

2009

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

Utah Supreme Court

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Recommended Citation

Reply Brief, *Marion Energy, Inc. v. KFJ Ranch Partnership*, No. 20090796.00 (Utah Supreme Court, 2009).
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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

**REPLY BRIEF OF
APPELLANTS**

APPEAL

**From the Seventh Judicial District Court in and for Carbon County, State of Utah
The Honorable George M. Harmond, Case No. 090700027**

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**FILED
UTAH APPELLATE COURTS**

APR 20 2010

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I. INTRODUCTION

Underlying the hyperbole in the Ranch's brief, the Ranch's entire argument is constructed to support a single proposition – that an intransigent landowner may block the Trust and the Trust's lessee (in this case Marion) from accessing oil and gas deposits owned by the Trust simply by refusing to permit access to those minerals.

The Ranch tries to draw the Court's attention away from this simple, unassailable fact by arguing that “[i]t is not true that Marion/SITLA are prevented from accessing SITLA's oil and gas deposits” because “the legislature has granted a lease holder like Marion the limited right to enter upon the land in which it holds SITLA mineral leases.” Brief of Appellee at 47 (citing Utah Code Ann. § 53C-2-401, *et seq.*).

It is most significant that the Ranch rewrites the Record, when the fact is that there is **no access** to the minerals leased by Marion from the Trust except over land owned by the Ranch – the Trust's mineral leases are “landlocked” by virtue of being literally surrounded by surface lands owned by the Ranch. (R000092.)

The Ranch further argues that “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 establishing that goal.” Brief of Appellee at 47 (emphasis added). On that point, the Trust and Marion agree. The Trust's minerals - its oil and gas deposits at issue here - simply cannot be accessed without the power of condemnation. Condemnation thus is absolutely necessary to accomplish the well-articulated and

constitutionally mandated public policy of maximizing the value of Trust assets for the benefit of the schoolchildren and institutional beneficiaries of the Trust.

II. ARGUMENT

A. THE TERM “MINERAL DEPOSITS” AS USED IN SECTION 501(6)(a) MUST INCLUDE OIL AND GAS IN ORDER TO EFFECTUATE LEGISLATIVE INTENT AND PURPOSE.

A court’s “primary goal when construing statutes is to evince ‘the true intent and purpose of the Legislature [as expressed through] the plain language of the Act.’” *Hall v. Utah State Dept. of Corr.*, 2001 UT 34, ¶ 15, 24 P.3d 958 (quoting *Jensen v. Intermountain Health Care, Inc.*, 679 P.2d 903, 906 (Utah 1984)). When properly viewed as a whole, there can be no doubt or question that the legislature has evidenced an intent and purpose to facilitate the development of oil and gas reserves on lands owned by the Trust. The term “mineral deposits,” as used in Utah Code Ann. § 78B-6-501(6)(a), must include oil and gas in order to effectuate the Legislature’s intent and purpose.

1. TRUST LANDS ARE DEDICATED TO AND MUST BE USED FOR THE BENEFIT OF THE BENEFICIARIES OF THE TRUST.

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.”

In turn, Utah’s Enabling Act articulates the requirement that the “proceeds of lands herein granted for educational purposes, . . . shall constitute a permanent school

fund,” and that such lands granted “shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislature of the State may provide.” 28 Stat. 107 (July 16, 1894).

The School and Institutional Trust Lands Management Act (the “Management Act”), Utah Code Ann. Title 53C, provides that the Congressional grant of lands to the State “imposes upon the state a perpetual trust obligation to which standard trust principles are applied,” and which trust principles “impose fiduciary duties upon the state, including . . . a strict requirement to administer the trust corpus for the exclusive benefit of the trust beneficiaries.” Utah Code Ann. § 53C-1-102 (1)(b), (2)(a). Moreover, the Management Act calls for the title to “be **liberally construed** to enable the board of trustees, the director and the administration to faithfully fulfill the state’s obligations to the trust beneficiaries.” *Id.* at § 53C-1-102 (3) (emphasis added).

As a fiduciary with responsibility to the Trust’s beneficiaries, the Trust is required to “obtain the optimum values from use of trust lands and revenues for the trust beneficiaries. . . .” *Id.* at § 53C-1-302(1)(b)(iii). In furtherance of this purpose, the Management Act provides for issuance of mineral leases for “prospecting, exploring, developing and producing minerals.” *Id.* at § 53C-2-405; *see generally id.* at § 53C-2-401, *et seq.* Mineral leasing under the Management Act, a critical component of the Trust’s constitutional and statutory duties, includes the leasing of oil and gas because the term “[m]ineral” includes oil, gas, and hydrocarbons.” *Id.* at § 53C-1-103(4).

2. THE POWER OF EMINENT DOMAIN TO ACCESS STATE-OWNED MINERALS HAS LONG BEEN AUTHORIZED IN UTAH.

Starting in 1898, the Legislature expressly has authorized the power of eminent domain to access the State’s minerals. In Utah Revised Statute Chapter 65, titled Eminent Domain, the Legislature expressly provided that the power of eminent domain could be exercised for:

3588.6 **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) (R.000137-138).

As long ago as 1909, the Legislature expressly included the term “mineral deposits” in the condemnation statute. *See Monetaire Mining Co. v. Columbus Rexail Consol. Mining Co.*, 53 Utah 413, 174 P. 172, 174-75 (Utah 1918) (quoting and analyzing Comp. Laws 1907, § 3588, as amended by Chapter 47, Laws Utah 1909, p.50).

Through these enactments, the Legislature clearly, and long ago, articulated “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.” *Id.* at 175 (emphasis added).

3. SECTION 501(6)(a) FURTHERS THE LEGISLATIVE MANDATE THAT TRUST LANDS BE UTILIZED FOR THE MAXIMUM BENEFIT OF THE TRUST’S BENEFICIARIES.

The adoption of the Judicial Code, § 78B-6-501, did not alter the long-standing and well-established precedent either as to the State’s power of condemnation or the

obligations of the Trust act for the benefit of the Trust beneficiaries. 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).

B. SECTION 501(6)(a) INCLUDED OIL AND GAS BOTH BY ITS EXPRESS TERMS AND BY NECESSARY IMPLICATION.

As the Ranch acknowledges, the State may exercise the power of eminent domain when a statute grants such authority “in express terms or by necessary implication.” *Great Salt Lake Auth. v. Island Ranching Co.*, 18 Utah 2d 45, 54, 414 P.2d 963, 969 (Utah 1966) (Callister, J., dissenting) (cited in Brief of Appellee at 10); *see also Bertagnoli v. Baker*, 117 Utah 348, 351-52, 215 P.2d 626, 627-28 (Utah 1950) (cited in Brief of Appellee at 11).

In this case, Section 501(6)(a) grants the power to condemn land necessary to access the Trust’s oil and gas deposits, in order to fulfill the Trust’s mandate to maximize the value of its assets for the benefit of the Trust beneficiaries, because oil and gas are included within the term “mineral deposits,” either expressly or by necessary implication.

1. MORE THAN 100 YEARS OF PRECEDENT FROM THIS COURT MANDATES A FINDING THAT OIL AND GAS ARE INCLUDED WITHIN THE TERM “MINERAL DEPOSITS” AS USED IN SECTION 501(6)(a).

Starting in 1907, the courts of this state, and courts construing those precedents, consistently have held that the term “minerals” includes oil and gas deposits. The Ranch’s efforts to distinguish this line of authority are unpersuasive at best.

In *Nephi Plaster & Mfg. Co. v. Juab County*, 33 Utah 114, 93 P. 53, 54 (Utah 1907), the court construed the phrase “or other valuable mineral deposits,” and held 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).

The Ranch attempts to distinguish *Nephi Plaster* by noting that the case did not arise in the context of an eminent domain action, Brief of Appellee at 27. While this distinction is true, the Ranch fails to demonstrate that *Nephi Plaster* is not convincing authority for how the Court should continue to interpret the legislative use of the term “mineral” in the context of contemporaneous legislation.

The Ranch fails to acknowledge that *Utah Copper Co. v. Montana-Bingham Consol. Mining Co.*, 69 Utah 423, 255 P. 672 (Utah 1926), was a condemnation action. Instead, the Ranch maintains that the Trust and Marion misconstrued *Utah Copper* because the “actual definition of ‘mineral’ was not even at issue.” Brief of Appellee at 27.

Though the definition of “mineral” was not at issue, the *Utah Copper* court expressly noted that it was conceded the term “‘mineral’ is not limited to metal or metalliferous deposits but **also includes petroleum and other liquids.**” 255 P. at 674 (emphasis added). Moreover, though wholly ignored by the Ranch, the *Utah Copper* court also noted that it “may be conceded” that “**oil and gas are minerals**” *Id.* at

675 (emphasis added).¹ Though these conceded points ultimately failed to support *Utah Copper* defendants' claims, they nevertheless reflect clear pronouncements by this Court that the scope of the definition of "minerals" in the context of the condemnation statute includes oil and gas.

The Ranch also seeks to diminish the significance of the holding in *Western Development Company v. Nell*, 4 Utah 2d 112, 288 P.2d 452 (Utah 1955), because that case involved the examination of a "deed[] of conveyance – not statutes – to determine the scope and meaning of the term 'mineral' as used" in the deed. Brief of Appellee at 29. Curiously, though, the Ranch acknowledges that "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 an ambiguity on the face of the document." Brief of Appellee at 38. The Ranch fails to explain, however, why such a presumption does not, or should not, apply to the interpretation of a statute, such as Section 501(6)(a), particularly in light of the precedential history cited by Marion and the Trust.

Moreover, the Ranch's argument is belied by the long-standing principle that the Legislature is presumed to be aware of court decisions when enacting legislation. *See*,

¹ The Ranch maintains that "[c]learly, 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." Brief of Appellee at 28-29. For the stated reasons, the Trust and Marion assert that by its plain language the Court in fact made a clear statement on the scope the term "mineral" and the inclusion of "petroleum and other liquids" within its definition. This Court will determine the proper reading of *Utah Copper*. However, for the Ranch to assert that Marion and the Trust were "misleading" in their use of *Utah Copper* (one of several *ad hominem* arguments in the Ranch's brief) is simply uncalled for.

e.g., *Gohler v. Wood*, 919 P.2d 561, 564 (Utah 1996). Thus, the Legislature, in enacting Section 501(6)(a), presumptively was aware, as was the Tenth Circuit when it decided *Anschutz Land and Livestock Co. v. Union Pacific RR. Co.*, 820 F.2d 338, 343 (10th Cir. 1987), that, under Utah law, the term “other minerals” had been held, “as a matter of law[,]” to encompass oil and gas interests.²

Nor is the Ranch’s reliance on *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 32, 104 P.3d 1208, persuasive.³ The Ranch’s argument that “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” in which it is used, is misplaced. Brief of Appellee at 15 (citing *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 32, 104 P.3d 1208). The issue determined by the *Carrier* court was not a consideration of a *ejusdem generis* meaning of the term “mineral.” Instead, the more specific question of whether gravel was included within the definition of “mineral” and, in that light concluded: “Whether the term ‘mineral’ actually incorporates the term ‘gravel’ in any given situation, however, is largely contextual.” *Id.*⁴

² The Ranch argues that Marion and the Trust are disingenuous in asserting that the *Anschutz* court held, as a matter of law, that minerals included oil and gas. The Ranch’s assertion simply is not correct. The *Anschutz* court quoted with approval the holding of the district court, which examined the *Western Development* holding, in concluding that “the language in Reservation A is plain, clear and without ambiguity. The term ‘other minerals’ includes oil and gas” 820 F.2d at 343. The court continued to hold, like the district court, that the clause in Reservation A was “sufficient to encompass oil and gas interests as a matter of law.” *Id.*

³ Because *Carrier* is readily distinguished from the case at bar, the election of Marion and the Trust not to address the case in the Brief of Appellants truly is not “surprising.” (See Brief of Appellee at 9 n.5.)

⁴ As stated in *Carrier*: “[W]hether gravel is appropriately deemed a mineral depends on the context in which the term is used.” 2004 UT 98, ¶ 34.

The narrow focus of the *Carrier* decision thus renders its application to the proper construction of Section 501(6)(a) negligible at best.

2. **RULES OF STATUTORY CONSTRUCTION ARE UNNECESSARY IN LIGHT OF THE INCLUSION OF OIL AND GAS IN MINERAL DEPOSITS BY EXPRESS TERMS OR NECESSARY IMPLICATION.**

The Ranch takes Marion and the Trust to task for their “lengthy discussion of why the doctrine of *ejusdem generis* does not apply, without showing why they believe the trial court’s decision was unsupported.” Brief of Appellee at 22-23. The Ranch misses the point completely. Tools of statutory construction are inapplicable where the meaning of a statutory provision is express or necessarily implied, as is the case here. *See, e.g., Utah Sign, Inc. v. Utah Dep’t of Transp.*, 896 P.2d 632, 633-34 (Utah 1995).

In fact, this Court has cautioned against the unrestrained use of principles of statutory construction, such as *ejusdem generis*, to bypass or limit the intent of the Legislature:

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.

Nephi Plaster, 93 P. at 58 (quotation omitted) (emphasis added).

The lack of authority for Ranch’s argument is demonstrated by its unsupported insistence that “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.” Brief of Appellee at 40. Such a proposition reads the concept of “necessary implication” out of

this Court's jurisprudence, creates a novel rule of statutory construction, and would place an untenable burden of precision on the Legislature to itemize every "mineral" for which the power of eminent domain may be exercised.

3. THE RANCH'S ANALYSIS OF SECTION 501(6)(d) IS INAPPOSITE, AS IS ITS RELIANCE ON SECTION 40-8-4(6)(b).

The Ranch, as did the district court, relies on the Legislature's use of the words "gas" and "oil" in Section 501(6)(d) and their exclusion in Section 501(6)(a). *See* Brief of Appellee at 19. Both the district court and the Ranch err, however, by failing to consider and appreciate the distinct purposes of each of these Sections.

Section 501(6)(d), by its express terms, deals with "pipelines, tanks or reservoirs." Without more, it would be impossible to determine any statutory parameters on the scope of the condemnation powers granted thereunder for those types of facilities. There may be any number of uses for "pipelines, tanks or reservoirs." The Legislature provides clear limits to this Section by specifying the types of "pipelines, tanks or reservoirs" for which it had authorized the use of the powers of eminent domain. In the case of Section 501(6)(d), the powers of condemnation are available for "gas, oil or coal pipelines, tanks or reservoirs" for "underground natural gas storage facilities." *See also* Utah Code Ann. § 78B-6-501(6)(9) (for sewerage) and Utah Code Ann. § 78B-6-501(6)(10) (for supplying and storing water for generating and transmitting electricity for power, light and heat). These limitations do not, and cannot, unwrite the grant of roads to access mineral deposits, including oil and gas, set forth in Section 501(6)(a).

The same is not true for Section 501(6)(a). By using the words “mineral deposits including deposits in solution,” and relying upon the well-defined and articulated case law construing the terms “mineral deposits” and “minerals,” the Legislature accurately and succinctly defined the scope of the powers being conveyed.⁵

The Ranch also argues that because the Legislature, in enacting Utah Code Ann. § 40-8-4(6)(b) – the basis for separate regulatory authority over non-oil and gas minerals – chose to expressly exclude oil and gas from the definition of the term “mineral deposit” “one cannot merely conclude that the term ‘mineral deposits’ necessarily includes ‘oil and gas.’” Brief of Appellee at 15. In fact, if anything, the Legislature’s express **exclusion of** oil and gas from the definition of “mineral deposit” confirms the argument advanced by Marion and the Trust; that is, in its normal and customary usage, the term “mineral deposits” includes oil and gas **unless** expressly defined otherwise. Thus, in

⁵ This critical distinction between Section 501(6)(a) and Section 501(6)(d) demonstrates the erroneous basis for the Ranch’s reliance on *Carrier* (see Brief of Appellee at 17-18). The *Carrier* court concluded that the use of the term “gravel pits” in two sections of the zoning ordinance but its omission in a third, was determinative because gravel pit operations were “inconsistent with the stated purpose” of the zone omitting the term “gravel pits” and, therefore, the term “mineral extraction and processing” as used in the zoning ordinance did not “encompass gravel pit operations.” 2004 UT 98, ¶ 41. In the present case, however, there is no assertion that using the power of condemnation under Section 501(6)(a) is inconsistent with its stated purpose and, as set forth above, the use of the terms gas and oil in Section 501(6)(d) but not in Section 501(6)(a) is entirely consistent with the Legislative purpose to develop the Trust’s minerals, which by statutory definition include oil and gas. Similarly, in *State Land Brd. v. State Dept. of Fish & Game*, 17 Utah 2d 237, 408 P.2d 707, 708 (1965), the phrase “all coal and other minerals” was held not to include sand and gravel in connection with a statutory reservation because such a reservation would “completely nullify the grant.” In the present case, there is no argument that including oil and gas within the meaning of “mineral deposits,” as used in Section 501(6)(a) would be fundamentally inconsistent with the purpose or intent of Section 501(6)(a). In fact, the opposite is true.

order to exclude oil and gas from the reach of the term “mineral deposit” in Section 40-8-4(6)(b), the Legislature separately expressed the exclusion.⁶ By contrast, the Legislature could simply use the term “mineral deposit” in Section 501(6)(a) without qualification and thereby include, by express terms or necessary implication, oil and gas.

C. THE DISTRICT COURT’S RULING WOULD CREATE AN ABSURD RESULT.

The Ranch maintains that the district court’s ruling, which denies the Trust access to its oil and gas deposits, and thus deprives the Trust the ability to produce the oil and gas for the benefit of the Trust beneficiaries, is “not an unfair or unexpected result.” Brief of Appellee at 8. In fact, the opposite is true – to deny the Trust access to its oil and gas deposits is a patently unfair and an unexpected result that cannot be sanctioned by this Court.

The Ranch argues that the Trust and Marion should appeal to the Legislature if they “desire to use eminent domain to take private property to construct permanent roads over private property rather than use pipelines.” Brief of Appellee at 49. The Ranch wholly misses – or misstates – the point.

The Trust and Marion do not seek to use the power of condemnation because roads are a more “cost-effective” means of transporting oil and gas than pipelines. The Trust and Marion seek to use the power of condemnation to be able to reach the Trust’s oil and gas deposits in the first place. Simply stated – in the absence of an easement for a

⁶ *See also, e g*, Utah Code Ann. § 40-6-5(7), prescribing that the enforcement powers of the Board of the Division of Oil, Gas and Mining has “enforcement powers with respect to operations of **minerals other than oil and gas . . .**” (Emphasis added.)

road to access the oil and gas deposits **none** of the Trust's oil and gas ever will be exploited. The deposits will remain in the ground; proceeds of production for the benefit of the Trust beneficiaries halted by the recalcitrance of a landowner fortuitous enough to be blocking access to the Trust's landlocked deposits. Such a result would be the definition of absurd.

The absurdity of the Ranch's position and the holding of the district court is highlighted by the holding in *Utah v. Andrus*, 486 F. Supp. 995, 1002 (D. Utah 1979), where the court held that "the State of Utah and Cotter Corporation, as Utah's lessee, do have the right to cross federal land to reach Section 36, which is a portion of the school trust lands." The court reasoned, as related to the Trust's mandatory purposes, that even the United States could not block access because "[t]he state **must** be allowed access to the state school trust lands so that those lands can be developed in a manner that will provide funds for the common schools." *Id.* at 1009 (emphasis added). Further, as the *Andrus* court explained:

Given the **rule of liberal construction** and the Congressional intent of enabling the state to use the school lands as a means of generating revenue, the court must conclude that **Congress intended that Utah (or its lessees) have access to the school lands**. Unless a right of access is inferred, the very purpose of the school trust lands would fail. Without access the state could not develop the trust lands in any fashion and they would become economically worthless. This Congress did not intend.

Id. (emphasis added).

It is absurd to maintain, as does the Ranch, that the power to condemn is limited as to oil and gas only for the purposes of conveyance and storage, but not for exploration and production of this vital public resource.

D. THE RANCH’S RELIANCE ON PROPOSED, BUT NEVER PASSED, LEGISLATION IS UNPERSUASIVE.

The Ranch vainly argues that legislation once proposed by Senator Dmitrich, which sought to amend Section 501(6)(a), aimed “to add authority to take land for roads to access oil and gas deposits” and evidences that “the legislature must have recognized that authority was not included under the terms of the current statute.” Appellee’s Brief at 25. The Ranch’s argument fails for two reasons. First, it is well-accepted that, as a matter of law, the failure of a proposed act to pass is of no precedential value. *See, e.g., Moss v. Brd. of Comm’rs of Salt Lake City*, 1 Utah 2d 60, 261 P.2d 961 (Utah 1953) (“it is with their declaration in the enactment itself that we must be principally concerned in determining its meaning” (footnote omitted)); *see also Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063, 1071 (6th Cir. 1997) (“statements made by persons in favor of a rejected or failed bill are meaningless and cannot be used as an extrinsic aid”).

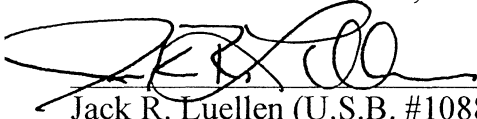
Second, even if an inference from the failure of the Legislature to pass a proposed amendment were permitted, it would be equally permissible to infer that the Legislature determined, as had this Court, that “mineral deposits,” as used in Section 501(6)(a) already included oil and gas, thereby rendering the proposed amendment redundant and unnecessary.

III. CONCLUSION

For each of 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 April 20, 2010.

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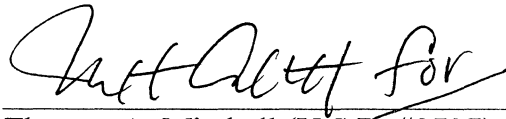
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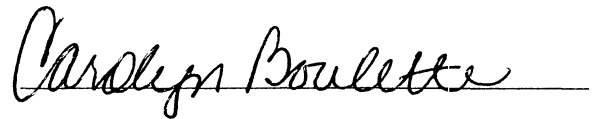
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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of April, 2010, a true and correct copy of the foregoing **Reply Brief of Appellant** was served via United States First Class Mail, postage prepaid, upon the following:

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A handwritten signature in cursive script, reading "Carolyn Boulette", is written over a horizontal line.

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