical force or energy, to be transmitted, sold, furnished and supplied to those who may desire to use such force or power or energy in any industrial pursuit, or for any useful or beneficial purpose, may acquire real estate or right of way through the same, when necessary, or any right, title, interest, or estate or claim therein, which may be necessary, for the purpose of any such business, by means of the special proceedings prescribed by this act. Right of way.

The said proceedings shall be substantially as follows: Proceedings to secure

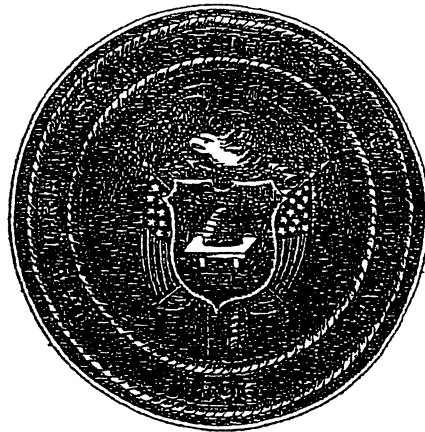
There shall be filed in the clerk's office, of the district court, in the county where the real estate is situated, a petition verified according to law, stating therein the name of the person, company or corporation presenting the petition, that they are engaged in the business of irrigation, or of mining, milling, smelting, or other reduction of ores, as the case may be, or that they are formed or organized for the purpose of using and applying the unappropriated waters of some natural stream or water-course in the State to the generation of electrical force or energy to be transmitted, sold, furnished, and supplied to those who may desire to use such force or energy in any industrial pursuit or for any useful or beneficial purpose; the description by metes and bounds, or by some accurate designation of the tract or tracts of land desired to be appropriated Petition; contents.

Tab 2

THE  
REVISED STATUTES  
OF THE  
STATE OF UTAH,

IN FORCE

JAN. 1, 1898.



Revised, Annotated, and Published by Authority of the Legislature,

BY

RICHARD W. YOUNG,

GRANT H SMITH,

WILLIAM A LEE,

*Code Commissioners*

TOGETHER WITH THE CONSTITUTION OF THE UNITED STATES, THE  
CONSTITUTION OF UTAH, THE ENABLING ACT, AND  
THE NATURALIZATION LAWS.

its full amount, and for the possession of the premises. In all other cases the judgment may be enforced immediately. [C. L. §§ 3801, 3802\*.

Cal C Civ P § 1174\*.

Treble damages for forcible entry, etc., § 3510  
Under sections 3787 and 3801, C. L. 1888, a plain-

tiff in a case for damages for forcible entry or unlawful detainer is entitled to recover treble damages. *Eucles v U P Coal Co.*, — U —, 48 P 148.

3585. Pleadings verified. The complaint and answer must be verified. [C. L. § 3802.

Cal C Civ P § 1175

3586. Appeal within ten days. Undertaking. Stay. Either party may, within ten days, appeal from the judgment rendered. But an appeal by the defendant shall not stay the execution of the judgment, unless, within said ten days, he shall execute and file with the court or justice his undertaking to the plaintiff, with two or more sureties, in an amount to be fixed by the court or justice, but which shall not be less than twice the amount of the judgment and costs, to the effect that, if the judgment appealed from be affirmed or the appeal be dismissed, the appellant will pay the judgment and the costs of appeal, the value of the use and occupation of the property, and damages justly accruing to the plaintiff during the pendency of the appeal. Upon taking the appeal and filing the undertaking, all further proceedings in the case shall be stayed. [C. L. § 3860\*.

Cal C Civ P § 978\*.

3587. Civil procedure applicable. The provisions of this code, relative to civil actions, appeals, and new trials, so far as they are not inconsistent with the provisions of this chapter apply to the proceedings mentioned in this chapter. [C. L. § 3804.

Cal C Civ P § 1177\*.

## CHAPTER 65.

### EMINENT DOMAIN.

3588. Exercised in behalf of what uses. Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

1. All public uses authorized by the government of the United States.
2. Public buildings and grounds for the use of the state, and all other public uses authorized by the legislature.
3. Public buildings and grounds for the use of any county, incorporated city or town, or school district; reservoirs, canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county, or incorporated city or town, or for draining any county, or incorporated city or town, for raising the banks of streams, removing obstructions therefrom, and widening, deepening, or straightening their channels, for roads, streets, and alleys, and all other public uses for the benefit of any county, incorporated city or town, or the inhabitants thereof.
4. Wharves, docks piers, chutes, booms, ferries, bridges, toll roads, by-roads, plank and turnpike roads, roads for transportation by traction engines or road locomotives, roads for logging or lumbering purposes, and railroads and street railways for public transportation.
5. Reservoirs, dams, water-gates, canals, ditches, flumes, tunnels, aqueducts, and pipes for supplying persons, mines, mills, smelters, or other works for the reduction of ores, with water for domestic or other uses, or for irrigating purposes, or for draining and reclaiming lands, or for floating logs and lumber on streams not navigable.
6. Roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dump-

ing places to facilitate the milling, smelting, or other reduction of ores, or the working of mines; outlets, natural or otherwise, for the deposit or conduct of tailings, refuse, or water from mills, smelters, or other works for the reduction of ores, or from mines; mill dams; natural gas or oil pipe lines, tanks, or reservoirs; also an occupancy in common by the owners or possessors of different mines, mills, smelters, or other places for the reduction of ores, of any place for the flow, deposit, or conduct of tailings or refuse matter.

7. By-roads leading from highways to residences and farms.

8. Telegraph, telephone, electric light, and electric power lines.

9. Sewerage of any city or town, or of any settlement of not less than ten families, or of any public building belonging to the state, or of any college or university.

10. Canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for power, light, or heat.

11. Cemeteries or public parks. [C. L. § 3841\*; '90, p. 37; '92, pp. 42, 92; '96, p. 316.

Cal. C. Civ. P. § 1238\*. See Sup. '93, p. 995, and Sup. '95, p. 33, § 1233\*.

Eminent domain for pipes, tanks, etc., for natural gas, § 1552; for right of way for canals, ditches, etc., § 1277, for railroads, § 436; for drainage district, § 773.

Under section 3841, C. L. 1898, providing that the right of eminent domain may be exercised in behalf of steam and horse railroads; held, that by implication this right may be exercised in behalf of electrical railways. *Ogden City Railway Company v. Ogden City*, 7 U. 207, 26 F. 288.

3589. Estates and rights subject to condemnation. The following is a classification of the estates and rights in lands subject to be taken for public use:

1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine, mill, smelter, or other place for the reduction of ores.

2. An easement, when taken for any other use.

3. The right of entry upon, and occupation of, lands, and the right to take therefrom such earth, gravel, stones, trees, and timber as may be necessary for some public use. [C. L. § 3842\*.

Cal. C. Civ. P. § 1239\*.

3590. Property subject to condemnation. The private property which may be taken under this chapter includes:

1. All real property belonging to any person.

2. Lands belonging to the state, or to any county, or incorporated city or town, not appropriated to some public use.

3. Property appropriated to public use; *provided*, that such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated.

4. Franchises for toll roads, toll bridges, ferries, and all other franchises; *provided*, that such franchises shall not be taken unless for free highways, railroads, or other more necessary public use.

5. All rights of way for any and all purposes mentioned in section thirty-five hundred and eighty-eight, and any and all structures and improvements thereon, and the lands held or used in connection therewith, shall be subject to be connected with, crossed, or intersected by any other right of way or improvement or structure thereon. They shall also be subject to a limited use in common with the owner thereof, when necessary; but such uses of crossings, intersections, and connections shall be made in the manner most compatible with the greatest public benefit and the least private injury.

6. All classes of private property not enumerated may be taken for public use when such taking is authorized by law. [C. L. § 3843.

Cal. C. Civ. P. § 1240\*.

Property and franchises of private corporations subject to eminent domain, Con. art. 12, sec. 11.



Tab 3

# L A W S

OF THE

## STATE OF UTAH

PASSED AT THE

SEVENTH REGULAR SESSION

OF THE

## Legislature of the State of Utah

WHICH CONVENED

January 14th, 1907, at Salt Lake City, the State Capital, and  
Adjourned March 14, 1907.

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PUBLISHED BY AUTHORITY.

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SKELTON PUB. CO.,  
SALT LAKE CITY

ated, the Board of County Commissioners shall appoint the members of the Board of Education, to serve until the next election provided for in this section, and until their successors are duly elected and qualified; provided, that where there have been designated three trustees for the entire district, each one being from a school representative precinct, then these are constituted members of the Board of Education until the next election, and the Board of County Commissioners shall appoint two other members, one from each unrepresented representative precinct; but where two or more trustees are from one school representative precinct, the Board of County Commissioners shall designate the member of the Board of Education. Members of the Board of Education in a county school district of the first class shall qualify by taking and subscribing the constitutional oath of office, and giving bonds to the district in which they reside in such sum and with such sureties as the Board of County Commissioners may require and approve, conditioned for the faithful discharge of the duties of their office; the oath of office and bonds to be filed with the County Clerk.

Approved this 14th day of March, 1907.

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## CHAPTER 114.

### RIGHTS OF EMINENT DOMAIN.

An Act amending Section 3588 of the Revised Statutes of Utah, 1898, as amended by Chapter 25, Laws of Utah, 1901, providing for the uses in which the right of eminent domain may be exercised.

*Be it enacted by the Legislature of the State of Utah:*

<sup>1</sup> ~~§~~

SECTION 1. Section Amended. That Section 3588 of Revised Statutes of Utah, 1898, as amended by Chapter 25, Laws of Utah, 1901, be and the same is hereby amended to read as follows:

3588. Exercised in Behalf of What Uses. Subject to the provisions of Chapter 65, Revised Statutes, 1898, the Right of Eminent Domain may be exercised in behalf of the following public uses:

1. All public uses authorized by the Government of the United States.
2. Public buildings and grounds for the use of the State, and all other public uses authorized by the Legislature.
3. Public buildings and grounds for the use of any County, incorporated City or Town, or School District; reservoirs, canals, aqueducts,

flumes, ditches, or pipes for conducting water for the use of the inhabitants of any County, or incorporated City or Town, or for draining any County, or incorporated City or Town; for raising the banks of streams, removing obstructions therefrom, and widening, deepening or straightening their channels; for roads, streets, and alleys, and all other public uses for the benefit of any County, incorporated City or Town, or the inhabitants thereof.

4. Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, by-roads, plank and turnpike roads, roads for transportation by traction engines or road locomotives, roads for logging or lumbering purposes, and railroads and street railways for public transportation.

5. Reservoirs, dams, water-gates, canals, ditches, flumes, tunnels, aqueducts, and pipes for supplying persons, mines, mills, smelters, or other works for the reduction of ores, with water for domestic or other uses, or for irrigating purposes, or for draining and reclaiming lands, or for floating logs and lumber on streams not navigable.

6. Roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting, or other reduction of ores, or the working of mines, quarries or mineral deposits; outlets, natural or otherwise, for the deposit or conduct of tailings, refuse, or water from mills, smelters, or other works for the reduction of ores, or from mines, quarries or mineral deposits; mill dams; natural gas or oil pipe lines, tanks, or reservoirs; also an occupancy in common by the owners or possessors of different mines, quarries, mineral deposits, mills, smelters, or other places for the reduction of ores, of any place for the flow, deposit or conduct of tailings or refuse matter.

7. By roads leading from highways to residences and farms.

8. Telegraph, telephone, electric lights, and electric power lines, and sites for electric light and power plants.

9. Sewerage of any city, or town, or of any settlement of not less than ten families, or of any public building belonging to the State, or of any college or university.

10. Canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for power, light, or heat.

11. Cemeteries or public parks.

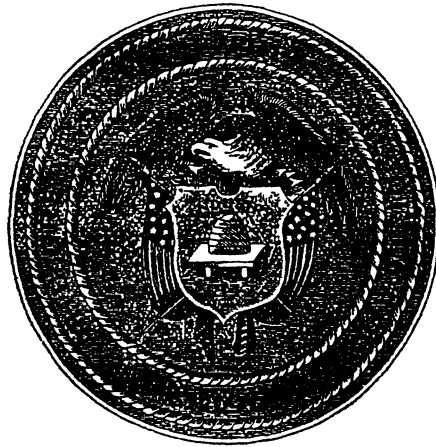
12. Pipe lines for the purpose of conducting any and all liquids connected with the manufacture of beet sugar.

Approved this 14th day of March, 1907.

Tab 4

4115

THE  
COMPILED LAWS  
OF THE  
STATE OF UTAH  
1917



VOLUME 2

Compiled, annotated, and published by authority  
of an act of the Legislature by

ALLEN T. SANFORD,  
RICHARD B. THURMAN,  
Compilation Commissioners.

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Together with the Constitution of the United States,  
the Constitution of the State of Utah, the  
Enabling Act, and the Naturalization  
Laws and Regulations.



sistent with the provisions of this chapter, apply to the proceedings mentioned in this chapter.

Cal. C. Civ. P., § 1177\*

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## CHAPTER 65.

### EMINENT DOMAIN.

**7330. (3588.) Exercised in behalf of what uses.** Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

1. All public uses authorized by the government of the United States;
2. Public buildings and grounds for the use of the state, and all other public uses authorized by the legislature;
3. Public buildings and grounds for the use of any county, incorporated city or town, or school district; reservoirs, canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county, or incorporated city or town, or for draining any county, or incorporated city or town; for raising the banks of streams, removing obstructions therefrom, and widening, deepening, or straightening their channels; for roads, streets, and alleys, and all other public uses for the benefit of any county, incorporated city or town, or the inhabitants thereof;
4. Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, by-roads, plank and turnpike roads, roads for transportation by traction engines or road locomotives, roads for logging or lumbering purposes, and railroads and street railways for public transportation;
5. Reservoirs, dams, water-gates, canals, ditches, flumes, tunnels, aqueducts, and pipes for the supplying persons, mines, mills, smelters, or other works for the reduction of ores with water for domestic or other uses, or for irrigation purposes, or for draining and reclaiming lands, or for floating logs and lumber on streams not navigable;
6. Roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting, or other reduction of ores, or the working of mines, quarries, coal mines, or mineral deposits; outlets, natural or otherwise, for the deposit or conduct of tailings, refuse, or water from mills, smelters, or other works for the reduction of ores; or from mines, quarries, coal mines, or mineral deposits; mill dams; natural gas or oil pipe lines, tanks, or reservoirs; also any occupancy in common by the owners or possessors of different mines, quarries, coal mines, mineral deposits, mills, smelters, or other places for the reduction of ores, or any place for the flow, deposit, or conduct of tailings or refuse matter;
7. By-roads leading from highways to residences and farms;
8. Telegraph, telephone, electric light, and electric power lines, and sites for electric light and power plants;
9. Sewerage of any city or town, or of any settlement of not less than ten families, or of any public building belonging to the state, or of any college or university;
10. Canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for power, light, or heat;
11. Cemeteries or public parks;
12. Pipe lines for the purpose of conducting any and all liquids connected with the manufacture of beet sugar;
13. For sites for mills, smelters, or other works for the reduction of ores and necessary to the successful operation thereof, including the right to take lands for the discharge and natural distribution of smoke, fumes, and dust therefrom, produced by the operation of such works; *provided*, that the powers granted by this subdivision shall not be exercised in any county where

the population exceeds twenty thousand, or within one mile of the limits of any incorporated city or town; nor unless the proposed condemnor has the right to operate by purchase, option to purchase, or easement, as to at least seventy-five per cent of the value of land acreage owned by persons or corporations situated within a radius of four miles from the mill, smelter, or other works for the reduction of ores; nor beyond the limits of said four miles radius; nor as to lands covered by contracts, easements, or agreements existing between the condemnor and the owner of land within said limit and providing for the operation of such mill, smelter, or other works for the reduction of ores; nor until an action shall have been commenced to restrain the operation of such mill, smelter, or other works for the reduction of ores.

Am' d '01, p. 19; '07, p. 143; '09, p. 50.

Cal. C. Civ. P., § 1238\*. See Sup. (1893) p. 995, and Sup. (1895) p. 33, § 1233\*.

Eminent domain for pipes, tanks, etc., for natural gas, § 4024; for right of way for canals, ditches, etc., § 3466; for railroads, for right of way and for water, § 1228, sub. 3; for drainage district, § 2046; for city, for water, § 670x2; irrigation districts, § 3526; county hospital site, § 2781.

Property and franchises of private corporations subject to eminent domain, Con. art. 12, sec. 11.

Private property shall not be taken or damaged for public use without just compensation, Con. art. 1, sec. 22, and note.

No person shall be deprived of property without due process of law, Con. art. 1 sec 7, and note.

Condemnation by foreign corporation, § 946. Condemnation by state armory, § 2884.

Con. art. 1, sec. 22, providing that private property shall not be taken or damaged for public use without just compensation, is a limitation on exercise of power of eminent domain.

Kimball v. Grantsville City, 19 U. 368; 57 P. 1.

If the land on which shade trees adjacent to sidewalk stood was owned by the abutting property owner, the city could only cut the trees by condemning the land and upon paying just compensation.

Glaucque v. S. L. City, 42 U. 89; 129 P. 429.

Where an owner of land on both sides of the highway acquired title to the highway by failure of the public to use and work it, she could not be compelled thereafter to allow it to be opened as a highway, without compensation being made.

Tuttle v. Sowadski, 41 U. 501; 126 P. 959.

#### RAILROADS:

Under § 3841, C. L. 1888, providing that the right of eminent domain may be exercised in behalf of steam and horse railroads; held, that by implication this right may be exercised in behalf of electrical railways.

Ogden City Railway Company v. Ogden City, 7 U. 207; 26 P. 288.

Land which is a part of a railroad's right of way, but not used for any purpose and not essential to the enjoyment of such railroad's franchise and property, may be appropriated to the use of a duly incorporated telegraph company for the purpose of constructing and maintaining its lines, since such appropriation is for a more necessary public use. Measure of damages.

Postal Tel. & C. Co. v. O. S. L. R. R. Co., 23 U. 474; 65 P. 735.

A city council cannot authorize a permanent switch track, for a private business only, along a street and across a sidewalk, from a steam railroad in the street, to the detriment of people residing on the street and to the damage of their abutting property; the streets being dedicated to public use.

Cereghino v. O. S. L. R. R. Co., 26 U. 467; 73 P. 634.

A party whose property is about to be damaged in a substantial degree for public use is given same remedies as would be accorded him if his property were actually appropriated for public use.

Stockdale v. R. G. W. Ry. Co., 28 U. 201; 77 P. 849.

Railroad cannot subject private property in

a city to burdens to which it will be subjected by running of cars and engines over a switch laid over adjoining property, without proceeding under law of eminent domain.

Id.

#### CANALS, MINES, ETC.:

The provision of this section and §§ 7332, 7338, render, under ordinary circumstances, property appropriated for a public use liable to condemnation for another public use.

Salt Lake City v. Water & El. P. Co., 24 U. 249; 67 P. 672.

A proceeding by a power company under the eminent domain statute to obtain the right to connect a flume with a city's canal for purpose of discharging water into it, under the provisions of this section and § 7332, is not a suit to condemn land belonging to the city, and it is not necessary to show, as provided in § 7333, that the use to which it is to be applied by power company is a more necessary public use than that to which the city devotes it. (On rehearing, 25 U. 456; 71 P. 1069.)

Salt Lake City v. Water & El. P. Co., 24 U. 249; 67 P. 672.

Property is taken for a public use, within the provision of the constitution declaring that private property shall not be taken for public use without just compensation, when the taking is for use that will promote the public interest, and will tend to develop the resources of the state. In this case a right of way for an irrigation ditch.

Nash v. Clark, 27 U. 158; 75 P. 371; affirmed 198 U. S. 361.

The construction and operation of roads and tramways for the development and working of mines is a public use.

Highland B. G. M. Co. v. Strickley, 28 U. 215; 78 P. 296; affirmed 200 U. S. 525.

Where a street grade was established but not carried into effect, and thereafter buildings were erected, the city was liable for damages resulting from the change of grade. The fact that the improvements were made before the adoption of Con. art. 1, sec. 22, does not relieve liability.

Kimball v. S. L. City, 32 U. 253; 90 P. 395.

Hempstead v. S. L. City, 32 U. 261; 90 P. 397.

Felt v. S. L. City, 32 U. 275; 90 P. 402.

Webber v. Salt Lake City, 40 U. 221; 120 P. 503.

Lannan v. Waltenspiel, 45 U. 564; 147 P. 908.

A proceeding under § 3467 to obtain the right to enlarge an irrigation canal of another is controlled by the principles involved in the exercise of the right of eminent domain.

S. L. City v. East Jordan Irr. Co., 40 U. 126; 121 P. 593.

The right to use a reservoir in common may be condemned.

Gunnison Irr. Co. v. Gunnison High. Canal Co., 51 U. —; 174 P. 852.

The right to run water through defendant's irrigation canal may be condemned, though the defendant has only an easement and the owners of the land were not parties.

Whiterocks Irr. Co. v. Mooseman, 45 U. 79; 141 P. 459.

A purchaser of property on a city street does so with the implied consent that the street must be made reasonably safe and convenient for travel, and cannot complain if it is lowered or filled to make it safe for travel so long as the city has established the grade so as to



Tab 5

3534

**L A W S**

of the

**STATE OF UTAH, 1963**

Passed by

**REGULAR SESSION**

of the

**THIRTY-FIFTH LEGISLATURE**

Convened at the Capitol in the City of Salt Lake

January 14, 1963

And Adjourned Sine Die on

March 14, 1963

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Published by Authority

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theretofore, in writing, acknowledged before any officer authorized to take acknowledgments, released his or her or their control or custody of such child to any agency licensed to receive children for placement or adoption under Chapter 8 of Title 55, and such agency consents, in writing, to such adoption.

A minor parent shall have the power to consent to the adoption of such parent's child, and a minor parent shall have the power to release, such parent's control or custody of such parent's child to any agency licensed to receive children for placement or adoption under Chapter 8, Title 55; and, such a consent or release so executed shall be valid and have the same force and effect as a consent or release executed by an adult parent. A minor parent, having so executed a release or consent, cannot revoke the same upon such parent's attaining the age of majority.

Approved March 15, 1963.

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## CHAPTER 193

S. B. No. 155.

(Passed March 14, 1963. In effect May 14, 1963.)

### COAL PIPE LINE EMINENT DOMAIN

**An Act Amending Section 78-34-1, Utah Code Annotated 1953, as Amended by Chapter 174, Laws of Utah 1957, Relating to Eminent Domain; Providing for Eminent Domain Regarding Coal Pipe Lines.**

*Be it enacted by the Legislature of the State of Utah:*

#### **Section 1. Section Amended.**

Section 78-34-1, Utah Code Annotated 1953, as amended by Chapter 174, Laws of Utah 1957, is amended to read:

#### **78-34-1. Uses for Which Right May be Exercised.**

Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses;

- (1) All public uses authorized by the government of the United States.
- (2) Public buildings and grounds for the use of the state, and all other public uses authorized by the Legislature.
- (3) Public buildings and grounds for the use of any county, city or incorporated town, or board of education; reservoirs, canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county or city or incorporated town, or for the draining of any county, city or incorporated town; the raising of the banks of streams, removing obstructions therefrom, and widening, deepening or straightening their channels; roads, streets and alleys; and all other public uses for the benefit of any county, city or incorporated town, or the inhabitants thereof.
- (4) Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, byroads, plank and turnpike roads, roads for transportation by traction engines or road locomotives, roads for logging or lumbering purposes, and railroads and street railways for public transportation.
- (5) Reservoirs, dams, watergates, canals, ditches, flumes, tunnels, aqueducts and pipes for the supplying of persons, mines, mills, smelters or other works for the reduction of ores, with water for domestic or

other uses, or for irrigation purposes, or for the draining and reclaiming of lands; or for the floating of logs and lumber on streams not navigable.

(6) Roads, railroads, tramways, tunnels, ditches, flumes, pipes and dumping places to facilitate the milling, smelting or other reduction of ores, or the working of mines, quarries, coal mines or mineral deposits; outlets, natural or otherwise, for the deposit or conduct of tailings, refuse or water from mills, smelters or other works for the reduction of ores, or from mines, quarries, coal mines or mineral deposits; mill dams; gas, oil or coal pipe lines, tanks or reservoirs; also any occupancy in common by the owners or possessors of different mines, quarries, coal mines, mineral deposits, mills, smelters, or other places for the reduction of ores, or any place for the flow, deposit or conduct of tailings or refuse matter.

(7) Byroads leading from highways to residences and farms.

(8) Telegraph, telephone, electric light and electric power lines, and sites for electric light and power plants.

(9) Sewerage of any city or town, or of any settlement of not less than ten families, or of any public building belonging to the state, or of any college or university.

(10) Canals, reservoirs, dams, ditches, flumes, aqueducts and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for power, light or heat.

(11) Cemeteries and public parks.

(12) Pipe lines for the purpose of conducting any and all liquids connected with the manufacture of beet sugar.

(13) Sites for mills, smelters or other works for the reduction of ores and necessary to the successful operation thereof, including the right to take lands for the discharge and natural distribution of smoke, fumes and dust therefrom, produced by the operation of such work; provided that the powers granted by this subdivision shall not be exercised in any county where the population exceeds twenty thousand, or within one mile of the limits of any city or incorporated town; nor unless the proposed condemner has the right to operate by purchase, option to purchase or easement, at least seventy-five per cent in value of land acreage owned by persons or corporations situated within a radius of four miles from the mill, smelter or other works for the reduction of ores; nor beyond the limits of said four-mile radius; nor as to lands covered by contracts, easements or agreements existing between the condemner and the owner of land within said limit and providing for the operation of such mill, smelter or other works for the reduction of ores; nor until an action shall have been commenced to restrain the operation of such mill, smelter or other works for the reduction of ores.

(14) Buildings, grounds, lands and rights of way for use of private educational institutions of collegiate grade within the State of Utah which are not conducted for profit and which admit all students of the state meeting the academic and moral standards of such educational institutions.

Approved March 19, 1963.

Tab 6

3 5 0 9

LAWS  
of the  
STATE OF UTAH, 1969

Passed by  
REGULAR SESSION  
of the  
THIRTY - EIGHTH LEGISLATURE

Convened at the Capitol in the City of Salt Lake

January 13, 1969  
And Adjourned Sine Die on  
March 13, 1969

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Published by Authority

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**Section 1. Section Enacted.**

Section 78-25-21, Utah Code Annotated 1953, as enacted by Chapter 46, Laws of Utah 1955, is amended to read as follows:

**78-25-21. Admissibility of results in evidence.**

The results of the tests shall be received in evidence where the conclusion of all examiners, as disclosed by the tests, is that the alleged father is not the actual father of the child, and the question of paternity shall be so resolved. If the examiners disagree in their findings or conclusions, the question shall be submitted to a jury duly impanelled. If the examiners conclude that the blood tests show the possibility of the alleged father's paternity, admission of this evidence is within the discretion of the court, depending upon the infrequency of the blood type.

Approved February 18, 1969.

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**CHAPTER 258**

S. B. No. 59

(Passed February 13, 1969. In effect May 13, 1969)

**EMINENT DOMAIN FOR MINERALS IN SOLUTION**

**An Act Amending Sections 78-34-1 and 78-34-2, Utah Code Annotated 1953, as Amended by Chapter 174, Laws of Utah 1957, and Chapter 193, Laws of Utah 1963, Relating to Eminent Domain, Providing for Eminent Domain for Solar Evaporation Ponds and Other Facilities for the Recovery of Minerals in Solution.**

*Be it enacted by the Legislature of the State of Utah:*

**Section 1. Section amended.**

Section 78-34-1, Utah Code Annotated 1953, as amended by Chapter 174, Laws of Utah 1957, and Chapter 193, Laws of Utah 1963, is amended to read:

**78-34-1. Uses for which right may be exercised.**

Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses;

(1) All public uses authorized by the government of the United States.

(2) Public buildings and grounds for the use of the state, and all other public uses authorized by the legislature.

(3) Public buildings and grounds for the use of any county, city or incorporated town, or board of education; reservoirs, canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county or city or incorporated town, or for the draining of any county, city or incorporated town; the raising of the banks of streams, removing obstructions therefrom, and widening, deepening or straightening their channels; roads, streets and alleys; and all other public uses for the benefit of any county, city or incorporated town, or the inhabitants thereof.

(4) Wharves, docks, piers chutes, booms, ferries, bridges, toll roads, byroads, plank and turnpike roads, roads for transportation by traction engines or road locomotives, roads for logging or lumbering purposes, and

railroads and street railways for public transportation.

(5) Reservoirs, dams, watergates, canals, ditches, flumes, tunnels, aqueducts and pipes for the supplying of persons, mines, mills, smelters or other works for the reduction of ores, with water for domestic or other uses, or for irrigation purposes, or for the draining and reclaiming of lands, or for the floating of logs and lumber on streams not navigable, or for solar evaporation ponds and other facilities for the recovery of minerals in solution.

(6) Roads, railroads, tramways, tunnels, ditches, flumes, pipes and dumping places to facilitate the milling, smelting or other reduction of ores, or the working of mines, quarries, coal mines or minerals deposits including minerals in solution; outlets, natural or otherwise, for the deposit or conduct of tailings, refuse or water from mills, smelters or other works for the reduction of ores, or from mines, quarries, coal mines or mineral deposits including minerals in solution; mill dams; gas, oil or coal pipe lines, tanks or reservoirs; solar evaporation ponds and other facilities for the recovery of minerals in solution; also any occupancy in common by the owners or possessors of different mines, quarries, coal mines, mineral deposits, mills, smelters, or other places for the reduction of ores, or any place for the flow, deposit or conduct of tailings or refuse matter.

(7) Byroads leading from highways to residences and farms.

(8) Telegraph, telephone, electric light and electric power lines, and sites for electric light and power plants.

(9) Sewerage of any city or town, or of any settlement of not less than ten families, or of any public building belonging to the state, or of any college or university.

(10) Canals, reservoirs, dams, ditches, flumes, aqueducts and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for power, light or heat.

(11) Cemeteries and public parks.

(12) Pipe lines for the purpose of conducting any and all liquids connected with the manufacture of beet sugar.

(13) Sites for mills, smelters or other works for the reduction of ores and necessary to the successful operation thereof, including the right to take lands for the discharge and natural distribution of smoke, fumes and dust therefrom, produced by the operation of such works; provided, that the powers granted by this subdivision shall not be exercised in any county where the population exceeds twenty thousand, or within one mile of the limits of any city or incorporated town; nor unless the proposed condemner has the right to operate by purchase, option to purchase or easement, at least seventy-five per cent in value of land acreage owned by persons or corporations situated within a radius of four miles from the mill, smelter or other works for the reduction of ores; nor beyond the limits of said four-mile radius; nor as to lands covered by contracts, easements or agreements existing between the condemner and the owner of land within said limit and providing for the operation of such mill, smelter or other works for the reduction of ores; nor until an action shall have been commenced to restrain the operation of such mill, smelter or other works for the reduction of ores.

(14) Buildings, grounds, lands and rights of way for use of private educational institutions of collegiate grade within the State of Utah



which are not conducted for profit and which admit all students of the state meeting the academic and moral standards of such educational institutions.

Section 78-34-2, Utah Code Annotated 1953, is amended to read:

**78-34-2. Estates and rights that may be taken.**

The following is a classification of the estates and rights in lands subject to be taken for public use:

(1) A fee simple, when taken for public buildings or grounds or for permanent buildings, for reservoirs and dams and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine, mill, smelter or other place for the reduction of ores, or for solar evaporation ponds and other facilities for the recovery of minerals in solution; provided that where surface ground is underlaid with minerals, coal or other deposits sufficiently valuable to justify extraction, only a perpetual easement may be taken over the surface ground over such deposits.

(2) An easement, when taken for any other use.

(3) The right of entry upon, and occupation of lands, with the right to take therefrom such earth, gravel, stones, trees and timber as may be necessary for some public use.

Approved March 3, 1969.

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**CHAPTER 259**

H. B. No. 276

(Passed March 13, 1969. In effect May 13, 1969)

**COURT ADMINISTRATOR TO APPOINT REPORTERS**

**An Act Requiring the Court Administrator to Appoint Certified Shorthand Reporters, Providing for their Tenure of Office Repealing Section 78-56-1, Utah Code Annotated 1953.**

*Be it enacted by the Legislature of the State of Utah:*

**Section 1. Court administrator to appoint certified shorthand reporters —District judge to approve.**

The court administrator shall appoint a certified shorthand reporter with the approval of the district judge to report the proceedings in each division of the district courts. The certified shorthand reporter shall hold office during the pleasure of the court administrator, and the district judge.

**Section 2. Section repealed.**

Section 78-56-1, Utah Code Annotated 1953, is hereby repealed.

Approved March 19, 1969.

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**CHAPTER 260**

H. B. No. 103

(Passed February 14, 1969. In effect May 13, 1969)

**COURT REPORTER FEES**

**An Act Amending Section 78-56-4, Utah Code Annotated 1953, as Amended by Chapter 183, Laws of Utah 1961, Relating to Fees of Court**

Tab 7

## EMINENT DOMAIN AMENDMENTS

1997 GENERAL SESSION

STATE OF UTAH

Sponsor: Mike Dimitrich

AN ACT RELATING TO THE JUDICIAL CODE, EXPANDING THE EMINENT DOMAIN  
STATUTE TO INCLUDE DEPOSITS OF OIL, GAS, AND HYDROCARBONS, AS WELL  
AS GEOTHERMAL STEAM;

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

78-34-1, as last amended by Chapter 164, Laws of Utah 1983

*Be it enacted by the Legislature of the state of Utah:*

Section 1. Section 78-34-1 is amended to read:

78-34-1. Uses for which right may be exercised.

Subject to the provisions of this chapter, the right of eminent domain may be exercised in  
behalf of the following public uses:

(1) All public uses authorized by the Government of the United States;

(2) Public buildings and grounds for the use of the state, and all other public uses  
authorized by the Legislature;

(3) Public buildings and grounds for the use of any county, city or incorporated town, or  
board of education, reservoirs, canals, aqueducts, flumes, ditches, or pipes for conducting water  
for the use of the inhabitants of any county or city or incorporated town, or for the draining of any  
county, city or incorporated town; the raising of the banks of streams, removing obstructions  
therefrom and widening, deepening or straightening their channels, roads, streets and alleys, and  
all other public uses for the benefit of any county, city or incorporated town, or the inhabitants  
thereof;

(4) Wharves, docks, piers, wharves, booms, ferries, bridges, toll roads, byroads, plank and  
turnpike roads, roads for transportation by traction engines or road locomotives, roads for logging

1 or lumbering purposes, and railroads and street railways for public transportation.

2 (5) Reservoirs, dams, watergates, canals, ditches, flumes, tunnels, aqueducts and pipes for  
3 the supplying of persons, mines, mills, smelters or other works for the reduction of ores, with  
4 water for domestic or other uses, or for irrigation purposes, or for the draining and reclaiming of  
5 lands, or for the floating of logs and lumber on streams not navigable, or for solar evaporation  
6 ponds and other facilities for the recovery of minerals in solution.

7 (6) Roads, railroads, turnways, tunnels, ditches, flumes, pipes and dumping places to  
8 facilitate the milling, smelting or other reduction of ores, or the working of mines, quarries, coal  
9 mines [or] mineral deposits including deposits of oil, gas, and hydrocarbons, minerals in solution  
10 and geothermal steam, outlets, natural or otherwise, for the deposit or conduct of tailings, refuse  
11 or water from mills, smelters or other works for the reduction of ores, or from mines, quarries, coal  
12 mines or mineral deposits including deposits of oil, gas, and hydrocarbons, minerals in solution,  
13 and geothermal steam, mill dams, gas, oil or coal pipelines, tanks or reservoirs, including any  
14 subsurface stratum or formation in any land for the underground storage of natural gas, and in  
15 connection therewith such other interests in property as may be required adequately to examine,  
16 prepare, maintain, and operate such underground natural gas storage facilities, and solar  
17 evaporation ponds and other facilities for the recovery of minerals in solution, also any occupancy  
18 in common by the owners or possessors of different mines, quarries, coal mines, mineral deposits,  
19 mills, smelters, or other places for the reduction of ores, or any place for the flow, deposit or  
20 conduct of tailings or refuse matter.

21 (7) Byroads leading from highways to residences and farms.

22 (8) Telegraph, telephone, electric light and electric power lines, and sites for electric light  
23 and power plants.

24 (9) Sewerage of any city or town, or of any settlement of not less than ten families, or of  
25 any public building belonging to the state, or of any college or university.

26 (10) Canals, reservoirs, dams, ditches, flumes, aqueducts and pipes for supplying and  
27 storing water for the operation of machinery for the purpose of generating and transmitting  
28 electricity for power, light or heat.

29 (11) Cemeteries and public parks.

30 (12) Pipe lines for the purpose of conducting any and all liquids connected with the  
31 manufacture of beet sugar.

1 (13) Sites for mills, smelters or other works for the reduction of ores and necessary to the  
2 successful operation thereof, including the right to take lands for the discharge and natural  
3 distribution of smoke, fumes and dust therefrom, produced by the operation of such works,  
4 provided, that the powers granted by this subdivision shall not be exercised in any county where  
5 the population exceeds twenty thousand, or within one mile of the limits of any city or  
6 incorporated town; nor unless the proposed condemner has the right to operate by purchase, option  
7 to purchase or easement, at least seventy-five per cent in value of land acreage owned by persons  
8 or corporations situated within a radius of four miles from the mill, smelter or other works for the  
9 reduction of ores; nor beyond the limits of said four-mile radius; nor as to lands covered by  
10 contracts, easements or agreements existing between the condemner and the owner of land within  
11 said limit and providing for the operation of such mill, smelter or other works for the reduction of  
12 ores; nor until an action shall have been commenced to restrain the operation of such mill, smelter  
13 or other works for the reduction of ores.

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**Legislative Review Note**  
as of 1-28-97 4:28 PM

A limited legal review of this bill raises no obvious constitutional or statutory concerns.

Office of Legislative Research and General Counsel