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State of Utah v. James L. Hatch and Della L. Hatch : Brief for the United States of America, Amicus Curiae

Utah Supreme Court

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In the
Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff and Appellant,

vs.

JAMES L. HATCH and DELLA L.
HATCH,

Defendants and Respondents.

Case No.
8937

BRIEF OF RESPONDENTS

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In the Supreme Court of the State of Utah

STATE OF UTAH,

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vs.

JAMES L. HATCH and DELLA L.
HATCH,

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BRIEF OF RESPONDENTS

STATEMENT OF FACTS

The Respondents agree with the Statements of Fact expressed in the Brief of Appellant, except to add that Donald G. Prince, Land Examiner called by the State of Utah, testified also on Cross-Examination that in virtually all selections made by the State of Utah a prospective purchaser from the State had already chosen the land selected and requested that State to acquire the same from the Federal Government. Thus the instant exchange, apparently

contrary to the broad conclusion elicited from Mr. Prince on Direct Examination, effected a result equally as beneficial to the State of Utah, and as consistent with the statute directing a "compacting" of the State's interests, as would have an exchange locating the selected lands contiguous to pre-existing state holdings and in effect *did* "compact" the State's holdings because it extricated the State's interests from a location inaccessibly within the boundaries of a national forest (Tr. p. 33).

STATEMENT OF POINTS

POINT I

SCHOOL SECTION LANDS ARE HELD BY THE STATE OF UTAH IN A PROPRIETARY CAPACITY; HOWEVER, EVEN ASSUMING THAT THEY ARE NOT, THE TRIAL COURT CORRECTLY RULED IN FAVOR OF THE DEFENDANTS AND RESPONDENTS.

POINT II

THE UTAH STATUTES HAVE NEVER REQUIRED OR EVEN CONTEMPLATED A RESERVATION OF MINERALS IN EXCHANGES OF LAND WITH THE FEDERAL GOVERNMENT.

A—Sec. 65-1-15 UCA 1953 was designed to correct administrative abuses in sales and cannot be extended to affect federal exchanges.

B—There can be no implied reservation in favor of any grantor.

POINT III

THE APPLICABLE FEDERAL LEGISLATION, TO THE EXCLUSION OF STATE STATUTES, CONTROLS IF UTAH STATUTES SHOULD BE CONSTRUED TO PROVIDE FOR A MINERAL RESERVATION IN EXCHANGES.

POINT IV

FEDERAL EXCHANGES MUST BE OF EQUIVALENT ESTATES, AND THIS WAS AN EQUIVALENT EXCHANGE ONLY IF THE MINERAL ESTATE PASSED TO THE UNITED STATES AND ITS SUCCESSORS, THE DEFENDANTS AND RESPONDENTS.

POINT V

VOLUMINOUS TRANSACTIONS EFFECTED BOTH BEFORE AND AFTER 1919 HAVE EVOLVED A RULE OF PROPERTY CONCLUDING UTAH FROM ASSERTING TITLE TO THE MINERALS.

ARGUMENT

POINT I

SCHOOL SECTION LANDS ARE HELD BY THE STATE OF UTAH IN A PROPRIETARY

CAPACITY; HOWEVER, EVEN ASSUMING THAT THEY ARE NOT, THE TRIAL COURT CORRECTLY RULED IN FAVOR OF THE DEFENDANTS AND RESPONDENTS.

In *Strand vs. State*, 132 P. 2d 1011, 16 Wash. 2nd 107, it is held that:

“The accepted rule is that a State acts in its proprietary capacity when it undertakes to *dispose* of public lands. This rule has been recognized almost since the inception of the principal of equitable estoppel.”

Cited for that proposition are numerous highly respected jurisdictions including the Federal Supreme Court as it expressed the rule in *United States vs. California and Oregon Land Company*, 148 U. S. 31, 13 S. Ct. 458, 37 L. Ed. 354 and *United States vs. Dalles Military Road Company*, 148 U. S. 49, 13 S. Ct. 465, 37 L. Ed. 362. The facts assumed by the rule and in existence in this case (i. e. the state *disposing* of public lands) take this litigation outside of the scope of *Van Wagoner vs. Whitmore*, 58 Utah 418, 199 P. 670, a case applying the statute of limitations.

All rules of property must certainly militate against a State acquiring an unfair advantage of an innocent purchaser merely by reason of the fact that the State is sovereign. Conceding as we do the high public purpose in preservation of trusts for the benefit of the public schools of this State, it must nevertheless be that long established principles of equity and property cannot grant special dispensations or unfair immunity against supervening rights of

innocent purchasers and proprietors of land to their great detriment.

The defenses of estoppel, laches, unjust enrichment, and all equitable doctrines should be available against a state as well as against any other *grantor* of land irrespective of such state's capacity as a trustee. If a contrary rule were adopted, there would be no capacity other than sovereign or governmental since every asset, chose in action, or property interest of any government is held for the benefit of its subjects or some segment thereof.

Notwithstanding the Court's holding upon this particular phase of the Appellant's argument we will demonstrate later that it is immaterial whether or not the State holds school lands as a sovereign but nevertheless urge at this point that the equities compel a holding, at least in the narrow circumstance where the State *disposes* of property, that it is a proprietor as opposed to a sovereign.

POINT II

THE UTAH STATUTES HAVE NEVER REQUIRED OR EVEN CONTEMPLATED A RESERVATION OF MINERALS IN EXCHANGES OF LAND WITH THE FEDERAL GOVERNMENT.

Section 65-1-27¹ and 65-1-70² UCA 1953 were a part of the Revised Statutes of 1896 and continued substantially unamended until the time of enactment of Section 65-1-15, the statute upon which Appellant relies.

The Appellant argues that 65-1-27 applied not to exchanges of school lands but only to selection of other grants made in the Enabling Act in quantity. The complete answer to this is that the Indemnity Selection Act, now Sections 851 and 852, Title 43, USCA (Sections 2275, 2276 of the Revised Statutes) was first enacted February 28, 1891, or five years prior to the first adoption of 65-1-27 and 65-1-70. Therefore the Utah enactments were expressly implementary to the Indemnity Exchange Act. The Appellant argues also that at the time of enactment of 65-1-27 it was thought that school lands, title to which had already vested in the State, could not be exchanged for lands lying outside of Federal

¹*Section 65-1-27*

"All selections of land shall be made in legal subdivisions according to the United States survey, and when a selection has been made and approved by the Board, it shall take such action as may be necessary to secure the approval of the proper officers of the United States and the final transfer to the state of the lands selected. The Board may cancel, relinquish or release the claims of the State too, and may reconvey to the United States, any particular tract of land erroneously listed to the State, or any tract upon which, at the time of selection, a bona fide claim has been initiated by an actual Settler."

²*Section 65-1-70*

"In order to compact, as far as practicable, the land holdings of the State, the Board is hereby authorized to exchange any of the land held by the State for other land of equal value within the State held by other proprietors; and upon request of the Board the Governor is hereby authorized to execute and deliver the necessary patents to such other proprietors and receive therefrom proper deeds of the lands so exchanged; provided that no exchange shall be made by the Land Board until the patent for the land so received in exchange shall have been issued to such proprietors or their grantors."

reservations. The simple explanation is that at the time *California vs. Deseret Water, Oil and Irrigation Company*, 243 U. S. 214, 37 S. Ct. 394, was decided in 1917 the United States Supreme Court said:

“Selections aggregating many thousands of acres have been made in reliance upon [the Land Decision holding that vested school sections could be exchanged under Sec. 2275] and that no doubt large expenditures of money have been made in good faith upon the selected lands. It is therefore urged that such construction has become a rule of property. In this situation we should be slow to disturb a ruling of the Department of the government to which is committed the administration of public lands.”

Both Sections 65-1-27 and 65-1-70 are sufficiently broad to embrace, and in fact have always been intended to embrace, exchanges of vested school lands lying within the exterior boundaries of a national forest for indemnity lands selected outside said reservation.

Section 65-1-70 authorizes an exchange by the State Land Board “with *any* other proprietors”. The Appellant cannot seriously contend that the Federal Government is not a “proprietor” of land within this State. It seems to advance an argument that the revision of the Utah Statutes in 1933 to delete the phrasing “by the Government of the United States” has relation back to 1925 to impose an unnatural construction upon 65-1-70 never intended. This Court is amply aware of the authority granted to the commission to revise the 1933 Statutes and readily will perceive that the deletion of the matter cited by the Appellant was purely to remove surplusage. It would be ridiculous,

we claim, to ascribe to a 1933 amendment made by the code commission any manifestation of legislative intent to enact a rule of construction upon a statute applicable retroactively to the year 1925.

We are certain that this court will not seriously consider the argument advanced in tedious and meticulous detail by the Appellant that Sections 65-1-27 and 65-1-70 did not in 1925 authorize the Utah State Land Board to make exchanges with the Federal government of lands lying within a National Forest granted to the State by the Enabling Act for lands lying outside a National Forest and owned by the United States.

A—Sec. 65-1-15 UCA 1953 was designed to correct administrative abuses in *sales* and cannot be extended to affect federal exchanges.

Section 65-1-15 can relate only to *sales*. The language of the Act is:

“All coal and other mineral deposited in lands belonging to the State of Utah are hereby reserved to the State. Such deposits are reserved from sale.
* * *

The second proviso is an express restriction on the scope of the first sentence. In the Utah case of *Bird and Jex Company, et al. vs. Funk, et al.*, 85 P. 2d 831, 96 Utah 450, it is stated that the office of a proviso in a statute is to qualify or restrain its generality or to exclude some possible ground of misinterpretation of it as *extending to cases not intended by the legislature to be brought within its purview*.

This is the exact situation with which we are confronted here. The proviso must limit the scope of the first sentence to restrict its application singularly to sales.

The transaction with which we are here concerned is an "exchange" and not a "sale". "Sale" is not synonymous with "exchange". See the numerous cases collected in Volume 38 Words and Phrases, pages 100 to 105. In *Hann vs. Malone*, 176 N. W. 393, the Supreme Court of Iowa held that:

"The test for determining whether there has been a sale or exchange of property is whether there was a fixed price for which the exchange was to be made. If there was a fixed price, the transaction is a sale, if not, an exchange."

The State's Statutes contain a number of provisions expressly dealing with "sales" (65-1-31 et. seq., 65-1-41, 65-1-42) all contemplating the transfer of property for a fixed, money consideration. *Watson vs. Odell*, 198 P. 772, 58 Utah 276, holds that a "sale" means the transfer of property for money.

Section 65-1-27 deals particularly with exchanges as does 65-1-70. It is a cardinal rule of construction that as between two statutes apparently in conflict the one dealing more particularly or specifically with the subject matter must prevail over the one dealing with it generally. *University of Utah vs. Richards*, 20 Utah 457, 59 P. 96. As opposed to the argument advanced by the Appellant that State executives are prohibited from making an exchange of both the State's mineral and surface interests, Section 65-1-27 requires the State Land Board to "take all action

required to secure the approval of the United States for the transfer to the State of lands selected." This would require alienation of the minerals under the express holding of *Wyoming vs. United States*, 255 U. S. 489, 41 S. Ct. 393, argued more fully hereinafter, and the essential interpretation of other Federal legislation. Section 65-1-70, cumulatively to 65-1-27, permits exactly the transaction which occurred here—an exchange of land within a national forest for unappropriated public domain outside. The direct testimony at the trial, modified on cross examination, may have been that the transactions here did not "compact" the State's holdings. Even assuming that the testimony was competent to prove that we are confident that the State, having acted upon the pretext of compliance with the Statute cannot rescind any exchange solely because one officer's opinion is that the strict letter of the enactment was not followed. But the result directed by the legislature was reached in any event, to-wit: The extrication of the State's interest from the inaccessibility of location within a forest reserve, precisely the situation viewed by the United States Supreme Court in *California vs. Deseret Water, Oil & Irrigation Company*, 243 U. S. 415, 37 S. Ct. 394.

It is very evident that 65-1-15 deals particularly and exclusively with "sales"; that 65-1-27 and 65-1-70 deal particularly and to the express exclusion of 65-1-15, with "exchanges". The sections are entirely harmonious and consistent yet, when dealing with a particular transaction, mutually exclusive to and with each other.

The foregoing argument is given great additional weight by reference to Page 28 of the Laws of 1917, where

there was appropriated \$25,000.00 for an investigation of the State Land Board and other State agencies, and to Page 469 of the 1919 House Journal, containing a report of the Committee which made that investigation.

Out of this report arose Chapter 107 of the Laws of Utah 1919, which is now Section 65-1-15, the statute upon which the Appellant relies. This report is a public document of which this court may take judicial notice and contains an account of numerous sales of public lands by the State for small and insufficient consideration, which lands for their valuable minerals were being sold for many times their cost by the persons who had dealt unscrupulously with the State. The report recommended that sales be suspended for five years and that the lands be leased during the moratorium. The report further recommended that the State continue to take the greatest possible advantage of available exchanges with the Federal Government to compact the State's holdings, to extricate its lands inside reservations and to consolidate holdings within national forests; to release interests of the State in desert school sections and secure indemnity lands suitable for grazing.

This Court must look to the evil sought to be corrected by the enacted bill and no further. *Norville vs. Tax Commission*, 98 Utah 170, 97 P. 2nd 937, 126 A. L. R. 1318. The evil certainly did not lie in exchanges with the Federal Government; it lay only in sales to private individuals and the latter are the only class of situations to which Section 65-1-15 can be given application.

B—There can be no implied reservation in favor of any grantor.

A general conveyance of land without any exception or reservation of the minerals therein carries with it the minerals as well as the surface. *Montana Mining Co. vs. St. Louis Mining and Milling Co.*, 204 U. S. 204, 51 L. Ed. 444, 27 S. Ct. 254.

The presumption established as an ancient principle in the law of property is that the grantor conveys the land free from any reservation, except such as he has expressed in his own grant. *Georgia vs. Cincinnati S. R. Co.*, 248 U. S. 26, 63 L. Ed. 104, 39 S. Ct. 14.

The stipulation of the parties hereto (Tr. p. 11) accurately expresses that a reservation of minerals is non-existent in those documents by which the parties consummated an exchange of the disputed lands from the State of Utah to the United States of America. In fact the grant *negatives* any intention to create a reservation by being absolute in form. The selection list recites that the

“State of Utah makes application *under the provisions of the acts of Congress of July 16, 1894, [the enabling act] and the acts supplementary and amendatory thereto* for the following described unappropriated non-mineral public lands in lieu of, or as indemnity for, the corresponding school lands, for losses to its grant for common schools, assigned and designated as bases therefore, and agrees to accept the selected tracts *in full satisfaction of the bases assigned.*”

Embodied in the Indemnity Exchange Act, (Section 851, Title 43), there is the following language:

“The selection of lands in lieu thereof by the state or territory shall be a waiver of its right to said sections.”

"Waiver of right" can only refer to those rights which were conferred upon the state by virtue of Section 6 of the Enabling Act, wherein the state is granted all Sections 2, 16, 32 and 36. A "waiver of right" is a "relinquishment or refusal to accept a right," *In re Auerbach's Estate*, 65 P. 488, 23 Utah 529. In *Smiley vs. Barker*, 83 F. 684 (9th Cir.) a waiver is defined as

"where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forebears the doing of something inconsistent with the existence of the right or of his intention to rely upon it. Thereupon, he is said to have waived it, and he is precluded from claiming anything by reason of it afterwards."

See also the numerous cases collected in Vol. 44, page 419, WORDS AND PHRASES.

The term "right", when referring to property interests, includes all the interest, estate, claim or title of the individual granting by use of that term, in the property affected. See *Shewell vs. Board of Goshen Union Local School District*, 96 North East 2nd, 323 88 Ohio App. 1, where it was held that:

"The provision in a deed conveying realty 'except the "right" owned by the school district or board of education to about one-fourth of an acre being used as a school house lot,' constituted an exception of the fee simple title to the school lot and was not merely an expression of permissive use."

The Enabling Act contains language of exact import and can be construed only to mean that title to the entire surface and mineral interests were transferred to the Fed-

eral Government when the State selected lieu lands. Section 6 of that Act requires an exchange of equivalents, stating that Sections numbered 2, 16, 32 and 36 *or other lands equivalent thereto* are granted, indemnity lands to be selected in such manner as the Legislature may provide *with approval of the Secretary of the Interior*. Section 12, paragraph 3 of the Enabling Act provides that the State of Utah shall not be entitled to any *further or other* grants of land and Section 13 provides that indemnity lands shall be selected under the direction of the Secretary of the Interior. Indemnity land is additional and therefore "other" lands if a part of the fee simple estate in base lands is reserved. Thus the State of Utah is, contrary to Section 12 of the Enabling Act, receiving "further and other lands" if it reserves minerals in lieu exchanges. Clearly a state reservation of minerals is entirely inconsistent with the express, affirmative, language of the Enabling Act.

There being no express reservation, but on the contrary an absolute grant of the mineral estate, recited in the instruments (Exhibits "A" and "B") effecting the exchange, the only remaining consideration can be whether or not the Utah State Statute (65-1-15) can be extended so as to embrace this transaction.

A parallel pronouncement and of equal dignity to the principle against implied reservations is the universally accepted rule that a statute may not be extended by construction beyond the purpose intended by the Legislature. *United States vs McElvain*, 272 U. S. 633, 71 L. Ed. 451, 47 S. Ct. 219. As we have pointed out in the argument on the preceding Sub-Point, the legislation upon which the Plaintiff relies

here was directed toward abuses practiced in the Land Board in the sales of public and school lands to private persons for their mineral value and was never intended to apply to the Federal Government or to exchanges therewith; on the contrary, Sections 65-1-27 and 65-1-70 were intended by the Legislature to continue to control those exchanges. The Court may take judicial notice of the fact that Section 65-1-15 was introduced in the Legislature by then State Senator George H. Dern, who later became Governor of the State of Utah, holding office for two terms between 1925 and 1933; further that during his terms as Governor, he was by virtue of such office Chairman of the State Land Board which was comprised of the Governor, Secretary of State, and the Attorney General, and that as Chairman of the Land Board, he effected numerous exchanges with the Federal Government and at no time attempted to make any reservation of minerals in such exchanges. Many hundreds of exchanges had in fact been made long before the introduction of Section 65-1-15 into the provisions of Utah law, and the Legislatures successively had understood and agreed that the provisions of Sections 65-1-27 and 65-1-70 were sufficient implementary legislation to authorize and to continue to authorize the exchanges. Numerous exchanges were carried on both before and after the enactment of Section 65-1-15 involving in excess of a million acres of land and are matters of public record within the Utah State Land Board, and therefore matters of which this Court may take judicial notice. *State Board of Land Commissioners vs. Ririe*, 56 Ut. 213, 190 P. 59 and Section 78-25-1, U. C. A. 1953. Virtually no changes and certainly

no changes of any consequence have been made in the provisions of 65-1-27 and 65-1-70 since the date of their enactment in 1896 to the present time.

Two fundamental rules of property sharply limit 65-1-15: First, a statute may not be extended by construction beyond the purpose intended by the Legislature, and Second, no grant nor the words contained therein may be extended by implication in order to create a reservation in favor of the grantor.

The practical construction given a statute for a long period of time has been considered strong evidence of the meaning of the law. Such contemporaneous or practical construction is treated by the Courts as of importance, and as entitled to great weight, respect and persuasive influence. 50 Am. Jur. Statutes Section 319. The interpretation placed upon the statute by the Utah State Land Board and by the Legislature itself is clearly indicated by the action of the Legislature in Chapter 56, Laws of 1927, to provide an *express* reservation of minerals when conveying lands to the United States at the mouth of Bear River forming a part of the bed of the Great Salt Lake. The construction placed by the Legislature itself upon Sections 65-1-27, 65-1-15 and 65-1-70 is to the effect that minerals are *not* reserved when dealing with the Federal Government or its wards. See Chapter 144, Laws of 1957 wherein a sale of lands to the Ute Indian Tribe contained another *express* reservation of minerals.

POINT III

THE APPLICABLE FEDERAL LEGISLATION,
TO THE EXCLUSION OF STATE STATUTES,
CONTROLS IF UTAH STATUTES SHOULD BE
CONSTRUED TO PROVIDE FOR A MINERAL
RESERVATION IN EXCHANGES.

The Appellant in its brief cites the case of *Newton vs. State Board of Land Commissioners, et al.*, 37 Idaho 58, 219 P. 1053. Upon close observation of the facts in that case, including the Admissions Bill and State Constitution requiring that School Section lands be disposed of only at public sale and for not less than \$10.00 an acre, it will readily be observed that the State of Idaho has organic provisions prohibiting *exchanges* of land for any purpose, a situation clearly not obtaining in the State of Utah.

We are not before this Court to argue that the State of Utah does not have sovereignty to legislate with respect to exchanges which it effects with the Federal Government, nor are we here to state that the Federal Government may legislate with respect to interests vested in the State of Utah without implementing and consensual state enactments. We do contend, however, that the State of Utah had to observe, in effecting these exchanges, the provisions of Federal Law as applied by decisions of the United States Supreme Court and that never did any of the executive or legislative officers of the State of Utah at any times material to these proceedings believe that such implementing and consensual legislation was not in existence as the long-practiced, consistent, uniform, and practical construction

of those statutes shows abundantly. The legislature in enacting Section 65-1-15 had no intention, design or purpose to prohibit the State of Utah from entering into exchanges with the Federal Government for the benefit of the State.

We also doubt that it is necessary for the Court here to apply the doctrine of *Dyer vs. Sims*, 341 U.S. 22 (1951); nevertheless if this Court should hold that the Utah statutes have contemplated a reservation of minerals in exchanges with the Federal Government or that the officials of the State of Utah had no state-enacted authority to enter into exchanges with the Federal Government upon the terms imposed by Federal Legislation as construed by U. S. Supreme Court Decisions, then *Dyer vs. Sims* is clearly in point. In that case the officers of the State of West Virginia had committed that State to an interstate compact which was later ratified by Congress. The United States Supreme Court held that at the point of ratification the interpretation of the West Virginia Constitution became a Federal question. Mr. Justice Frankfurter speaking for the Court at 341 U. S., page 28, said:

“Of course every deference will be shown to what the highest court of the State deems to be the law and policy of its state, particularly where 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 the disability of the state to undertake it is quite another.”

A concurring opinion of Mr. Justice Robert M. Jackson indicated that West Virginia was estopped from repudiating the contract.

POINT IV

FEDERAL EXCHANGES MUST BE OF EQUIVALENT ESTATES, AND THIS WAS AN EQUIVALENT EXCHANGE ONLY IF THE MINERAL ESTATE PASSED TO THE UNITED STATES AND ITS SUCCESSORS, THE DEFENDANTS AND RESPONDENTS.

In the case of *Wyoming vs. United States*, 255 U. S. 489, the State of Wyoming waived its right to a school tract within a Federal reservation and selected in lieu thereof a tract of equal acreage from the public lands within the State and outside the reservation, and it performed every act which was required of it in waiving its base lands and selecting lieu lands. The application remained in the General Land Office awaiting consideration for three years. In the meantime, minerals were indicated and the selected lands were withdrawn. The Commissioners then came to consider the selection by Wyoming and declined to approve it demanding that the State either accept a limited—surface right—interest or withdraw the selection.

The United States Supreme Court held that when a state has done all that is required of it in relinquishing its school tract in place and selecting another tract therefor, the Department has no alternative but to approve the list. With respect to the demand that the State of Wyoming relinquish its interest in the minerals in the selected land, the Court approved a statement in *Kern Oil vs. Clark*, 30

L. D. 560 construing a land selection under the Act of June 4, 1897, identical to the laws applicable here, which stated:

"The act clearly contemplates an exchange of equivalents. Such is the unmistakable import of its terms. In the case of relinquishment of patented lands, title is to be given by the government for title received."

All of the language of Federal Legislation which we have hereinbefore quoted contemplates a "right" for a "right", and "interest" for an "interest" and title for title. We are confident that the same spirit has always been intended by the State of Utah and its Legislature as expressed in Sections 65-1-27 and 65-1-70.

Plaintiff argues in its brief that because state selections must be made in lands "not known to be mineral in character," the State of Utah presumptively acquired lands subject to a mineral reservation and therefore the exchange was an "exchange of equivalents".

The complete answer to this contention is that the State of Utah was never supposed to have received any lands "known to be valuable for minerals" by virtue of the Enabling Act or any other congressional grant. *United States vs. Sweet*, 245 U. S. 563, 62 L. Ed. 473, 38 S. Ct. 193. Thus the State of Utah gets an exact "exchange of equivalents" when it waives all its rights (including surface and mineral estates) to lands by present knowledge non-mineral in character (which was all it was entitled to receive in the first instance) for other lands also by present knowledge non-mineral in character.

The second argument against Plaintiff's untenable position here is that there is a vast difference between lands valuable for minerals in this age and lands "known to be valuable for minerals" in 1925. This is boldly illustrated by virtually every currently-producing oil or gas field in the State of Utah. None of those lands were known to be mineral in 1925. It is so fundamental that the Court's attention need not be drawn to the proposition that an absolute reservation of minerals is an overwhelmingly greater burden upon one receiving lands than an injunction not to select lands then "known to be valuable for minerals".

The controlling and pertinent legislation, both Federal *and* State, contemplate an exchange of equivalent titles and any reservation by one party destroys that result.

POINT V

VOLUMINOUS TRANSACTIONS EFFECTED BOTH BEFORE AND AFTER 1919 HAVE EVOLVED A RULE OF PROPERTY CONCLUDING UTAH FROM ASSERTING TITLE TO THE MINERALS.

In the history of exchanges by the State of Utah with the Federal Government, in excess of a million acres have been transferred by the Federal Government to this State and an equivalent number have been transferred in consideration therefor by this State to the Federal Government. These exchanges have all transpired under the scope of the United States Supreme Court decisions cited including *California vs. Deseret Water, Oil and Irrigation Company*,

supra, and *Wyoming vs. United States*, *supra*. This Court may take judicial notice of the fact that hundreds of thousands of acres have been exchanged since May 12, 1919 as a continuing, uninterrupted flow of the same transactions as were occurring prior to the adoption of 65-1-15. These enormous proportions of real property and the numerous exchanges entered into superimposed upon which are the rights of third parties and the extensive improvements placed thereupon by purchasers from both the Federal and State governments have all given rise to a "rule of property" under the equivalent estate principle of *Wyoming vs. United States* that cannot now be unsettled by a strained construction of Section 65-1-15.

An estoppel may arise against a State out of a transaction in which it acted even in its *governmental* capacity if an estoppel is necessary to prevent loss to another and the perpetration of a fraud and if such estoppel would not impair the exercise of a sovereign power of the state. 19 Am. Jur. Estoppel, Sec. 166. See also Corpus Juris Secundum, Estoppel, Sec. 138-140.

CONCLUSION

All the pertinent events must be viewed in one perspective and chronologically as they occurred.

First, there was in existence in 1891 the School Lands Indemnity Act and its amendments authorizing vested school lands within federal reservations or withdrawals to be exchanged for lands outside the withdrawn area.

Second, the Enabling Act was adopted in 1894 granting to the State of Utah Sections 2, 16, 32 and 36 or "other lands equivalent thereto * * * such indemnity lands to be selected within said state in such manner as the legislature may provide with the approval of the Secretary of the Interior."

Third, there follows an exchange of millions of acres in hundreds of transactions, under the scope and aegis of *Wyoming vs. United States* interpreting those laws to prescribe an exchange of equivalent estates, all of which exchanges were effected under the Federal statutes and Sections 65-1-27 and 65-1-70, U. C. A. 1953.

The next occurrence significant to this litigation was an obscure amendment, advanced on the theory that abuses were being practiced by the administrative officers of the land board in connection with sales of state lands to private individuals, to reserve minerals in the event of "sales" without any repeal or modification either expressly or by implication of Section 65-1-27 or 65-1-70 and without any clear or even veiled threat of jeopardy to the mineral interests in lands being acquired from the State of Utah by the Federal Government and its successors and assigns—65-1-15.

Still a free, full flow of exchanges between the State and the Federal Government continues uninterrupted with the Governor of the State of Utah, who had been the senator in 1919 who introduced the provisions of what is now 65-1-15, administering as the chief executive officer of the land board the same transactions without voicing any objection or demanding the insertion of a reservation in favor of the State of Utah.

Next, the Federal Government assigns the fee simple estate to the lands acquired from the State of Utah to these defendants and respondents who are bona fide purchasers for value with no notice of any nature of the rights claimed by the State of Utah under the tenuous precepts now advanced by counsel.

From a reversal of the Trial Court there would now stem loss to thousands of other proprietors of millions of dollars in valuable lands, improvements, and mineral interests.

We contend that the Lower Court should be affirmed.

Respectfully submitted,

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