

1958

# State of Utah v. James L. Hatch and Della L. Hatch : Brief of Appellant

Utah Supreme Court

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In the  
**Supreme Court of the State of Utah** D  
10 1958

STATE OF UTAH,

vs.

JAMES L. HATCH and  
DELLA L. HATCH,*Plaintiff**Defendants*

Clerk, Supreme Court, Utah

Case No.  
8937

**BRIEF FOR THE UNITED STATES OF AMERICA,  
AMICUS CURIAE**

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*Defendants*

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**BRIEF FOR THE UNITED STATES OF AMERICA,  
AMICUS CURIAE**

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I

**THE INTEREST OF THE UNITED STATES AND  
THE IMPORTANCE OF THIS CASE.**

The interest of the United States is not clearly brought out in the record or appellant's brief in this case. Even though the United States has conveyed all of its title to the particular tract of land here involved it, as well as other parties to be mentioned, has a very real and important interest in the questions presented for decision to this Court. The same legal question arises as to hun-

dreds of instances since May 12, 1919, wherein the State's title to school lands has been exchanged for other lands. In federal court litigation, to be explained later herein, the State has asserted that some 377,000 acres have been exchanged with the United States since that date. The State has advised the U.S. Bureau of Land Management that more than 92,000 acres are in this disputed category. Many of these lands are located in southeastern Utah where, it may be judicially known, very valuable oil deposits have been discovered. The United States incorporated many of those sections into the Navajo Indian Reservation. That Tribe has executed many leases of such former school sections to the Superior Oil Company and Honolulu Oil Corporation and others. The State of Utah has executed competing leases on some 13,719 acres of land, many of them to Western States Refining Company and perhaps others. The financial interests of the United States, the Navajo Indians, the Superior Oil Company, the Honolulu Oil Corporation and Western States Refining Company, none of whom is a party to this case, are obvious.

There is another large class of persons whose interests may be vitally affected by the decision of this case. Selection of lands by the State in place of school sections is made, for the most part, only when a private party has sought such lieu lands. Thus most, if not all, of the 377,000 lieu acres have been patented to private interests. In this litigation the State contends that it received both the minerals in the school lands and the lieu lands as well as the surface rights in the lieu lands. Alternatively, the

State contends that the exchanges should be rescinded re-vesting in it the title to the school sections and returning to the United States the lieu lands. The State's position thus jeopardizes the titles of those disputed lands to the extent that they had been sold or leased to private parties. The interests of the multitude of owners, mortgagees, etc., of lands, title to which traces back to such grants from the State, will likewise be vitally affected by this decision, but they are not here represented.

So, also, the titles of grantees and lessees from the United States, like the title of appellees Hatch, are jeopardized by this claim of the State. Although the State seeks to restrict its claim to the mineral rights (Br. 1), it is inevitable that title to the tract as a whole is involved since it is clear that the State is not entitled both to whatever minerals there may be in the Hatch land as well as the complete fee title to the tract it got from the United States in place of the Hatch tract (*infra* p. 15).

## II.

### THE SITUATION OF FOUR OTHER CASES FILED IN THE STATE OR FEDERAL COURTS THIS YEAR HAS AN IMPORTANT BEARING ON THIS CASE.

Consideration of the entire controversy of which the instant case is an integral part requires an understanding of three cases pending in the United States District Court for the District of Utah as well as another case filed with this Court but dismissed in April of this year. Chronologically the last-mentioned case was the first one filed. It was an original proceeding in this Court seeking a

writ of prohibition against the State Land Board. The case was filed as No. 8801 on January 13, 1958, under the title of *Lee v. Henderson*. Lee, as assignee of an oil and gas lease issued by the United States Bureau of Land Management, sought to prohibit the Land Board from leasing the same tract of land to Western States Refining Company. That Company was permitted to intervene to assert that the mineral rights in this tract belonged to the State.

On February 27, 1958, the United States filed in the United States District Court for the District of Utah a case, *United States v. State of Utah, et al.*, Docket No. C-21-58, to quiet its title to that tract of land subject to the Lee lease. It also sought in the same case an injunction against prosecution of *Lee v. Henderson*. The injunction was granted after hearing of March 15, 1958. The court held that the *Lee* case constituted an attempt to adjudicate title to the minerals without the United States being a party to the action, that there were federal questions involved, and also that, as the court put it, "there are elements which strongly suggest" that the *Lee* case was collusive and not between adverse parties. This latter statement was based upon facts, developed at the hearing, showing that Lee was a stockholder of Western States and a good friend of the Chairman of its Board of Directors, Mr. Eliason. Mr. Eliason arranged a test case, approached Mr. Lee to use his name on an assignment of a lease for that purpose, Western States to pay all expenses and to secure attorneys for Mr. Lee. Mr. Lee had never seen his assignor. The section involved was located



a considerable distance from any oil and gas development. Mr. McCarthy, counsel for Western States, said that Lee's attorney was to act independently and that an adversary proceeding was contemplated. He further stated (p. 11, Transcript of Federal Court Hearing, March 15, 1958, copies of which have been filed with the Clerk of this Court):

At the time this petition was filed, your Honor, counsel for Western States Refining Company and the Attorney General of the State of Utah and counsel for Lee all went to see Chief Justice McDonough and explained to him exactly the nature of this test case, just as I have attempted to explain it here to your Honor today.

Justice McDonough, in effect, said that he could see nothing objectionable in the procedure, although the jurisdiction of the Supreme Court would have to be *affirmed as Lee* (sic) (affirmatively) demonstrated.

The case of *Lee v. Henderson* was dismissed a few days later and the injunction consequently dissolved. Pending these proceedings the United States had, on February 18, 1958, filed the case of *United States v. State of Utah, et al.*, Docket No. C-16-58, to quiet title to a section 32 alleged to be part of the Navajo Indian Reservation. The Navajo Tribe had granted a lease to the Honolulu Oil Corporation, which was named a defendant, while the State had purported to lease the same land to one George N. Larsen who assigned to Western States. The third federal case, *United States v. State of Utah, et al.*, Docket No. C-40-58, was filed April 14, 1958, involving lands within the Navajo Indian Reservation which had

been leased by the Tribe to the Superior Oil Company. Western States likewise had a purported lease from the State on these lands. In the federal court cases, the State of Utah, the members of its Land Board, Western States and other purported owners of interests under the purported state leases, Honolulu Oil Corporation and Superior Oil Company are all parties.

When the injunction was dismissed, defendants in the federal court cases had sought to have proceedings stayed pending the filing of a proposed declaratory judgment action in the state courts. This was denied. The present case was then filed on April 21, 1958. The motion to stay federal court proceedings was renewed and a hearing was had on July 31, 1958. Government counsel there stated that the nearest oil activity to the Hatch property was 20 miles away and that so far as he knew there was no mineral value to the Hatch land (p. 15, Transcript of Hearing, July 31, 1958). He further stated that Hatch is a brother of M. V. Hatch, a member of the State Land Board of the State of Utah and a defendant in C 21-58 (*id.*, p. 15). These statements were not controverted at the hearing. Defendants' counsel admitted that federal questions were involved (*id.*, p. 19). The court's reasons for refusing the stay were stated after the arguments as follows (*id.*, pp. 22-24) :

Now, without deciding the question at this point, ordinarily one would expect that, if the State of Utah wanted to exchange a school section for some other section in the public domain, when that exchange was made that they are going to give just as many rights, including mineral, in

that section, to the United States as they expected to get back in the section they received from the United States. That is what one ordinarily would expect, whether it was the United States and the State dealing or whether it was you and I dealing. If I had a school section and wanted to trade it to you for a section that wasn't a school section and nothing was said about mineral rights—nobody thought about it then because there wasn't any oil down there discovered in them—one would expect that when that was exchanged you would get all the rights in the school section and I would get all the rights in the other section.

Now, you are calling my attention to circumstances which you say alter this case, and one of them is that state statute. But there are a lot of others.

Here you have two parties to an exchange, and we are going to have a look into all of the circumstances involved, it seems to me. One of the important things is that the exchange was made with the United States of America. And that Garfield case<sup>1</sup> is not really the kind of case you are concerned with. You are concerned with the cases down there in San Juan County and perhaps other counties where there are valuable oil discoveries and those school sections now are very valuable things.

I should think, Mr. McCarthy, that if the State is going to decide this case for you it ought to decide all of these issues; if this Court is going to decide this case for you, this Court should decide all these issues, because they are irretrievably intermingled and tied together—you can't separate them. You are trying to try this case piece-

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<sup>1</sup>This refers to the Hatch case which was filed in Garfield County.

meal; you are trying to get the Supreme Court of Utah to decide one little segment of it. It may be decisive; it may not be, I don't know. I don't know enough about it yet. And after that you are perfectly happy to come back and let us monkey around with the rest of it. You are trying that case piecemeal. You have one question: Under all of the circumstances, including the statutes on both sides and everything else, did they reserve those mineral rights or didn't they?

For some reason you folks think you would rather get that matter decided over in the state courts, and you are entitled to do it if you can. The United States for some reason — and one reason the United States is here is perfectly evident: There are federal questions involved. This is the only court where they can have those questions decided and this is the proper forum for the United States to appear as a party either to sue or be sued. That is why they are here. I do not think the United States is here with any idea that this Court's decision is going to be any more or less favorable to them.

I don't know why I should pay any attention to that sort of consideration anyway.

MR. McCARTHY: I agree with your Honor.

THE COURT: Any at all. It seems to me that you have a case here, and we have spent a lot of time thinking about it, we have spent a lot of time thinking and talking about this. Now, it seems to me this is the proper forum to try this issue. I don't think it is as narrow an issue as you urge.

The motion to stay was denied and there is now pending in the United States Court of Appeals for the Tenth

Circuit an application for leave to file a petition for a writ of certiorari to reverse this ruling.

### III.

#### THE POSITION OF THE UNITED STATES

The United States believes that the State of Utah has waived and relinquished all right, title and interest to the former school sections for which it has received lieu lands. The federal statutes provide that selection of the lieu lands "shall be a waiver of its [the State's] right to said sections" [school sections]. R.S. 2275, as re-enacted by the Act of February 28, 1891, 26 Stat. 796, 43 U.S.C. sec. 851. The relevant portions of various federal statutes are printed in the Appendix, *infra*. The Act of May 3, 1902, 32 Stat. 189, 43 U.S.C. sec. 853, *infra*, p. iii, specifically made these provisions for lieu selections applicable to Utah. These statutes contemplated the exchange of full fee title on an acreage basis as stated in section 852, *infra*, p. ii. No reservation of minerals was authorized. The selection lists filed by the State to take advantage of these opportunities did not purport to reserve any minerals. Clearly any attempt to do so would have been rejected by federal authorities as not authorized by law. In contrast, the Taylor Grazing Act, 48 Stat. 1269, as amended 43 U.S.C. sec. 315g, authorized reservation of minerals in exchanges when lands mineral in character are involved.

Many exchanges, both before and after 1919, were made without expression of a mineral reservation. The State seizes upon the 1919 statutes to argue that the

Land Board had no jurisdiction to waive the State's interest in the minerals in the former school sections. We think the trial court correctly held that such limitation did not apply to school land exchanges. The administrative actions of both state and federal officials confirm that view.

Even if a contrary construction of the 1919 statute viewed *in vacuo* should be taken, we believe that there are other reasons why the State's claim to these minerals must be rejected. But, as we point out later in detail in Point VI, these matters cannot be decided on the record of the present case. They relate in part to federal questions which are here presented and likewise, we believe, have a bearing on the proper construction of the Utah statute and to the question whether on all the facts the statute should be construed so as to nullify many outstanding titles.

#### IV.

#### THIS CASE IS NOT CONTROLLED BY UTAH LAW

At the first hearing in federal court regarding the injunction the following colloquy took place between the court and Mr. McCarthy, who is one of the counsel for plaintiff here (Transcript of Hearing, March 15, 1958, pp. 41-42):

MR. McCARTHY: I respectfully suggest there are potential and probable constitutional issues.

THE COURT: What are the constitutional issues?

MR. McCARTHY: For example, under the Federal statute under which this exchange was made is the provision that exchange of these lands constitutes a waiver by the state of its rights. Query: Should the question of whether or not a waiver has taken place here be determined on the basis of state law or should it be determined on the basis of a Federal statute?

THE COURT: What is the constitutional question?

MR. McCARTHY: If determined on the basis of a Federal statute, I think there is a serious question involved as to the right of the Federal Government to legislate in a field with respect to states rights in these minerals and whether or not a certain action constitutes a waiver of the states rights with respect to the minerals.

I think, just as much as there are questions in this case of an impairment of the contract, there is such a problem involved in this case, the implied contract of exchange by which the state offers these lands and the Government accepts the lands and conveys lieu lands to the state. Also, I have no doubt that if the state statutes were construed as the State of Utah and Western States Refining Company would want them construed, that the Federal Government would be claiming a violation of due process, the taking of property without due process. I think there are potential constitutional questions, very much so, in this case, your Honor.

See also *supra*, p. 7, 8.

While it is not admitted that the constitutional questions referred to by counsel in the above quoted colloquy exist, yet the federal court and all parties before it are



agreed that there are federal questions involved. Some of them relate to the correct construction of the federal statutes. And, of course, the issue whether State law controls is itself a federal question. Plaintiff argues that the issue here is the lack of authority of its agents to convey minerals to the United States and that this question is controlled by local law. But this is a two-party transaction between the State and the United States. *Dyer v. Sims*, 341 U.S. 22 (1951), rejected a similar attempt by West Virginia to make its law as to authority of its officers control performance of an interstate compact. The court said (p. 28):

But a compact is after all a legal document. Though the circumstances of its drafting are likely to assure great care and deliberation, all avoidance of disputes as to scope and meaning is not within human gift. Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts. It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the "federal common law" governing interstate controversies (*Hinderlider v. LaPlata Co.*, 304 U.S. 92, 110), is the function and duty of the Supreme Court of the Nation. Of course every deference will be shown to what the highest court of a State deems



to be the law and policy of its State, particularly when recondite or unique features of local law are urged. Deference is one thing; submission to a State's own determination of whether it has undertaken an obligation, what that obligation is, and whether it conflicts with a disability of the State to undertake it is quite another.

In *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958), the respondents argued that contracts between California irrigation districts and the United States had been invalidated under State law controlling the authority of local districts to contract. The United States Supreme Court held that the decision of the State Supreme Court, in fact, was based on mistaken views of federal law and left open the question whether State law could control, saying (p. 290):

Nor would the suggestion that state law prevented the water districts and agencies of the State from entering into the contracts change this conclusion. We need not determine whether a State could in that manner frustrate the consummation of a federal project constructed at its own behest. The fact remains that the state law was, in fact, invoked only by the interpretation the court gave §8 [of the Federal Reclamation Laws].

This argument that local law controlled authority of a local entity was also urged in *City of Tacoma v. Taxpayers*, 357 U.S. 320 (1958), but not decided because the case went off on other grounds.

Moreover, the exchange transaction whereby the State of Utah received other lands in lieu of school sections was contractual in nature. The construction and

effect of federal contracts is governed by federal law. *United States v. Allegheny County*, 322 U.S. 174, 183 (1944); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-367 (1943); *Kem-Limerick Inc. v. Scurlock*, 347 U.S. 110, 121-122 (1954); *United States v. Latrobe Construction Company*, 246 F. 2d 357 (C.A. 8, 1957), cert. den. 355 U.S. 890; *United States v. Independent School Dist. No. 1*, 209 F. 2d 578, 580-581 (1954); *American Homes v. Schneider*, 211 F. 2d 881, 882-883 (C.A. 3, 1954).<sup>2</sup> *United States v. Fox*, 94 U.S. 315 (1876), relied on by appellant, is irrelevant since it rested on the authority of local government to control testamentary dispositions. Cf. *United States v. Burnison*, 339 U.S. 87 (1950). Cases such as *United States v. Nebo Oil Co.*, 190 F.2d 1003 (C.A. 5, 1951), and *Los Angeles and Salt Lake R. Co. v. United States*, 140 F. 2d 435 (C.A. 9, 1944), simply applied local law of real property in construing deeds from private parties to the United States. The present situation where transactions of a contractual nature with the State itself are concerned clearly brings into play different principles. And it should be noted that the more recent Supreme Court decision in *Leiter Minerals v. United States*, 352 U.S. 220 (1957), recognized that federal law might control even the title acquired from private interests. We find nothing in *California v. Deseret Water Co.*, 243 U.S. 415 (1917), holding that the

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<sup>2</sup>These decisions make plain the irrelevancy of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). It was under the mistaken notion that the *Erie* case applied here that the district court said he would be obliged to follow the State court decisions (Transcript of Hearing, July 31, 1958, p. 12).

issue presented turned on federal law which supports the claim that state law controls here. *Newton v. State Board of Land Com'rs*, 37 Idaho 58, 219 Pac. 1053 (1923), cited by the State (Br. 17-21), was a writ of prohibition against the State Board of Land Commissioners before they had purported to make any exchanges. The series of transactions between the United States and Utah over the last 39 years cannot be ignored. The *Newton* case, if anything, tends to confirm our position since it shows that within a few years of passage of the 1919 Utah Act a somewhat similar question as to authority with regard to school lands was raised in an adjoining state. The fact that nevertheless the pre-1919 practice as to exchanging school lands continued in Utah demonstrates the understanding of the participants that the 1919 statute had not changed things.

We want to make it clear that this brief outline of some of the federal questions that may be presented before this controversy is resolved is by no means intended to be complete or exhaustive. Other issues may well emerge when all of the facts surrounding this series of federal-state transactions have been brought to light.

## V.

THE STATE IS NOT ENTITLED TO BOTH THE MINERALS IN THE SCHOOL LANDS AND THE FULL FEE TITLE TO THE EXCHANGED LANDS.

The State admits that under federal law there was contemplated an exchange of equivalents. It asserts, however that, since lands selected were to be non-mineral

in character, there was an exchange of equivalents. The federal court gave the obvious answer (*supra*, p. 7) when it said that all rights in each section would be exchanged since minerals were not known to exist in either section.<sup>3</sup> The non-mineral character of the lieu lands is determined at the time the State selects them and the United States thereby parts with all interests, including minerals, later discovered. *Wyoming v. United States*, 255 U.S. 489 (1921). The same result applies as to the school sections, we submit, since when the State makes its selection "Equity then regards the State as the owner of the selected tract and the United States as owning the other; and this equitable ownership carries with it whatever of advantage or disadvantage may arise from a subsequent change in conditions whether one tract or the other be affected." *Wyoming v. United States*, 255 U.S. 489, 497 (1921). Federal law thus prohibits the State from retaining any interest in the school section and also securing the lieu section.

## VI.

### THE RECORD OF THIS CASE DOES NOT PRESENT ADEQUATE BASIS UPON WHICH TO DECIDE IMPORTANT FEDERAL AND STATE QUESTIONS.

The answer to the federal questions suggested above depends to considerable degree on facts not in this record. It is extremely important that the conduct, expressions of opinion, etc., of both federal and state officers or agen-

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<sup>3</sup>The Utah school land grant excluded lands known to be mineral. *United States v. Sweet*, 245 U.S. 562 (1918).

cies participating in the exchanges be known. Illustrative of the importance of the administrative practice is *United States v. Wyoming*, 331 U.S. 440 (1947), which also shows the relevancy of practices in regard to other states. In *United States v. Burlington, Etc., R.R. Co.*, 98 U.S. 334 (1878), the court, speaking of an amendment to a railroad land grant, said (p. 341):

Such has been the uniform construction given to the acts by all departments of the government. Patents have been issued, bonds given, mortgages executed, and legislation had upon this construction. This uniform action is as potential, and as conclusive of the soundness of the construction, as if it had been declared by judicial decision. It cannot at this day be called in question.

See also *Minnesota Company v. National Company*, 3 Wall. 332, 334 (1865). So here the actions of the State, the grantees of the lieu lands, and the subsequent interests in the chains of title resting on those grants, as well as actions of the United States as to school lands, may reveal that a situation exists which should not be overturned regardless of the correct *a priori* construction of the statute. See also *Cate v. Beasley*, 299 U.S. 30 (1936). Also, it is quite possible that rules of estoppel, laches and the like may be applicable to this federal-state controversy.

We submit that before a multitude of titles is disturbed, as may result from the State's argument, these facts should be thoroughly examined. We doubt if defendant Hatch would be willing to undertake the expense of the necessary research and presentation of evidence

concerning those matters, since no valuable oil and gas deposits appear to be contained in his land. We suggest, however, that in the federal court cases the resources of the United States and the oil companies having a direct and important interest in the outcome are available and will be used to discover and produce all relevant material. This case could properly, we believe, be held in abeyance pending such proceedings.

There is precedent for refusal to decide important questions on an inadequate record. In *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948), important issues under the Fair Labor Standards Act were presented. The case was disposed of on motion for summary judgment. The Supreme Court vacated the judgment which the court of appeals had affirmed. It said (pp. 256-257) :

The short of the matter is that we have an extremely important question, probably affecting all cost-plus-fixed-fee war contractors and many of their employees immediately, and ultimately affecting by a vast sum the cost of fighting the war. No conclusion in such a case should prudently be rested on an indefinite factual foundation. The case, which counsel have described as a constantly expanding one, comes to us almost in the status in which it should come to a trial court. In addition to the welter of new contentions and statutory provisions we must pick our way among over a score of technical contracts, each amending some earlier one, without full background knowledge of the dealings of the parties. The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties

and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine.

We do not hold that in the form the controversy took in the District Court that tribunal lacked power or justification for applying the summary judgment procedure. But summary procedures, however salutary where issues are clear-cut and simple,<sup>7</sup> present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice.

We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.

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<sup>7</sup>Rule 56 requires that summary judgment shall be rendered if "there is no genuine issue as to any material fact . . ." See note 4.

See also *Skelly Oil Co. v. Phillips Co.*, 339 U.S. 667, 677-678 (1950).



## CONCLUSION

It is submitted that either the judgment should be affirmed or, if vacated, the case should be remanded and held in abeyance pending full development of all relevant facts in the federal court proceedings.

Respectfully,

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## APPENDIX

R.S. 2275, as re-enacted by the Act of February 28, 1891, 26 Stat. 796, 43 U.S.C. sec. 851, provides:

*Deficiencies in grants to State by reason of settlements, etc., on designated sections generally.*

Where settlements with a view to preemption or homestead have been, prior to February 26, 1859, or shall thereafter be made, before the survey of the lands in the field, which are found to have been made on sections 16 or 36, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by preemption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections 16 or 36 are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided*, Where any State is entitled to said sections 16 and 36, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections 16 or 36 are fractional in quantity, or where one or both are wanting by reason of the town-

ship being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections 16 and 36 therein; but such selections may not be made within the boundaries of said reservations: *Provided, however*, that nothing in this section contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections 16 and 36 in place therein; but nothing in this proviso shall be construed as conferring any right not in this section existing prior to February 28, 1891.

43 U.S.C. sec. 852 provides:

*Selections to supply deficiencies of school lands.* The lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur; and where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters

of a township, three quarters of a section; for a fractional township, containing a greater quantity of land than one quarter, and not more than one half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township, one quarter section of land: *Provided*, That the States or Territories which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships.

The Act of May 3, 1902, 32 Stat. 189, 43 U.S.C. sec. 853, provides:

*Selections in Utah to supply deficiencies of school lands.* All the provisions of sections 851 and 852 of this title, which provide for the selection of lands for educational purposes in lieu of those appropriated for other purposes, are made applicable to the State of Utah, and the grant of school lands to said State, including sections 2 and 32 in each township, and indemnity therefor, shall be administered and adjusted in accordance with the provisions of said sections, anything in the Act providing for the admission of said State into the Union, to the contrary notwithstanding.

Wherever the words "sections 16 and 36" occur in said sections, the same as applicable to the State of Utah shall read: "sections 2, 16, 32, and 36," and wherever the words "sixteenth and thirty-sixth sections" occur the same shall read: "second, sixteenth, thirty-second, and thirty-sixth sections," and wherever the words "sections 16 or 36" occur the same shall read: "sections 2, 16, 32, or 36," and wherever the words "two sections" occur the same shall read "four sections."