

2009

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiffs/Appellants,
v.

KFJ RANCH PARTNERSHIP, a business
association of unknown type,

Defendant/Appellee.

Case No. 20090796

BRIEF OF APPELLANTS

APPEAL

Seventh Judicial District Court
Honorable George M. Harmond

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APPELLATE COURTS

3 2009

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I. JURISDICTION OF THE SUPREME COURT

The Supreme Court has jurisdiction of this appeal pursuant to Utah Code § 78A-3-102(3)(j).

II. ISSUES PRESENTED FOR REVIEW

Whether the district court, interpreting Utah Code § 78B-6-501(6)(a), incorrectly reached the legal conclusion that this statutory grant of authority for the exercise of eminent domain to reach mineral deposits excludes oil and gas as non-mineral substances?

III. STANDARD OF APPELLATE REVIEW

This case is a question of statutory interpretation, which is a question of law. *See, e.g., Sill v. Hart*, 2007 UT 45, ¶ 5, 162 P.3d 1099; *Sachs v. Lesser*, 2008 UT 87, ¶ 9, 207 P.3d 1215. Where the issue on appeal is purely legal in nature, this Court “review[s] the district court’s decision for correctness, without deference.” *Conatser v. Johnson*, 2008 UT 48, ¶ 10, 194 P.3d 897 (quotation omitted).

IV. PRESERVATION OF ISSUE FOR APPEAL

A Notice of Appeal was timely filed with the Seventh Judicial District Court in and for Carbon County, State of Utah, on September 27, 2009.

V. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

Utah Code § 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 § 78B-6-501(6)(d): Subject to the provisions of this part, the right of eminent domain may be exercised on behalf of the following public uses: (6)(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 § 53C-1-103(4): As used in this title: (4) “Mineral” includes oil, gas, and hydrocarbons.

VI. STATEMENT OF THE CASE

The State of Utah School and Institutional Trust Administration (the “Trust”) owns oil and gas minerals deposited in lands bounded by real property owned and/or controlled by KFJ Ranch Partnership (the “Ranch”). Marion Energy, Inc. (“Marion”) is the Trust’s Lessee of the Trust’s oil and gas deposits. (R.00003, ¶ 10)

Due to location and topography, Marion cannot access the leased premises without crossing Ranch-owned lands. In an effort to gain access to the leased oil and gas deposits, Marion unsuccessfully attempted to negotiate easements from the Ranch. Despite Marion’s good-faith efforts, the Ranch refused to grant Marion any easements, and Marion continued to be without an access route to the leased oil and gas. (R.00006, ¶ 17)

Since it was impossible for Marion to reach the leased oil and gas deposits, or for the Trust to thereby receive royalties from the production of oil and gas thereon, the Trust and Marion brought an action for condemnation in the district court. The condemnation action was founded upon the express rights of eminent domain granted by the legislature and codified as Utah Code § 78B-6-501(6)(a) (“Section 501(6)(a)”) and Utah Code § 78B-6-503. (R.00007, ¶ 20)

On its face, Section 501(6)(a) confers the power of eminent domain for the construction of “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.**” (Emphasis added.) (R.000126, ¶ 1)

The Ranch moved to dismiss the Complaint in Condemnation. (R.000073) In response, Marion and the Trust not only opposed the Ranch’s motion (R.000119), but also moved for partial summary judgment on the grounds that, as a matter of law, Utah Code § 78B-6-501, authorizes the power of eminent domain to access Plaintiffs’ leases for the working of oil and gas mineral deposits. (R.000144, ¶ 1)

Given this procedural posture, the district court was faced with the sole question of whether the Trust’s oil and gas deposits sought to be accessed by Marion fell within the scope of “mineral deposits including minerals in solution” as used in Section 501(6)(a).

Following a hearing on the parties’ motions, the district court incorrectly concluded that the legislature purposefully excluded “oil and gas” from Section 501(6)(a). As a result, according to the district court, Marion and the Trust could not rely upon the eminent domain authority set forth therein to reach the oil and gas deposits owned by the Trust situated below real property owned by the Ranch. (R.000216, ¶ 4)

The district court’s holding, as a matter of law, was incorrect and cannot be sustained. This Court consistently has held that the term “minerals” includes oil and gas, and that definition is supported by other authority, including the Trust’s Enabling Act. *See* Utah Code § 53C-1-103(4).

Application of the settled definition of “minerals” to an interpretation of Section 501(6)(a) compels the conclusion that Marion and the Trust properly invoked the statutory authority of eminent domain to access the leased oil and gas deposits. The

district court erred by ignoring the unambiguous meaning of “minerals” and by impermissibly applying principles of statutory construction to an unambiguous statutory provision. Moreover, the district court’s ruling would result in an absurd result that cannot be supported or affirmed.

VII. STATEMENT OF FACTS

Marion is the lessee of oil and gas leases ML-48130 and ML-48132 (the “Leases”), which it leased from the Trust. Pursuant to the Leases, the Trust remains the reversionary interest owner. (R.00003, ¶ 10) Both Leases are overlain by surface owned by or under permit to the Ranch.

Specifically, Lease ML-48130 covers the following lands:

Township 12 South, Range 12 East, SLB&M

Section 21:	N $\frac{1}{2}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ SE $\frac{1}{4}$
Section 22:	SE $\frac{1}{4}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$
Section 23:	SW $\frac{1}{4}$ NE $\frac{1}{4}$, W $\frac{1}{2}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ NW $\frac{1}{4}$
Section 24:	SE $\frac{1}{4}$ NE $\frac{1}{4}$
Section 25:	E $\frac{1}{2}$ SW $\frac{1}{4}$
Section 26:	NW $\frac{1}{4}$ NW $\frac{1}{4}$
Section 27:	NE $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$
Section 36:	ALL

(containing 1560.00 acres more or less in Carbon County, Utah)

Lease ML-48132 covers the following lands:

Township 12 South, Range 13 East, SLB&M

- Section 19: Lot 10 (44.28 acres), SE $\frac{1}{4}$ NE $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$
- Section 20: S $\frac{1}{2}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$
- Section 29: NW $\frac{1}{4}$ NW $\frac{1}{4}$, W $\frac{1}{2}$ SW $\frac{1}{4}$
- Section 30: Lot 1 (46.26 acres), E $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$
- Section 31: Lot 6 (32.47 acres), E $\frac{1}{2}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$
- Section 32: Lot 1 (33.40 acres), Lot 2 (33.18 acres), Lot 3 (33.13 acres), Lot 4 (33.61 acres), N $\frac{1}{2}$ S $\frac{1}{2}$, N $\frac{1}{2}$ (ALL)

(containing 1576.33 acres more or less in Carbon County, Utah) (R.00003-00004, ¶ 10)

To exploit the leased oil and gas deposits, Marion proposed two initial well locations (the “Well Sites”) on surface lands covered by or within the Ranch. Marion’s plans called for the KFJ #20-1 well to be located in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 20 in Township 12 South, Range 13 East, SLB&M on Lease ML-48132, in close proximity to the existing road leading from Nine Mile Canyon Road through Sections 17, 21 and 29, also known as the KFJ Ranch Road. (R.00005, ¶ 11)

Marion also proposed to locate the Pole Canyon West #36-1 well in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 36, Township 12 South, Range 12 East, SLB&M on Lease ML-48130. In an effort to minimize surface disturbances, this well was proposed to be located in close proximity to the existing road, known as the Pole Canyon Road, running south from Nine Mile Canyon Road through Sections 24 and 25 and into State Section 36. (R.00005, ¶ 12)

If the wells drilled on the Well Sites proved to be commercially productive, Marion intended to install pipelines connecting to the wells in or near these existing roads in efforts to further minimize surface damage to the KFJ Ranch. (R.00005, ¶ 13)

Because of the topography and the location of the lands covered by the Leases, however, it was impossible for Marion to access the Leases without crossing surface lands owned and/or controlled by the Ranch. As a result, Marion engaged in substantive, good-faith efforts to negotiate easements (the “Easements”) from the Ranch. (R.00006, ¶ 17)

Despite these efforts, however, the Ranch refused to enter into any agreement with Marion with respect to either the locations of or the compensation to be paid to the Ranch for Easements across the Ranch. (R.000130)

Left without any means of accessing the Leases and the leased oil and gas deposits, Marion sought to avail itself of the legislatively enacted condemnation rights. Pursuant to Utah Code § 78B-6-505, Marion advised the Ranch of its rights to mediation and arbitration under Utah Code § 78B-6-522, provided the name and current telephone number of the office of the State of Utah Private Property Ombudsman, and gave the Ranch a written statement explaining that oral representations or promises made during the negotiation process were not binding upon Marion. (R.00006, ¶ 18)

Marion also retained J. Philip Cook, MAI, CRE, Utah State-Certified General Appraiser, Certificate 5451057-CG00, of LECG, LLC, to appraise the property to be taken from the Ranch for use as the Easements (the “KFJ Appraisal”). In the KFJ Appraisal, Mr. Cook arrived at a total value for the Easements of \$28,000, reflecting a

rounded valuation of the perpetual easement sought by Marion (valued at \$24,868), in addition to the temporary construction easement also requested by Marion (valued at \$3,040). The bases for the valuations were set forth in detail in the KFJ Appraisal. (R.00007, ¶ 24, 25)

Because the Trust, as the reversionary interest owner of the Leases, desired to have Marion exploit the oil and gas deposits on the Leases and thereby pay the prescribed royalties to and for the benefit of the Trust, Marion and the Trust filed a Complaint in Condemnation (the “Complaint”) in the Seventh Judicial District Court, in and for Carbon County (the “district court”). (R.00001-00009)

After being served with the Complaint, the Ranch moved to dismiss the Complaint pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure asserting that the Trust and Marion did “not have the authority under the condemnation statute to take Defendant’s private land for roads to access oil and gas leases.” (R.00073, ¶ 1) Marion and the Trust opposed the Ranch’s Motion to Dismiss and also moved for partial summary judgment for a determination “that Utah Code § 78B-6-501 authorizes Plaintiffs to condemn an easement to access Trust oil and gas leases.” (R.000144, ¶ 1)

Following a hearing on August 5, 2009, the district court issued a Judgment and Order Granting Defendant’s Motion to Dismiss and Denying Plaintiffs’ Motion for Summary Judgment (the “Judgment”). In the Judgment, the district court held that Section 501(6)(a) “does not provide authority to take lands for roads to access oil and gas deposits.” (R.000216, ¶ 3)

Marion and the Trust appealed the Judgment to this Court. (R.000219)

VIII. SUMMARY OF ARGUMENTS

The district court incorrectly held that the legislature purposefully excluded oil and gas from Section 501(6)(a) and, as a result, Marion and the Trust could not rely upon the eminent domain authority set forth therein to reach the Trust's oil and gas deposits situated below real property owned by the Ranch.

The district court's holding, as a matter of law, was incorrect and cannot be sustained. This Court consistently has held that the term "minerals" includes oil and gas, and that definition is supported by other authority, including the definition of "mineral" expressed in the Trust's Enabling Act. Utah Code § 53C-1-103(4).

Application of the settled definition of "minerals" to the construction of Section 501(6)(a) compels the conclusion that Marion and the Trust properly invoked the statutory authority of eminent domain to access the leased oil and gas deposits. The district court erred by ignoring the unambiguous meaning of "minerals" and by impermissibly applying principles of statutory construction to an unambiguous statutory provision. Moreover, the district court's ruling would result in an absurd result that cannot be supported or affirmed. The district court's holding was, as a matter of law, incorrect and cannot be sustained.

IX. ARGUMENT

A. THE DISTRICT COURT INCORRECTLY INTERPRETED UTAH CODE SECTION 501(6)(a) BY CONCLUDING THAT THE STATUTORY GRANT OF AUTHORITY FOR THE EXERCISE OF EMINENT DOMAIN TO REACH MINERAL DEPOSITS EXCLUDES OIL AND GAS AS NON-MINERAL SUBSTANCES.

In plain and unambiguous terms, Section 501(6)(a) confers the power of eminent domain for the construction of “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.” The only question addressed by the district court and the only question relevant to this appeal is whether the leased oil and gas deposits sought to be accessed by Marion and the Trust are within the ambit of “mineral deposits including minerals in solution” that may be accessed by resort to the powers of eminent domain.

This Court consistently has held that the term “minerals” includes oil and gas, and that definition is supported by other authority, including the definition of “mineral” contained in the Trust’s Enabling Act. *See* Utah Code § 53C-1-103(4). The district court’s judgment excluding oil and gas as non-mineral substances outside the reach of the statute constitutes reversible error.

1. Over 100 Years of Precedent Demonstrates that the Term “Minerals” Unequivocally includes Oil and Gas Deposits.

For more than 100 years, Utah courts consistently have held that the term “minerals” includes oil and gas deposits. The district court’s Judgment impermissibly ignores and repudiates this long-standing authority.

In *Nephi Plaster & Mfg. Co. v. Juab County*, 33 Utah 114, 93 P. 53, 54 (Utah 1907), the court construed the taxing statute in Utah’s 1898 Revised Statutes, which read, in relevant part: “[a]ll mines and mining claims, both placer and rock in place, containing or bearing gold, silver, copper, lead, coal or other valuable mineral deposits” In considering whether the statutory term “mineral deposits” was to be read restrictively or expansively, and after review of the numerous authorities and cases cited therein, the court concluded:

We think that it is reasonably clear that the phrase “or other valuable mineral deposits,” was not intended to contain minerals only *ejusdem generis* with the metals specially named, but that it was intended that **all mineral deposits** should be taxed in this way, **and not only the metalliferous minerals and coal.**

Id. at 57 (emphasis added).

Though the *Nephi Plaster* decision was limited to “a gypsum deposit, and nothing else[.]” the court’s conclusions are particularly applicable to the present case because the term “mines” was held not to be “limited to mere subterranean excavations or workings,” nor was the term “minerals” **“limited to the metals or metalliferous deposits”** *Id.* at 58 (emphasis added).

This Court’s expansive definition of “minerals” in *Nephi Plaster* consistently has been reaffirmed and reiterated, and has been utilized to mandate the inclusion of oil and gas within the term. In *Utah Copper Co. v. Montana-Bingham Consol. Mining Co.*, 69 Utah 423, 255 P. 672, 673 (Utah 1926), this Court considered “a perpetual grant or easement to dump ore, rock, and earth, and other material, on the surface of a portion of the mining claim of the defendant” In reviewing a condemnation action, the *Utah Copper* court held that the plaintiff had the right “to avail itself of waters carrying copper or other minerals in solution” *Id.* at 674.

The *Utah Copper* defendants had attempted to rely upon *Nephi Plaster*, which had been “cited to the effect that the term ‘mineral’ is not limited to metal or metalliferous deposits but **also includes petroleum and other liquids.**” *Id.* at 675 (emphasis added). While the court found defendants’ reliance on *Nephi Plaster* unpersuasive, it did so while expressly noting that the cited proposition – that the term “mineral” is not limited to metal or metalliferous deposits but **also includes petroleum and other liquids** – was a proposition “[t]hat may be conceded.” *Id.*

The *Utah Copper* defendants also had cited additional cases “to the effect that **oil and gas are minerals**” *Id.* (emphasis added). The court again reiterated that defendants’ assertion “may be conceded,” even though it ultimately failed to support defendants’ claims. *Id.*

The now “conceded” principal that the term “minerals” includes oil and gas was reaffirmed in *Western Development Company v. Nell*, 4 Utah 2d 112, 288 P.2d 452 (Utah 1955), where the court considered conveyance documents that granted and reserved “all

the coal, gold, silver, lead, copper, and other precious and valuable ores, minerals, mines and mining rights.” *Id.* at 453.

The *Western Development* case stemmed from the “problem of the interpretation of a deed, usually an old one, where ‘minerals’ or ‘mineral rights’ have been reserved and oil and gas have subsequently been discovered on the land;” a problem that had not previously arisen in Utah but had “been frequently treated in other jurisdictions.” *Id.* at 453-54.

The *Western Development* court’s consideration of the grants and reservations at issue was founded upon the fundamental understanding and acknowledgement that the term “minerals” **included** oil and gas:

Were the only question involved the construction of the first paragraphs of both the reservation and the grant in the instant case, we would have no trouble applying the majority rule that a **reservation of “minerals” retains the rights to oil and gas**, unless a contrary intention is manifested.

Id. at 454 (emphasis added) (citing *Nephi Plaster*).

The construction of the term “minerals” was not the only consideration in *Western Development*, however. Rather, since the intent of the parties controlled the construction of the particular conveyance instrument at issue and “the intention of the parties [could] be ascertained from the instrument,” the court elected not to invoke “arbitrary rules of law as to construction.” *Id.* Nevertheless, since the evidence of the intent of the parties was “equivocal” and there was no proof “by extrinsic evidence that the intention of the parties was other than to grant what is generally accepted as within the term ‘minerals,’” oil and gas were minerals included in the operative grants and reservations. *Id.* at 455.

2. The District Court Impermissibly Ignored the Statute's Plain Meaning.

Despite this 100 year history of this Court's consistent interpretation of the term "minerals" to include oil and gas, the district court failed in its mandate to construe Section 501(6)(a) by relying on the "plain language of the statute."

There is no question or doubt but that Section 501(6)(a) allows for the exercise of the powers of eminent domain and condemnation in connection with "the milling, smelting, or other reduction of ores, or the working of mines, coal mines, or mineral deposits, including minerals in solution." The district court should have been guided by this Court's direction in *Western Development*:

Were the only question involved the construction of the first paragraphs of both the reservation and the grant in the instant case, we would have no trouble applying the majority rule that **a reservation of "minerals" retains the rights to oil and gas**, unless a contrary intention is manifested.

288 P.2d at 454 (emphasis added).

Significantly, unlike this Court in *Western Development*, the district was not required to consider the intent of the parties. Rather, the only mandate to the district court was that it apply the unambiguous definition of a term in a statute. In that light, this case is directly analogous to and the district court properly should have been guided by the Tenth Circuit's holding in *Anschutz Land and Livestock Company v. Union Pacific Railroad Company*, 820 F.2d 338 (10th Cir. 1987). There, the court, applying Utah law and after analyzing *Western Development*, held that the term "other minerals" "**as a matter of law**" encompassed oil and gas interests and, thus, "[e]xtrinsic evidence of intent was . . . inadmissible." *Id.* at 343 (emphasis added).

The district court erred by failing to apply the unambiguous definition of “minerals” in its interpretation of Section 501(6)(a). Therefore, as a matter of law, the Judgment cannot be sustained.

3. The Principles of Statutory Construction Relied upon by the District Court Cannot Support the Judgment.

Because the meaning of the term “minerals” in the context of oil and gas deposits has long had been decided, as a matter of law, the district court erred by applying principles of statutory construction, including *ejusdem generis*, to its interpretation of Section 501(6)(a).

“When interpreting statutes, this court is guided by the long-standing rule that a statute should be construed according to its plain language. Thus, where the statutory language is plain and unambiguous, we will not look beyond it to divine legislative intent.” *Utah Sign, Inc. v. Utah Dep’t of Transp.*, 896 P.2d 632, 633-34 (Utah 1995) (citations omitted); *State v. Ireland*, 2006 UT 17, ¶ 11, 133 P.3d 396 (“[o]nly if we find the statutory language to be ambiguous may we turn to secondary principles of statutory construction”);¹ see also *Johnson v. Utah State Retirement Bd.*, 770 P.2d 93, 95 (Utah 1988) (“A fundamental principle of statutory construction is that unambiguous language in the statute itself may not be interpreted so as to contradict its plain meaning.”).

¹ The cited case is a criminal case but there is no reason to apply different rules of statutory construction to criminal, as opposed to civil, statutes.

Thus, in *Western Development*, this Court rejected defendants' attempted application of the principle of *ejusdem generis* because, in addition to enumerating valuable ores ("gold, silver, lead copper and other precious and valuable ores"), "the granting clauses included 'coal.'" 288 P.2d at 454. This inclusion was significant because, while the listed ores "have the quality of being 'hard' minerals, coal is similar in composition and use to oil, being a hydrocarbon." *Id.* Since it was impossible to determine whether the "classification of materials being granted should be approached from the view of use, physical characteristics, or value," application of the *ejusdem generis* doctrine was rejected. *Id.*

It also is significant that this Court in *Nephi Plaster* cautioned, with particular applicability here:

The doctrine of *ejusdem generis* is but a rule of construction ...and is intended to aid in ascertaining the meaning of the Legislature, and **does not warrant a court in confining the operation of a statute within narrower limits than intended by the lawmakers.** The general object of an act sometimes requires that the final general term not be restricted in meaning by its more specific predecessors.

93 P. at 58 (quotation omitted) (emphasis added).

Furthermore, and more recently in *State v. Tanner*, 2009 UT App 326, ¶16, -P.3d-, the court of appeals, considering the interpretation of Utah Code § 76-5-404.1(4)(h), concluded the statute was "not ambiguous, and we therefore need not resort to other methods of interpretation, **such as *ejusdem generis*.**" (Footnote omitted) (emphasis added).

Contrary to this clear authority, the district court erred by improperly utilizing principles of statutory construction and other methods of interpretation, such as *ejusdem generis*, in its interpretation of the unambiguous terms of Section 501(6)(a). The Judgment thus must be reversed.

B. THE HISTORY OF UTAH'S CONDEMNATION STATUTE EVIDENCES THE STATE'S RIGHT TO CONDEMN FOR ACTIVITIES RELATING TO THE EXPLOITATION OF MINERALS AND MINERAL DEPOSITS, INCLUDING OIL AND GAS.

"The power of eminent domain is considered an inalienable power of state sovereignty. Without it, the state cannot be a state." Attorney General Opinion 92-008 (June 16, 1992) (*quotation omitted*).

In recognition of this inalienable and necessary power, since the first comprehensive compilation of the State's Code in 1898, the Legislature expressly has authorized the power of eminent domain to access the State's minerals. Utah Revised Statute Chapter 65, titled Eminent Domain, stated in pertinent part:

[Section] 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:

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

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;** 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;**

(Emphasis added).

Revised Statute Section 3589 additionally provided, “[t]he following is a classification of the estates and rights in lands subject to be taken for public use: ... 2. An easement, when taken for any other use.” A road and pipeline easement to access the Leases has always been contemplated by the Utah Legislature. So too has access for oil and gas activities.

Section 1552 in Title 45 of the Revised Statute, titled “Natural Gas,” expressly states (emphasis added):

Right of way for pipe lines. Any person, corporation, or association desirous of obtaining the right-of-way for a pipe line or lines, or the location of any gas tank or reservoir, **shall be entitled to exercise the right of eminent domain.**

Moreover, the term “mineral deposits” has resided in the condemnation statute since at least 1909. *See Monetaire Mining Co. v. Columbus Rexall Consol. Mining Co.*, 174 P. 172, 174-75 (Utah 1918) (*quoting* Comp. Laws 1907, § 3588, as amended by chapter 47 Laws Utah 1909).

There is and can be no question but that “it was the intention of the legislative power of this state to declare mining generally and the development of mines and mineral deposits a public use, in furtherance of which the right of the exercise of eminent domain was applied with full force and effect.” *Monetaire Mining*, 174 P. at 175.

The adoption of the Judicial Code, § 78B-6-501, did not alter or affect this long-standing and well-established precedent. Rather, the Code continues the grant of the

power of eminent domain for: “(6) (a) **roads**, ... [and] pipes, ... to facilitate the ... working of mines, quarries, coal mines, or **mineral deposits** including minerals in solution;” as well as for “(d) **gas, oil or coal pipelines, tanks or reservoirs.**” (Emphasis added). As did the prior statutes, today’s Utah Code § 78B-6-502(2), grants a concomitant “easement, when taken for any other use”

C. THE TRUST’S ENABLING STATUTE DEFINES “MINERAL” TO INCLUDE OIL AND GAS AND REQUIRES THE TRUST TO OPTIMIZE THE VALUE OF TRUST LANDS AND ASSETS.

The definition of the term “mineral” has been well-settled both by this Court and the legislative history of the condemnation statute. That definition, and the impropriety of the district court’s failure to apply that definition, is further reinforced by reference to the statutes and Constitutional mandates governing the Trust.

1. Utah’s Enabling Act Requires the Trust to Generate Proceeds for the State’s Public Schools and Public Institution – Both Being Public Purposes.

The Trust was founded through the adoption of the School and Institutional Trust Lands Management Act for the purpose of “manag[ing] lands that Congress granted to the state for the support of the common schools and other beneficiary institutions, under the Utah Enabling Act.” Utah Code § 53C-1-102.

The controlling Federal law which is the genesis for the Utah Constitution and Code, Utah’s Enabling Act, 28 Stat. 107 (July 16, 1894), Sections 10 and 12 require:

Section 10 [School fund.]

That the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent

school fund, the interest of which only shall be expended for the support of said schools, and such land shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be surveyed for school purposes only.

Section 12 [third proviso, Disposition.]

[t]he lands granted by this section [for State institutions] shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislature of the State may provide.

(Emphasis added).

With simple clarity, the Trust's Management Act also provides that, for purposes of the Act, "'Mineral' includes oil, gas, and hydrocarbons." Utah Code § 53C-1-103(4).

2. Utah's Constitution and Code Require the Trust to Obtain Optimum Value from Trust Lands.

Article XX, Section 2 of Utah's Constitution, titled "School and Institutional Trust Lands" provides that lands granted to the State "are declared to be school and institutional trust lands, held in trust by the State for the respective beneficiaries and purposes stated in the Enabling Act grants." The Trust is required to "obtain the optimum values from use of trust lands and revenues for the trust beneficiaries, including the return of not less than fair market value for the use, sale, or exchange of school and institutional trust assets" Utah Code § 53C-1-302(1)(b)(iii). The Trust performed that duty by issuing the Leases. *See, i.e.,* Utah Code § 53C-2-401(1)(d)(i) ("Coal and mineral deposits in trust lands may be leased on a rental and royalty basis."). Permitting the Defendant to deny access to the Trust's oil and gas deposits "would be to contravene the important public policy that the State should recover full value from the lease of

school trust land.” *Plateau Min. Co. v. Utah Div. of State Lands & Forestry*, 802 P.2d 720, 729 (Utah 1990).

D. THE DISTRICT COURT’S INTERPRETATION WOULD PRODUCE AN ABSURD AND IRRATIONAL RESULT.

The present case requires the judicious application of the absurd results doctrine because, if left to stand, the district court’s interpretation of Section 501(6)(a) would effect an irrational result that could not have been intended by the Legislature.

The district court’s interpretation of Section 501(6)(a) was based on a superficial reading of the statute without regard to the long-established understanding of the terms used by the Legislature in that Section. It is a well-accepted principle of statutory construction that “a court should not follow the literal language of a statute if its plain meaning works an absurd result.” *State ex rel. Z.C.*, 2007 UT 54, ¶ 11, 165 P.3d 1206 (*quoting Savage v. Utah Youth Vill.*, 2004 UT 102, ¶ 18, 104 P.3d 1242) (footnote omitted). “The absurd results canon of statutory construction recognizes that although ‘the plain language interpretation of a statute enjoys a robust presumption in its favor, it is also true that [a legislative body] cannot, in every instance, be counted on to have said what it meant or to have meant what it said.’” *Z.C.*, 2007 UT 54, ¶ 11 (*quoting FBI v. Abramson*, 456 U.S. 615, 638 (1982) (O’Connor, J., dissenting)).

The benefits to a statutory construction that avoids absurd results are clear:

When statutory language plausibly presents the court with two alternative readings, we prefer the reading that avoids absurd results. The FAK parties’ interpretation not only creates an absurd result, it invites confusion, piecemeal litigation, a waste of judicial resources, and gamesmanship in the payment of claims.

Encon Utah, LLC v. Fluor Ames Kraemer, LLC, 2009 UT 7, ¶ 73 - P.3d -, (quotations omitted).

As this Court has observed, “the guiding star of the absurd results doctrine is the intent of the pertinent legislative body, which limits the application of this canon of construction. Rather than controverting legislative power, the absurd results doctrine functions to preserve legislative intent when it is narrowly applied.” *Z.C.*, 2007 UT 54, ¶ 12.

If the Judgment were allowed to stand, the result would be irrational and absurd in at least two distinct manners. First, notwithstanding the mandate issued in the Trust’s Enabling Act, and as supported by the Utah Constitution, one landowner could effectively prevent the Trust from accessing and exploiting its oil and gas deposits for the benefit of the Trust and the beneficiaries under the Trust, including the state of Utah’s schools.

Second, the district court relied upon the specific inclusion of oil and gas in Utah Code Section 78B-6-501(6)(d) for the proposition that “the legislature purposely intended to exclude oil and gas from” Section 501(6)(a) (R.000216). Of course, this would give parties the power of condemnation to store oil and gas under Section 501(6)(d) but not to produce it under 501(6)(a). Surely, the legislature did not intend such an absurd contradiction. This Court should not support the district court’s interpretation which inextricably leads to that absurd result.

E. BECAUSE UTAH CODE § 78B-6-501(6)(A) ALLOWS FOR THE EXERCISE OF EMINENT DOMAIN TO REACH OIL AND GAS DEPOSITS, MARION AND THE TRUST ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THEIR COMPLAINT IN CONDEMNATION.

In addition to opposing the Ranch's Motion to Dismiss, Marion and the Trust also moved for partial summary judgment for a determination "that Utah Code § 78B-6-501 authorizes Plaintiffs to condemn an easement to access Trust oil and gas leases." (R.000144) The Judgment denied the Motion for Partial Summary Judgment as moot in light of the granting of the Ranch's Motion to Dismiss. (R.000216)

As established above, the Judgment was contrary to established authority and, as a matter of law, cannot be sustained. Instead, as a matter of law, the district court should have applied the unambiguous definition of "minerals" to Section 501(6)(A). Such an application would require a finding that Utah Code § 78B-6-501 authorizes Plaintiffs to condemn an easement to access, develop and produce Trust oil and gas leases. As a result, as a matter of law, the Motion for Partial Summary Judgment filed by Marion and the Trust should have been granted.

Accordingly, to effectuate the clear intent of the Legislature, this Court should reverse the Judgment, order that the Motion for Partial Summary Judgment be granted, and remand the matter to the district court for a determination of the proper statutory compensation to be paid by Marion to the Ranch for the use of the Easements.

X. CONCLUSION

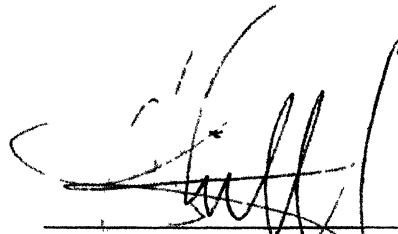
For the foregoing reasons, Marion and the Trust respectfully request that this Court reverse the district court's Judgment, enter judgment for Marion and the Trust, and grant such other and further relief as the Court deems just and proper.

DATED December 17th, 2009.

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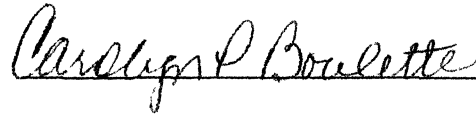
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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of December, 2009, a true and correct copy of the foregoing **Brief of Appellant** was served via United States First Class Mail, postage prepaid, upon the following:

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ADDENDUM

1. Utah Code § 78B-6-501 Eminent Domain – Uses for which right may be exercised.
2. Utah Code § 53C-1-103(4) Definition of “Mineral”
3. Utah Revised Statutes dated January 1, 1898
4. Judgment and Order Granting Defendant’s Motion to Dismiss and Denying Plaintiffs’ Motion for Summary Judgment dated September 8, 2009, Case No. 090700027, Seventh Judicial District, Carbon County, Utah.

ADDENDUM TAB 1

◉ Formerly cited as UT ST § 78-34-1

West's Utah Code Annotated Currentness

Title 78B. Judicial Code

▢ Chapter 6. Particular Proceedings

▢ Part 5. Eminent Domain (Refs & Annos)

→ § 78B-6-501. Eminent domain--Uses for which right may be exercised

Subject to the provisions of this part, the right of eminent domain may be exercised on 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)(a) public buildings and grounds for the use of any county, city, town, or board of education;

(b) reservoirs, canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county, city, or town, or for the draining of any county, city, or town;

(c) the raising of the banks of streams, removing obstructions from streams, and widening, deepening, or straightening their channels;

(d) bicycle paths and sidewalks adjacent to paved roads;

(e) roads, streets, and alleys for public vehicular use, excluding trails, paths, or other ways for walking, hiking, bicycling, equestrian use, or other recreational uses, or whose primary purpose is as a foot path, equestrian trail, bicycle path, or walkway; and

(f) all other public uses for the benefit of any county, city, or town, or its inhabitants;
- (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)(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;

(b) 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;

(c) mill dams;

(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;

(e) solar evaporation ponds and other facilities for the recovery of minerals in solution; and

(f) 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, except for a park whose primary use is:

(a) as a trail, path, or other way for walking, hiking, bicycling, or equestrian use; or

(b) to connect other trails, paths, or other ways for walking, hiking, bicycling, or equestrian use;

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

(13) sites for mills, smelters or other works for the reduction of ores and necessary to their successful operation, including the right to take lands for the discharge and natural distribution of smoke, fumes, and dust, produced by the operation of works, provided that the powers granted by this subsection may not be exercised in any county where the population exceeds 20,000, 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 75% 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 the four-mile radius; nor as to lands covered by contracts, easements, or agreements existing between the condemner and the owner of land within the 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.

CREDIT(S)

Laws 2008, c. 3, § 942, eff. Feb. 7, 2008; Laws 2008, c. 341, § 1, eff. May 5, 2008.

ADDENDUM TAB 2

West's Utah Code Annotated Currentness

Title 53C. School and Institutional Trust Lands Management Act

▢ Chapter 1. Administration

▢ Part 1. General Provisions (Refs & Annos)

→ § 53C-1-103. Definitions

As used in this title:

- (1) "Administration" means the School and Institutional Trust Lands Administration.
- (2) "Board" or "board of trustees" means the School and Institutional Trust Lands Board of Trustees.
- (3) "Director" or "director of school and institutional trust lands" means the chief executive officer of the School and Institutional Trust Lands Administration.
- (4) "Mineral" includes oil, gas, and hydrocarbons.
- (5) "Nominating committee" means the committee that nominates candidates for positions and vacancies on the board.
- (6) "Policies" means statements applying to the administration that broadly prescribe a future course of action and guiding principles.
- (7) "School and institutional trust lands" or "trust lands" means those properties granted by the United States in the Utah Enabling Act to the state in trust, and other lands transferred to the trust, which must be managed for the benefit of:
 - (a) the state's public education system; or
 - (b) the institutions of the state which are designated by the Utah Enabling Act as beneficiaries of trust lands.

CREDIT(S)

Laws 1994, c. 294, § 8; Laws 2005, c. 39, § 5, eff. March 10, 2005.

CROSS REFERENCES

State Grazing Advisory Board, duties, see § 4-20-1.5.

Trust lands, rights-of-way across state lands, see § 72-5-202.

U.C.A. 1953 § 53C-1-103, UT ST § 53C-1-103

Current through 2009 General Session and 2009 First Special Session

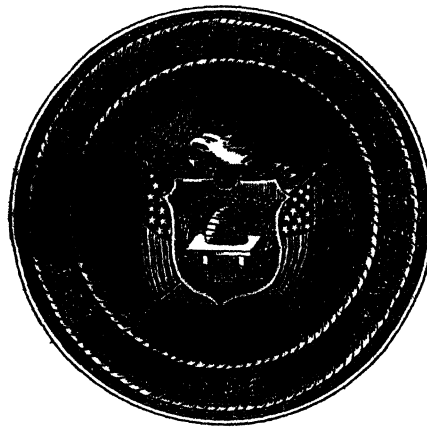
ADDENDUM TAB 3

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.

may file a petition therefor in the district court of the county where located, setting forth:

1. The cause for which the change of name is sought.
2. The name proposed.
3. If the petitioner is a person, that he has been a bona fide citizen of the county for the year immediately prior to the filing of the petition; or, if the petitioner is a city, town, precinct, or school district, that two-thirds of the legal voters thereof desire such change of name, and that there is no other city, town, precinct, or school district, in this state, of the name sought. [C. L. §§ 222*, 3861-2*.

1546. **Hearing. Proof of publication. Order.** At any subsequent term, the district court may order the change of name as requested, upon proof in open court of the allegations of the petition, and that there exists proper cause for granting the same, and that thirty days' previous notice of the hearing thereof has been given in a newspaper published or having a general circulation in the county. [C. L. §§ 223*; 3862-4.

1547. **Effect of change.** Such proceedings shall in no manner affect a legal action or proceeding then pending, nor any right, title, or interest whatsoever.

TITLE 45.

NATURAL GAS.

1548. **Confining gas in unused well.** Any person or corporation in possession as owner, lessee, agent, or manager, of any well in which natural gas has been found, shall, unless said gas is being utilized, within three months from the completion of said well, or at any time upon ceasing to use such well, confine the gas in said well until such time as it shall be utilized; *provided*, that this section shall not apply to any well operated as an oil well. ['92, p. 41.

1549. **Plugging abandoned well.** Upon abandoning or ceasing to operate any well sunk in exploring for gas, the person or corporation that sunk the same shall fill up the well with sand or rock sediment to a depth of at least twenty feet above the gas-bearing rock, and drive a round, seasoned wooden plug, at least three feet in length, equal in diameter to the diameter of the well below the casing, to a point at least five feet below the bottom of the casing; and immediately after drawing the casing, shall drive a round, seasoned wooden plug, to a point just below where the lower end of the casing rested, which plug shall be at least three feet in length, tapering in form, and of the same diameter at the distance of eighteen inches from the smaller end as the diameter of the hole below the point at which it is to be driven. After the plug has been properly driven there shall be filled on the top of the same, sand or rock sediment to a depth of at least five feet; *provided*, that in case such geological formation shall be encountered in the bore as to make some other method more effective for preventing flooding by water from superposed strata, the inspector may direct what other plan shall be pursued without unreasonable cost to the owner or lessee of the well. ['92, pp. 41-2.

1550. **Penalties for neglect.** Any person or corporation who shall violate any of the provisions of sections fifteen hundred and forty-eight and fifteen hundred and forty-nine, shall be liable to a penalty of two hundred dollars for each and every violation thereof, and to the further penalty of two hundred dollars for each thirty days during which such violation shall continue; and all such penal-

, from costs of suit, in a civil action or actions, in the name of the state for the use of the county in which the well shall have been opened. ['92, p. 42.

1551. Rights of adjacent owner. Whenever any person or corporation shall abandon any gas well, and shall fail to comply with section fifteen hundred and forty-nine, any person or corporation lawfully in possession of lands adjacent to or in the neighborhood of said well may enter upon the land upon which said well is situated and take possession of said well, and plug the same in the manner provided by section fifteen hundred and forty-nine, and may maintain a civil action in any court of the state, against all or any of the owners or persons abandoning said well, to recover the costs thereof. This shall be in addition to the penalties provided by section fifteen hundred and fifty. ['92, p. 42.

1552. Right of way for pipe lines. Any person, corporation, or association desirous of obtaining the right of way for a pipe line or lines, or for the location of any gas tank or reservoir, shall be entitled to exercise the right of eminent domain. ['92, p. 42.

Eminent domain generally, §§ 3588-3608.

TITLE 46.

NEGOTIABLE INSTRUMENTS.

CHAPTER 1.

DEFINITIONS.

1553. Written promise for sum certain. A negotiable instrument is a written promise or request for the payment of a certain sum of money to order or bearer, in conformity to the provisions of this title. [C. L. § 2841.

Cal. Civ. C. § 3087.

Notes, bills, checks, etc., may be made or drawn by telegraph, § 2699.

Provision in a note that "if the interest be not paid as stipulated, the legal holder may declare the principal due and proceed by law to recover both principal and interest," does not destroy negotiability. *Smith v. Williamson*, 8 U. 219; 30 P. 753. The stipulation in a note which includes the covenants of a mortgage by which the makers agree to pay taxes on the property, assessment, insurance, and damages for waste, renders the note non-negotiable. *Salisbury v. Stewart*, — U. —; 49 P. 777. The fact that the makers of a promissory note

undertake to pay an attorney's fee if a suit should be brought to enforce the collection of a note, does not render the note non-negotiable. *Id.* A note falling due in the hands of the payee ceases to be negotiable. Afterwards indorsers take it subject to the same defense that could have been made in the hands of the payee. The stipulation to pay attorney's fees in case of suit, binds the maker to pay them as a part of the costs of the remedy, but he cannot be required to pay more than the fees actually charged. *Id.*

Decisions on consideration, § 1567; on suretyship, etc., § 1568; on notes generally, § 1658.

1554. Payable in money only. Conditions. A negotiable instrument must be made payable in money only, and without any condition not certain of fulfillment. [C. L. § 2842.

Cal. Civ. C. § 3088.

1555. Payee to be ascertainable. The person to whose order a negotiable instrument is made payable must be ascertainable at the time the instrument is made. [C. L. § 2843.

Cal. Civ. C. § 3089.

1556. When payee has option. A negotiable instrument may give to the payee an option between the payment of the sum specified therein and the

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. *Eccles 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. § 3660*.

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. 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.

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.

3591. Conditions precedent to condemnation. Before property can be taken it must appear:

1. That the use to which it is to be applied is a use authorized by law.
2. That the taking is necessary to such use.
3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use. [C. L. § 3844.

Cal. C. Civ. P. § 1241

3592. Right to enter to make survey, etc. Damage. In all cases where land is required for public use, the person or corporation or his or its agents in charge of such use, may survey and locate the same; but it must be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of this chapter. The person or corporation or his or its agents in charge of such public use, may enter upon the land and make examinations, surveys, and maps thereof, and such entry shall constitute no cause of action in favor of the owners of the lands, except for injuries resulting from negligence, wantonness, or malice. [C. L. § 3845.

Cal. C. Civ. P. § 1242*

3593. Jurisdiction in district court. Complaint verified. All proceedings under this chapter must be brought in the district court for the county in which the property or some part thereof is situated. The complaint in such cases must be verified. [C. L. § 3846*.

Cal. C. Civ. P. § 1243*

3594. Contents of complaint. The complaint must contain:

1. The name of the corporation, association, commission, or person in charge of the public use for which the property is sought, who must be styled plaintiff.
2. The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants.
3. A statement of the right of the plaintiff.
4. If a right of way be sought, the complaint must show the location, general route, and termini, and must be accompanied with a map thereof, so far as the same is involved in the action or proceeding.
5. A description of each piece of land sought to be taken, and whether the same includes the whole or only part of an entire parcel or tract. All parcels lying in the county and required for the same public use may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of parties. [C. L. § 3847.

Cal. C. Civ. P. § 1244*.

SUBDV. 2. Grantors in trust deed to secure indebtedness are "owners" hereunder. O S L and U. N. Ry. Co. v Mitchell, 7 U. 505, 27 P 693

3595. All parties in interest may appear. All persons in occupation of, or having or claiming an interest in, any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead, and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint. [C. L. § 3849.

Cal. C. Civ. P. § 1246.

3596. Power of the court. The court or judge thereof shall have power:

1. To determine the conditions specified in section thirty-five hundred and ninety-one; to determine the places of making connections and crossings, and to regulate the manner thereof and of enjoying the common use mentioned in the fifth subdivision of section thirty-five hundred and ninety.
2. To hear and determine all adverse or conflicting claims to the property sought to be condemned, and to the damages therefor.
3. To determine the respective rights of different parties seeking condemnation of the same property. [C. L. § 3850.

Cal. C. Civ. P. § 1247*

3597. Occupancy of premises pending action. Notice. Hearing. Bond. Restraining order. The plaintiff may move the court or a judge thereof, at any time after the commencement of suit, on notice to the defendant, if he is a resident of the county, or has appeared in the action, otherwise by serving a notice directed to him on the clerk of the court, for an order permitting the plaintiff to occupy the premises sought to be condemned, pending the action, and to do such work thereon as may be required for the easement sought, according to its nature. The court or a judge thereof shall take proof by affidavit or otherwise, of the value of the premises sought to be condemned and of the damages which will accrue from the condemnation, and of the reasons for requiring a speedy occupation, and shall grant or refuse the motion according to the equity of the case and the relative damages which may accrue to the parties. If the motion is granted, the court or judge shall require the plaintiff to execute and file in court a bond to the defendant, with sureties to be approved by the court or judge, in a penal sum to be fixed by the court or judge, not less than double the value of the premises sought to be condemned and the damages which will ensue from condemnation, as the same may appear to the court or judge on the hearing, and conditioned to pay the adjudged value of the premises and all damages in case the property is condemned, and to pay all damages arising from occupation before judgment in case the premises are not condemned, and all costs adjudged to the defendant in the action. The sureties shall justify before the court or judge after a reasonable notice to the defendant of the time and place of justification. The amounts fixed shall be for the purposes of the motion only, and shall not be admissible in evidence on final hearing. The court or judge may also, pending the action, restrain the defendant from hindering or interfering with the occupation of the premises and the doing thereon of the work required for the easement. [92, pp. 2-3*.

3598. Damages, how assessed. The court, jury, commissioners, or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

1. The value of the property sought to be condemned and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and of each estate or interest therein shall be separately assessed.

2. If the property sought to be condemned constitutes only a part of a large parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff.

3. If the property, though no part thereof is taken, will be damaged by the construction of the proposed improvement, the amount of such damages.

4. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit shall be equal to the damages assessed, under subdivision two of this section, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value of the portion taken.

5. If the property sought to be condemned be for a railroad, the cost of good and sufficient fences along the line of such railroad between such railroad and other adjoining lands of the defendant; and the cost of cattle guards where fences may cross the line of such railroad.

6. As far as practicable, compensation must be assessed for each source of damages separately. [C. L. § 3851*.

Cal C. Civ. P. § 1248*.

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

Where receiver built over unoccupied public land to which a party afterward acquires title, he cannot recover as damages the value of the rail-

road's improvements. *Denver & R. G. W. Ry. Co. v. Stanchiff*, 4 U. 117; 7 P. 530.

Where land taken in good faith for the erection of a schoolhouse, the owner not being known, but with intention to acquire title by proceedings in

eminent domain, if he should not consent to such use of it, he cannot recover as damages the value of such schoolhouse. *Chase v. Jemmett*, 8 U. 231; 30 P. 757.

3599. Damages deemed accrued at date of service. For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the service of summons, and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed, as provided in the last section. No improvements put upon the property subsequent to the date of service of summons, shall be included in the assessment of compensation or damages. [C. L. § 3852.

Cal. C. Civ. P. § 1249.

3600. Action begun anew where defendant's title defective. If the title attempted to be acquired is found to be defective from any cause, the plaintiff may again institute proceedings to acquire the same as in this chapter prescribed. [C. L. § 3853.

Cal. C. Civ. P. § 1250.

3601. Damages to be paid within thirty days. Bond for railroad fence. The plaintiff must, within thirty days after final judgment, pay the sum of money assessed; and, if the plaintiff is a railroad company, it shall also execute to the defendant a bond, with sureties, to be determined and approved by the court or judge, conditioned that the plaintiff shall build proper fences within six months from the time the railroad is built on or over the land taken. In an action on the bond all damages sustained and the cost of the construction of such fences may be recovered. [C. L. § 3854.

Cal. C. Civ. P. § 1251.

3602. Id. To whom paid. Execution if not paid. Annuling proceedings. Payment may be made to the defendants entitled thereto, or the money may be deposited in court for the defendants and be distributed to those entitled thereto. If the money be not so paid or deposited, the defendants may have execution as in civil cases; and if the money cannot be made on execution, the court upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendants if possession has been taken by the plaintiff. [C. L. § 3855.

Cal. C. Civ. P. § 1252.

3603. Final order made upon payment. Recording same. When payments have been made (and the bond given, if the plaintiff elects to give one), as required by the last two sections, the court must make a final order of condemnation, which must describe the property condemned and the purpose of such condemnation. A copy of the order must be filed in the office of the recorder of the county, and thereupon the property described therein shall vest in the plaintiff for the purpose therein specified. [C. L. § 3856.

Cal. C. Civ. P. § 1253.

3604. Authorizing occupancy by plaintiff. Deposit. Payment. Effect. At any time after the entry of judgment, or pending an appeal from the judgment to the supreme court, whenever the plaintiff shall have paid into court for the defendant the full amount of the judgment, and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in said proceedings, as well as all damages that may be sustained by the defendant, if for any cause the property shall not be finally taken for public use, the district court in which the proceeding was tried may, upon notice of not less than ten days, authorize the plaintiff, if already in possession, to continue therein, and if not, then to take possession of and use the

property during the pendency of and until the final conclusion of the litigation, and may, if necessary, stay all actions and proceedings against the plaintiff on account thereof. The defendant, who is entitled to the money paid into court for him upon any judgment, shall be entitled to demand and receive the same at any time thereafter upon obtaining an order therefor from the court. It shall be the duty of the court or a judge thereof, upon application being made by such defendant, to order and direct that the money so paid into court for him be delivered to him upon his filing a satisfaction of the judgment, or upon his filing a receipt therefor, and an abandonment of all defenses to the action or proceeding, except as to the amount of damages that he may be entitled to in the event that a new trial shall be granted. A payment to a defendant, as aforesaid, shall be held to be an abandonment by such defendant of all defenses interposed by him, excepting his claim for greater compensation. [C. L. § 3857.

Cal. C. Civ. P. § 1254*.

3605. Apportionment of costs. Costs may be allowed or not, and if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court. [C. L. § 3858.

Cal. C. Civ. P. § 1255.

3606. Procedure applicable. Except as otherwise provided in this chapter, the provisions of this code relative to civil actions, new trials, and appeals, shall be applicable to and constitute the rules of practice in the proceedings in this chapter. [C. L. § 3859.

Cal. C. Civ. P. § 1256*.

3607. Rights of cities and towns not affected. Nothing in this code must be construed to abrogate or repeal any statute providing for the taking of property in any city or town for street purposes. [C. L. § 3860.

Cal. C. Civ. P. § 1263.

3608. Crossings to be made and kept in repair. A party obtaining a right of way shall, without delay, construct such crossings as may be required by the court or judge, and shall keep them and the way itself in good repair. [90, pp. 39, 40*.

CHAPTER 66.

QUO WARRANTO

3609. Action in name of state, against whom. A civil action may be brought in the name of the state:

1. Against a person who usurps, intrudes into, or unlawfully holds or exercises, a public office, civil or military, or a franchise, within this state, or an office in a corporation created by the authority of this state.

2. Against a public officer, civil or military, who does or suffers an act which, by the provisions of law, works a forfeiture of his office.

3. Against an association of persons who act as a corporation within this state without being legally incorporated. [C. L. § 3529*.

Mont. Civ. P. § 1410. Cal. C. Civ. P. § 803*.

Original jurisdiction in supreme and in district courts, Con art. 8, secs. 4, 7.

3610. Id. Against a corporation. A like action may be brought against a corporation:

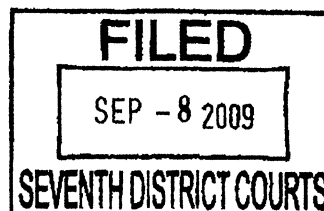
1. When it has offended against a provision of an act by or under which it was created, altered, or renewed, or any act altering or amending such acts.

2. When it has forfeited its privileges and franchises by non-user.

3. When it has committed or omitted an act which amounts to a surrender or a forfeiture of its corporate rights, privileges, and franchises.

ADDENDUM TAB 4

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Attorneys for Defendant

IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR CARBON COUNTY, STATE OF UTAH

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

Plaintiffs,

vs.

KFJ RANCH PARTNERSHIP, a business
association of unknown type,

Defendant.

**JUDGMENT AND ORDER GRANTING
DEFENDANT'S MOTION TO DISMISS
AND DENYING PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT**

Case No. 090700027

Judge George M. Harmond

Defendant KFJ Ranch Partnership's Motion to Dismiss and Plaintiffs' Motion for Summary Judgment came on for hearing before the Court on August 5, 2009. Defendant KFJ Ranch Partnership was represented by Thomas R. Karrenberg and Samantha J. Slark of Anderson & Karrenberg. Plaintiff Marion Energy, Inc. ("Marion") was represented by Jack R. Luellen and Matthew L. Crockett of Beatty & Wozniak, P.C. and the State of Utah School and Institutional Trust Lands Administration ("SITLA") was represented by Thomas A. Mitchell.

The Court, having carefully reviewed and considered the various pleadings and papers submitted by the parties with respect to Defendant's Motion to Dismiss and Plaintiffs' Motion for Summary Judgment, hereby enters the following order:

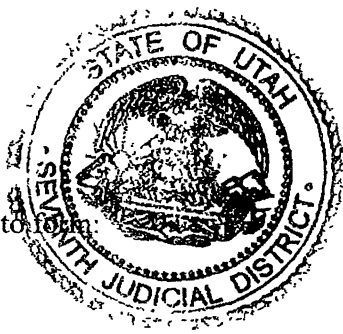
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

Defendant's Motion to Dismiss is granted and Plaintiffs' Motion for Summary Judgment is denied. Plaintiffs' condemnation action is hereby dismissed with prejudice. The operative facts of this case are not in dispute. Plaintiffs brought this condemnation action to take two permanent easements over Defendant's private property for the purpose of building roads to access and develop their SITLA oil and gas leases.

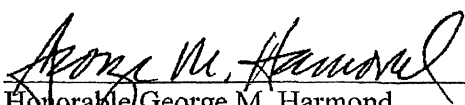
Utah Code Ann. § 78B-6-501(6)(a) does not provide authority to take land for roads to access oil and gas deposits. In interpreting the intent of the legislature, the Court is required to consider the plain language of the statute, to consider that each word has been used advisedly, and to presume any omissions are purposeful. Utah Code Ann. § 78B-6-501(6)(a) lists the substances for which land can be condemned for roads, and oil and gas are not included. Furthermore, oil and gas are specifically mentioned in Utah Code Ann. § 78B-6-501(6)(d), which shows the legislature purposefully intended to exclude oil and gas from Utah Code Ann. § 78B-6-501(6)(a). Accordingly, Defendant's Motion to Dismiss is granted, Plaintiffs' Motion for Summary Judgment is denied, and the condemnation action is dismissed with prejudice.

DATED this 8 day of September, 2009.

BY THE COURT:



Approved as to form:


Honorable George M. Harmond
District Court Judge

Jack R. Luellen
Matthew L. Crockett
Attorneys for Plaintiff Marion

Approved as to form

Thomas A. Mitchell
Attorneys for Plaintiff SITLA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ____ day of August, 2009, I did cause a true and correct copy of the foregoing **JUDGMENT AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** to be served via first-class mail, postage prepaid, upon the following:

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