

1959

State of Utah v. James L. Hatch and Della L. Hatch : Petition on Behalf of the State of Utah for Rehearing and Brief in Support Thereof

Utah Supreme Court

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DEC 19 1958

IN THE

Supreme Court of the State of Utah

No. 8937

STATE OF UTAH, *Appellant*
(*Plaintiff*)

vs

JAMES L. HATCH
and DELLA L. HATCH, *Respondents* to Court, Utah
(*Defendants*)

FILED

DEC 18 1958

Brief Amicus Curiae
ON BEHALF OF
HONOLULU OIL CORPORATION
and
THE SUPERIOR OIL COMPANY

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October, 1958

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IN THE
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No. 8937

STATE OF UTAH, *Appellant*
(*Plaintiff*)
vs
JAMES L. HATCH
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(*Defendants*)

Brief Amicus Curiae
ON BEHALF OF
HONOLULU OIL CORPORATION
and
THE SUPERIOR OIL COMPANY

INTEREST OF SUPERIOR AND HONOLULU

Pending in the United States District Court for the District of Utah, Central Division, are three suits to quiet title (C-16-58, C-21-58 and C-40-58) involving issues similar to those in the case at bar. Two of these actions are:

- (a) Civil No. C-16-58, *United States of America, plaintiff, v. The State of Utah, Honolulu Oil Corporation et al., defendants*; and

(b) Civil No. C-40-58, *United States of America, plaintiff v. The State of Utah, The Superior Oil Company et al., defendants.*

In said actions C-16-58 and C-40-58 the United States sued as trustee for the use and benefit of the Navajo Tribe of Indians. Honolulu and Superior are the respective lessees under oil and gas leases issued December 22, 1954 and January 8, 1954 by the Navajo Tribe of Indians covering the lands involved in said two actions.

The lands involved in said suits are lands title to which presumably vested in the State of Utah under Section 6 of the Enabling Act (28 Stat. 107) and which were after May 12, 1919 used by the State of Utah as base land in the making of lieu selection exchanges similar to those involved in the case at bar.

THE REAL NATURE OF THE CASE

On its face, this action is just an action brought by the State of Utah to quiet title to the mineral deposits in a 200-acre tract in Section 2, Township 37 South, Range 7 West, SLM, Garfield County, Utah. There is nothing in the record in this case to indicate that said tract has any mineral value, known or prospective. Appellant, the State of Utah, was not moved to initiate this action or to prosecute this appeal because of any belief that said tract has either present or potential mineral value. The real object and purpose of the case goes far beyond what appears from the pleadings.

Several years ago, oil discoveries and development on lands in southeastern Utah within the boundaries of the Navajo Indian Reservation established the existence of important and valuable oil fields. Years before these discoveries, the State of Utah, as owner (by virtue of the school land grant of the Utah Enabling Act of July 16, 1894, 28 Stat. 107) of a number of school sections in the general area of this oil development, had used such school section lands as base for lieu selections made pursuant to such Enabling Act and the Act of February 28, 1891 (26 Stat. 796; 43 USC 851-852) as extended by the Act of May 3, 1902 (32 Stat. 188, 189; 43 USC 853). At the time these school section lands were so used as base they were considered to be practically worthless, not only because of the character of the lands but because their isolation by surrounding Indian lands rendered them unwanted, unsalable and almost useless.

It was not surprising that, after oil had been discovered nearby and these lands had been found to be valuable, the State Land Board of Utah should regret that these lands had been used as base and should covet for the State the benefits which could accrue to the State had the lands been not so used. It was concluded that the State of Utah, as to lieu selection exchanges made after May 12, 1919, should assert that, notwithstanding the tender by the State and acceptance by the United States of the school sections as base, the State retained the mineral rights therein and should assert that, although the predecessor State Land Commissioners and State Land Boards had, without reservation, tendered the lands to the United States as base

for lieu selections, said predecessor Commissioners and Boards lacked authority to so act. This claim was first asserted by the State of Utah more than 35 years after enactment of the Act of May 12, 1919 (L. 1919, ch. 107) upon which the claim was and is premised.

As will be hereinafter more fully pointed out, the State of Utah over a period of more than 30 years subsequent to May 12, 1919, had filed, and the Interior Department had approved, over 300 separate lieu selection applications, each involving a tender by the State of lands, State title to which had vested, as base for the applied-for lieu selections.

The real purpose of this action is to attempt to secure in this Court a decision which will be asserted by the State of Utah to be a binding determination that the State of Utah retains mineral ownership in these thousands of acres which were voluntarily tendered by the State as base for the requested lieu selection exchanges and which were accepted by the United States as base for the selected lands which the State received from the United States by virtue of such lieu selection exchanges.

The attempt to use for this purpose a mandamus proceeding (*Lee v. Henderson et al.*, No. 8801) filed in this Court on January 13, 1958, came to naught, as is more fully explained in the Brief *Amicus Curiae* filed herein by the United States. Thereafter, in its endeavor to find some other means whereby the State's assertion could be presented in an action where those vitally concerned

(namely, the United States of America, the Navajo Tribe of Indians and those holding Federal and Indian mineral leases) would not have to be made parties, the State of Utah succeeded in finding a tract, the 200-acre tract involved in this case, where the United States, after receiving the tract as base from the State of Utah, had parted with title. In this instance, the United States, pursuant to the National Forest Exchange Act of March 20, 1922 (42 Stat. 465, as amended, 43 Stat. 1090; 16 USC 485-486), had issued a patent (plaintiff's Exhibit D) to Ira W. Hatch, Respondents' predecessor in interest, in exchange for a conveyance to the United States of land of equal value owned by Ira W. Hatch. Neither such conveyance nor such patent contained any mineral reservation.

THE INADEQUACY OF THE RECORD IN THIS CASE

If the Utah statutes permit any doubt as to the correctness of the construction placed thereon by the trial court in the decision appeal from, it is certainly apparent that there is no clear or manifest basis in the Utah statutes for the construction contended for by Appellant.

The relevancy and importance of long continued administrative interpretation and practice in reference to statutory construction has been repeatedly recognized by the courts.

The case of *California v. Deseret Water, Oil and Irrigation Co.*, 243 U.S. 415; 37 S. Ct. 394, 396, 397, involved

the construction of the provisions of Section 851, Title 43, United States Code, which reads:

“ ‘Where any state is entitled to said sections sixteen and thirty-six, 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.’ ”

After quoting this provision, the Supreme Court said:

“This language, while not as clear as it might be, operates, as we interpret it, to give to the state a right to waive its right to such lands where, as in this case, the same are included in a forest reservation after survey, that is, after the title vests in the state.”

The Supreme Court also said:

“In the brief presented by leave of court on behalf of the United States it is set forth that the rule laid down in *Re California*, 28 Land Dec. supra, is still adhered to by the Land Department; that selections aggregating many thousands of acres have been made in reliance upon it, 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. *McMichael v. Murphy*, 197 U.S. 304, 49 L. Ed. 766, 25 Sup. Ct. Rep. 460.”

Except only as the record in the case at bar shows that the two lieu selection exchanges involved in this case were made without any assertion whatsoever of a mineral reservation by the State of Utah, no evidence was introduced as to the interpretation and application of the Utah statutes by those to whom has been committed the administration of state lands. The failure by Respondents to have developed and presented such evidence is entirely consistent with the practical and financial considerations which confronted Respondents in defending mineral rights in the tract not deemed to have any mineral value. However, the lack of full and proper placing before the court of the facts as to administrative interpretation and practices is not consistent with the force and effect which Appellant will, in the pending Federal actions, seek to attribute to the decision in the case at bar.

The mere fact that these many years have elapsed between the 1919 enactment and the assertion of the presently made State's claim as to the restrictive effect upon lieu selection exchanges of the 1919 enactment should make the Court want to know and be entitled to know what had happened during that long interval.

The State Land Board of Utah, over a period of 35 years following the enactment of the Act of May 12, 1919, placed upon the Utah statutes (as will be hereinafter pointed out) the same construction as has been placed upon such statutes by the trial court in the decision appealed from.

With a letter dated June 12, 1956, the State Land Board of Utah transmitted to the Bureau of Land Management at Salt Lake City, Utah, "a list of lands which were involved in selection lists subsequent to May 12, 1919." Said letter asserted that the State of Utah was the owner of said listed lands on said date, and asserted that the State retained mineral rights in said listed lands which had been tendered as the base for exchanges. Said list enumerates over 300 separate exchanges which had been filed by the State Land Board on behalf of the State of Utah, and lists over 90,000 acres of land (in over 180 sections within more than 120 townships) which had been tendered by the State to the United States and which had been accepted by the United States as base for approvals of selections of an equivalent acreage of selected lands. Said 300 plus applications were made over the course of more than 30 years, during which the membership of the Land Board had changed from time to time. A large number of said applications were filed during the period when one of the three members of the State Land Board was the Governor of the State of Utah — the same Governor who signed the 1919 enactment which Appellant says precluded the Land Boards from doing what they did. During that same period the Attorney General and the Secretary of State of the State of Utah were also members of the State Land Board. (State's answer to Interrogatories Nos. 23, 24, 25 and 26 in said Civil No. C-16-58.) Each of said applications provided that "the State of Utah * * * agrees to accept the selected tracts in full satisfaction of the bases assigned" — i.e., the state lands tendered and later accepted.

It is significant that the more than 300 separate exchange selections made after 1919 each represented a voluntary exchange requested by the State with full knowledge of the Federal statutes applicable thereto.

The State's answer to Interrogatory No. 22 in said C-16-58 shows that the first attempt by the State to reserve minerals in connection with a state selection application occurred in 1940. The State's answer to said Interrogatory No. 22 further shows that said application, and the other therein listed applications where a similar attempt was made, were cancelled, rejected or withdrawn except in two instances. The records of the State Land Office and the Bureau of Land Management show that in one of these two instances the original indemnity selection application was withdrawn and the approval related to a substitute application for exchange under the provisions of Section 8 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1272; 43 USC 315 g); and that in the other instance the State's application was from the outset an application under Section 8 of said Taylor Grazing Act. The list filed by the State Land Board as aforesaid with its letter of June 12, 1956, shows that a number of the state exchange applications therein referred to were not approved until after 1940, several having been approved as late as 1955. While these applications were pending no attempt was made by the State to withdraw them or to assert that the State was withholding from the exchange the mineral rights in the base lands which it had tendered.

Prior to 1956 the State Land Office refused to receive any application for a mineral lease covering any lands which the State had tendered as base for an approved lieu selection exchange. The State's answer to Interrogatory No. 28 in said C-16-58 shows that the first mineral leases issued by the State as to state lands, which had been used as base for approved lieu selections, were issued April 20, 1956.

The State of Utah did not make any claim that the 1919 Utah enactment operated to reserve to the State mineral rights in State "School Sections" used as the base for lieu selection exchanges until more than 35 years after that enactment and until after oil development had demonstrated that a number of the so-used sections had substantial value for oil and gas. When the State sold the selected lands received by it in the exchanges, the State, in its patents, reserved all mineral rights. The State now contends that it also retains all mineral rights in the lands which it gave to secure the selected lands.

The transcript of the testimony in this case is only six pages in length. No witness or evidence was presented on behalf of the defendants (Respondents). The plaintiff (Appellant) offered testimony by one witness. On the basis of a record of this type Appellant hopes to secure from this Court a construction of the Utah statute which will have a controlling effect in respect to the United States and those claiming under it as to tens of thousands of acres of land involved in lieu selection exchanges between the United States and the State of Utah.

- A. PRIOR TO MAY 12, 1919, THE UTAH STATE LAND BOARD WAS AUTHORIZED TO MAKE AND MADE NUMEROUS SCHOOL SELECTION EXCHANGES OF THE KIND INVOLVED IN THIS CASE WITHOUT RESERVING MINERALS IN THE LAND USED AS BASE.
- B. THE ACT OF MAY 12, 1919, DID NOT EXPRESSLY REVOKE SUCH AUTHORITY NOR CAN SAID ACT BE CONSTRUED TO HAVE REVOKED SUCH AUTHORITY BY IMPLICATION.

A. Prior to May 12, 1919, the State of Utah, acting by and through its State Land Board, had filed scores if not hundreds of applications for lieu selections involving hundreds of thousands of acres of land. Many of these applications involved use by the State as base of school section lands which had been included within reservations subsequent to vesting of State title. In the filing of such applications or selection lists by the State, no distinction was made in the listing and tender of base lands as between lands title to which had vested in the State and lands title to which had not vested in the State. Appellant, the State of Utah, does not question and has never questioned the adequacy of the power and statutory authority of the State Land Board to make those selections and to "take such action as may be necessary to secure the approval of the proper officers of the United States and final transfer to this state of the land selected."

The Federal statutory authority for the making by the State of Utah and for the allowance and approval by

the United States of indemnity selections and lieu selections (whether before or after May 12, 1919) is to be found and must be found in the following enactments:

1. Act of July 16, 1894 — Utah Enabling Act (28 Stat. 107); and
2. Act of February 28, 1891 (26 Stat. 796; 43 USC 851-852) as extended by the Act of May 3, 1902 (32 Stat. 188, 189; 43 USC 853).

Said Utah Enabling Act includes the following provisions:

“Sec. 6.

“That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed state, and where such sections, or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, 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: * * *

“Sec. 13.

“That all land granted in quantity or as indemnity by this Act shall be selected under the direction of the Secretary of the Interior, from the unappropriated public lands of the United States within the limits of the said State of Utah.”

The provisions of the Utah statutes in respect to indemnity selections and lieu selections are to be found in the following enactments:

1. Laws of Utah 1899, ch. 64, §10 which as amended and carried forward is now Section 65-1-27 UCA 1953 and provides:

“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 this state of the lands selected. The board may cancel, relinquish or release the claims of the state to, 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. Laws of Utah 1899, ch. 64, §43, which as amended and carried forward is now Section 65-1-70 UCA 1953 and provides:

“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 a patent for the land so received in exchange shall have been issued to such proprietors or their grantors.”

In 1925 the Utah legislature (L. 1925, ch. 31) amended and re-enacted what are now Sections 65-1-27 and 65-1-70 of our Utah Code to replace with a Land Board the Land Commissioner who had, in 1921 (L. 1921, ch. 118) replaced a Land Board. Despite the fact that the State Land Office, between 1919 and 1925, had, in numerous transactions, tendered without mineral reservation state-owned lands as base for selections, the Utah legislature in 1925 did not see fit to act to declare any intention that lieu selection exchanges without mineral reservations could not be made by and on behalf of the State.

Said Act of February 28, 1891, in providing for the selection by a state or territory of lands in lieu of designated sections, expressly declares that "the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its rights to said sections."

Accordingly, the indemnity or lieu selection applications and lists filed by the State of Utah, whether before or after May 12, 1919, and whether title to the listed base lands had or had not theretofore vested in the State, have included the following express agreement on behalf of the State:

"The State of Utah hereby makes application, under the provisions of the Act of Congress of July 16, 1894, and the acts supplementary and amendatory thereto, for the following described unappropriated, nonmineral, public lands, in lieu of, or as indemnity for, the corresponding school lands, or losses to its grant for common schools,

assigned and designated as bases therefor, and agrees to accept the selected tracts in full satisfaction of the bases assigned, to wit:”

This agreement is to be found in the State’s selection application list No. 2225 (plaintiff’s Exhibit A) and in the State’s selection application list No. 2226 (plaintiff’s Exhibit B), both as said lists were originally filed in 1925 and as said lists were amended in 1928.

The contemplation and requirement that the United States shall receive full and unencumbered title to any school section land offered as base is clear from the regulation which was promulgated by the Interior Department January 10, 1906 (34 L.D. 365, par. 6) and which, as amended without substantial change June 23, 1910 (39 L.D. 39, par. 7) has since been in force and is now found in Title 43 Code of Federal Regulations, part 270, section 270.7. This regulation requires that:

“Where indemnity is sought for school lands in place, because of their inclusion within any Indian, military, or other reservation, the list of selections must, in every case, be accompanied by a certificate of the officer or officers charged with the care and disposal of school lands, that the State has not previously sold or disposed of, or contracted to sell, or dispose of any of said lands used as bases, or any part thereof; that the said lands are not in the possession of, or subject to the claim of any third party, under any law or permission of the State; * * *”

Such regulation further required that the State must file a certificate of the county recorder or of a reliable

abstractor certifying "that no instrument purporting to convey, or in any way encumber, the title to any of said lands used as bases, is of record, or on file, in the office" of the recorder.

The correspondence which constitutes a part of plaintiff's Exhibit B shows that the State was called upon to furnish and furnished such a non-encumbrance certificate as to list No. 2226 and there is no basis for doubt that a similar non-encumbrance certificate was required and furnished in connection with list No. 2225 (plaintiff's Exhibit A). There can be no doubt but that the listed base lands would not have been accepted had such certificate disclosed that the mineral rights therein could not pass to the United States because of a prior conveyance thereof from the State to a third party. That there likewise can be no doubt that an attempted use of lands as base with retention by the State of mineral rights would not be accepted has been demonstrated in the instances where such a limited tender has been made by a state and has been rejected.

Appellant in its Brief (Appl. Br. 1) asserts that the State "asserts no claim whatsoever to the surface rights." Does the State concede, in reference to its claimed reservation of all mineral, that the claimed reservation was naked of any right to use the surface in respect to exploration for or development of minerals or will the State say that what it meant was that it "asserts no claim whatsoever to the surface rights except a claim to use such part thereof as may be required to

explore for and develop minerals''? If the former, how will the State of Utah obtain as against the United States any right to go upon the land? If the latter, how could the assertion that the land is encumbered by easements of use be consistent with a non-encumbrance certificate? What happens to the surface when strip-mining is conducted?

B. The State of Utah contends that the provisions of the Act of May 12, 1919 (presently contained in Section 65-1-15 UCA 1953) operated to amend Sections 65-1-27 and 65-1-70 above referred to and to limit and restrict the powers of the State Land Board of Utah thereunder. Since there was and is in the Federal statutes no authority under which a tender of base lands could be accepted by the United States with a reservation to the State of the mineral rights in the tendered base lands, it follows that the contention of Appellant amounts to a contention that such 1919 Utah enactment was intended to operate and should be construed as operating to thereafter preclude use by the State or state-owned sections as base for lieu selections.

That no such intention was attributed to the 1919 enactment and that no such construction was placed thereon by the State Land Board (or State Land Commissioner) clearly appears from the above-noted administrative practices which consistently prevailed for more than 35 years after such enactment.

To construe the Act of May 12, 1919, as precluding the State Land Board from making lieu selection ex-

changes of the kind involved here without reserving minerals in the base lands is to attribute to such Act an implied revocation of the authority of the Land Board to make such selections which, as above indicated, clearly existed prior to May 12, 1919.

It is submitted that under well-established rules of interpretation the Act of May 12, 1919, cannot be so construed.

In *Moss, County Atty. ex rel State Tax Commission v. Board of Com'rs. of Salt Lake City et al.*, 1 U. 2d 60, 64, 261 P. 2d 961, 965 (1953), the Court stated:

“It is elementary that the repeal or over-riding of an existing law by implication is not favored and only occurs if the later statute is wholly irreconcilable with the former. Wherever two such statutes can stand separately, both should be given effect.”

And in *Glenn v. Ferrell*, 5 U. 2d 439, 443, 304 P. 2d 380, 383 (1956):

“Repeal by implication is not favored in the law. In order for a later enactment to take precedence over a prior one, without expressly repealing it, there must be irreconcilable conflict, which as above indicated, does not exist here.”

There is no conflict between the Act of May 12, 1919 and said Sections 65-1-27 and 65-1-70 UCA 1953 if the Act of May 12, 1919, is construed in accordance with its terms as applying only to “sales” of state land and not to selections or exchanges of state lands under said Sec-

tions 65-1-27 and 65-1-70. Such construction conforms with the clear language of the Act and its legislative history.

CONTRARY TO APPELLANT'S CONTENTION, INDEMNITY SCHOOL SELECTIONS OF THE KIND INVOLVED IN THIS ACTION CANNOT BE MADE PURSUANT TO SECTION 65-1-14 UCA 1953.

Appellant argues that:

"The authority of the State Land Board—if authority exists — to enter into exchanges with the United States must stem from what is now known as Section 65-1-14, Utah Code Annotated, 1953." (Appl. Br. 14)

and says:

"In this connection, it must be noted that the power of the State Land Board to 'sell' under the authority of Section 5575 (now 65-1-14) is expressly limited by the requirement that it must be 'in accordance with the provisions of this chapter and the constitution of this state.' (1925 Session Laws, Chap. 31, Sec. 5575.)" (Appl. Br. 16)

The fallacy of Appellant's contention is apparent from a reading of the provisions of the succeeding sections. Their specifications as to the manner of making sales, contract terms and otherwise, clearly show that there was no contemplation that the word "sell" or "sale" had any application to indemnity selection or lieu selection exchange transactions with the United States.

That the Utah legislature has considered the “power to sell or lease * * * in accordance with the provisions of this chapter” (L. 1925, ch. 31), quoted by Appellant (Appl. Br. 15), to apply only to sales and leases of the character specifically defined in the provisions relating to the sale and leasing of state lands and that the Utah legislature did not consider Section 65-1-14 to apply to transactions with the United States is shown by its subsequent enactments.

In 1935 the Utah legislature passed an act permitting “acquisition by the United States by purchase” of lands needed for national forest purposes. Nothing was said as to mineral reservations by the State (L. 1935, ch. 137). In 1957 (L. 1957, ch. 144; Sections 65-1-83 to 65-1-85, UCA 1953) the Utah legislature passed a special act authorizing the State Land Board to sell to the Utah Indian Tribe certain specified lands. It is significant that in the 1957 enactment the Utah legislature did not consider the mineral reservation expressed in Section 65-1-15 to be applicable, for it expressly provided (Section 65-1-84) that the conveyances “shall reserve to the State of Utah all minerals within or underlying the lands conveyed.”

By an Executive Order No. 8579 of October 29, 1940, the President of the United States withdrew as an Aerial Bombing and Gunnery Range a large area in Tooele County, Utah. Included within the exterior boundaries of this bombing range were approximately 39,900 acres of school section lands, title to which had vested in the State of Utah. The Utah legislature in 1941 passed an

act (L. 1941 2d S. S., ch. 24) authorizing the leasing of such lands by the State of Utah to the United States. In that Act it was expressly provided that:

“* * * the state reserves the right to use said lands or any part thereof as base in exchange for other lands belonging to the United States of America in accordance with the laws of the state of Utah and of the United States relating to the exchange of lands.” (65-1-55 UCA 1953)

Obviously, the Utah legislature, in so expressly reserving the right to use state-owned lands as base for exchanges with the United States, considered such right to be of advantage and importance to the State. Obviously, the Utah legislature did not share Appellant's doubt (Appl. Br. 14) as to the existence of statutory authority “to enter into exchanges with the United States.” The 1941 Utah legislature, in so expressly reserving to the State the right to use state-owned lands as base for lieu selection exchanges, did not see fit to express any requirement of mineral reservation notwithstanding the fact that between 1919 and 1941 there had been hundreds of selection transactions in which the State Land Boards of Utah had tendered without mineral reservation state-owned lands as base for lieu selection exchanges.

AN EXCHANGE OF EQUIVALENTS IS CONTEMPLATED AS TO LIEU SELECTION EXCHANGES.

Completely without merit or logic is Appellant's argument (Appl. Br. 21-23) that a reservation of minerals

in the land used by the State as base "merely tends to make the exchange, in truth, an exchange of 'equivalents'." It is, of course, clear and undisputed that a state's right to select indemnity or lieu lands was limited to a selection of "unappropriated, surveyed public lands, not mineral in character." (43 USC 852.) It is equally well established that the phrase "not mineral in character" means lands not known at the time of the selection to be mineral in character. The fact that later discoveries established that the lands did in reality contain valuable mineral deposits does not affect the rights of the state to the selected land and the minerals therein. *Wyoming v. United States*, 255 U.S. 489; 41 S. Ct. 393 (1921). Appellant itself states that "the transaction must be considered as of the date of said exchange." (Appl. Br. 23.) The tenders which the State made of state-owned lands as base for lieu selection exchanges were completely voluntary tenders initiated by the State in what was considered to be the State's interest.

In his Instructions of February 1, 1928 (52 I.D. 273, 274) relating to the construction of the Act of January 25, 1927 (44 Stat. 1026) which extended the several school land grants to include lands known to be valuable for mineral, the First Assistant Secretary of the Interior stated:

"The act of February 28, 1891, *supra*, extended to the States a right (which they were at liberty to exercise or forego) to surrender lands to which they had acquired title, where sections in place 'are mineral lands or are included within any In-

dian, military, or other reservation, or are otherwise disposed of by the United States.' The States making such surrenders were entitled to select and receive title to other lands of equal acreage in lieu thereof, each lieu selection to be a waiver of right to the base lands.'"

Of course, reference in the 1891 Act as to the selection of lieu lands in place of "mineral lands" had reference to mineral lands to which state title did not attach because of the known mineral character of such lands at the time when the state's title would otherwise have attached.

To assume that the State Land Board has tendered state-owned school section lands which were known to be valuable for mineral as base for such lieu selection exchanges is to attribute to the State Land Board either stupidity or culpability. The exchange transactions must be considered as having been made under circumstances where, as of the date of the transactions, the State of Utah considered that it was exchanging state-owned lands not then known to be valuable for mineral for selected lands not then known to be valuable for mineral.

Appellant now asserts that it received the mineral rights in the selected lands and that it kept the mineral rights in the tendered base lands which were accepted by the United States. In other words, that the net result was that the State of Utah could by surrendering surface rights on one section secure not only surface rights on one section but mineral rights on two sections.

Section 12 of the Utah Enabling Act clearly states :

“The said State of Utah shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this Act; * * *”

Who can say that the future will not establish that the mineral rights in the many thousands of acres received by the State in lieu selection exchanges will not prove more valuable than the mineral rights in the equal thousands of acres of state lands surrendered as base for the exchanges?

ADOPTION OF APPELLANT'S CONSTRUCTION
OF THE ACT OF MAY 12, 1919, COULD INVALIDATE
MANY LIEU SELECTIONS AND CONFUSE THE TITLES TO THOUSANDS OF ACRES
OF SELECTED LAND.

In the case at bar, Appellant in its Brief (Appl. Br. 1) states that the State of Utah “asserts no claim whatsoever to the surface rights” in the 200-acre tract involved in this action. This case is, therefore, presented to this Court upon the presupposition that if it were held that because of Utah law the State of Utah did not part with what it had tendered for the lieu selection exchanges and the United States did not receive what it had accepted as the base for the approval of the lieu selection exchanges, that is, the entire legal title, nevertheless the exchanges were valid, effective and binding as to the United States.

In the above-mentioned mandamus proceeding (*Lee v. Henderson et al.*) which was filed in this Court, the

members of the State Land Board of Utah, in the answer filed on their behalf by the Attorney General of Utah, recognized the real possibility that if a party to an exchange transaction did not deliver what was offered by such party, the other party would not be bound by the transaction, for in said answer it is stated:

“* * * if said term (‘sale’ as used in 65-1-14 and 65-1-15) does not include an exchange with the United States, then the State of Utah and the State Land Board do not have and have not had any authority whatsoever to effect an exchange and the purported exchange involving the land herein described was void and of no effect in its entirety, and said lands, both surface and subsurface, still belong to the State of Utah.”

In the State’s answer to Interrogatory No. 11 in said civil action No. C-16-58, the State of Utah says:

“In the event it is determined that the mineral rights in Section 32 were not reserved to the State of Utah, then and in that event defendant will contend that the State conveyed neither the mineral rights nor the surface rights in said Section 32.”

The question of whether or not the United States would be bound by a lieu selection exchange transaction, where the United States did not receive what was offered to it and what it expected to receive, is a question which cannot be ignored. There is no provision in the Federal statutes authorizing the approval of lieu selections upon any basis other than the waiver by the State of all of its rights in the lands tendered as base. The Department of the Interior has declined to approve lieu selections where

there has been an attempted reservation of mineral rights in the lands tendered as base for the selections — this upon the basis that there is no authority in the Federal statutes authorizing or permitting such approval. If it should be held that the lieu selection transaction as to the 200-acre tract involved in this action was a nullity and that the United States received no title to such tract, then it would follow that the patentee Ira W. Hatch would have received nothing under the patent (Exhibit D). Would he not then be entitled to recover from the United States the lands which he conveyed in exchange for a worthless patent?

Furthermore, if it should be held that the lieu selection exchange as to the 200-acre tract involved in this action was a nullity it would also follow that the State of Utah acquired no title to the selected lieu lands. Where would this leave the purchaser to whom the State sold what it did not own?

Adoption of Appellant's construction of the Act of May 12, 1919, could create similar questions of title as to the tens of thousands of acres of selected lands involved in the hundreds of lieu selection exchanges which have occurred since that date.

THE ADMINISTRATIVE INTERPRETATION AND APPLICATION OF THE UTAH STATUTES HAS BECOME A “RULE OF PROPERTY.”

The Federal regulations (43 CFR 270.18) specify, and since the promulgation of Circular No. 260 of August 13, 1913, have specified, that “All lists of indemnity school land selections * * * must be accompanied by a certificate from the selecting agent, showing that the selections are made under and pursuant to the laws of the state.”; and further specify that no application to select will be received or allowed unless accompanied by such certificate. Such a representation has been made since May 12, 1919, as well as prior thereto, in connection with each of the hundreds of applications involving lieu selection exchanges which have been filed on behalf of the State of Utah — applications which express no qualification whatsoever upon the therein contained representation that “the State of Utah hereby * * * agrees to accept the selected tracts in full satisfaction of the bases assigned” — applications which were made under and with full knowledge of the provisions of the Federal statutes (43 USC 851) that the selection by the state “shall be a waiver of its right to said sections” used by it as base for the selections. The filing of each such application constituted a representation of authority to completely waive the State’s title to the base lands. If this representation was made in good faith, as we must assume that it was, each filing of such an application constituted an administrative interpretation and practical application of the

Utah statutes. Where, as is the case, selections aggregating many thousands of acres have been made and where, as is the case, third parties have in good faith and in reliance upon the State's waiver dealt with the United States (or as in the case of Indian Reservation land with the Indian Tribe) as to the surrendered base lands, and where, as is the case, third parties have in good faith and in reliance upon approval of the selections dealt with the State of Utah as to the selected lands, and where, as is the case, this practice continued for many years before the State decided to dispute the authority of those who had acted on its behalf, the administrative interpretation and practical construction of the Utah statutes has become, it is submitted, a "rule of property."

Even if the language of the Utah statutes is not as clear as it might be in this situation, this Court should be slow to disturb the interpretation of those statutes by the administrative body to which is committed the administration of state lands.

In this connection, reference is made to *California v. Deseret Water, Oil and Irrigation Co.*, 243 U.S. 415; 37 S. Ct. 394 (1917), quotations from which decision are hereinabove set forth.

In *Johanson v. Washington*, 190 U.S. 179; 23 S. Ct. 825, 827 (1903), the United States Supreme Court stated:

"If some one authorized to represent the territory of Washington made a selection, and it was approved by the Secretary of the Interior, such action, being that of the officer charged with the

supervision of the landed interests of the United States, should, unless some direction of Congress has manifestly been violated, be held to be conclusive upon the transfer of title.”

The principles of fairness and propriety, which were in those cases applied in determining the binding effect upon the United States of state selection transactions, are not less applicable to a state.

In *Utah Power & Light Co. v. Public Service Commission et al.*, 107 Utah 155, 186, 152 P. 2d 542, 557 (1944), this Court stated:

“The Company’s second argument designed to have us construe the Utah Act as a directive to the Commission to fix rates in relation to fair value is that the Utah Commission has consistently so construed the statutes and that such administrative interpretations are entitled to great weight. The proposition of law implicit in this argument is well settled. Consistent administrative interpretations over the years by the officers charged with the duty of applying the statute and making each part work efficiently and smoothly are entitled to great weight by the courts. *United States v. American Trucking Assn.*, 310 U.S. 534, 60 S. Ct. 1059, 1067, 84 L.Ed. 1345, 1356; *State Board of Land Commissioners v. Ririe*, 56 Utah 213, 190 P. 59; *Mutart v. Pratt*, 51 Utah 246, 170 P. 67; *Decker v. New York Life Ins. Co.*, 94 Utah 166, 76 P. 2d 568, 115 A.L.R. 1377; *Murdock v. Mabey*, 59 Utah 346, 203 P. 651; *In re Lambourne’s Estate*, 97 Utah 393, 93 P. 2d 475.”

CONCLUSION

No attempt has been made herein to reiterate the arguments made or to cite the authorities cited in Respondent's Brief or in the *Amicus* Brief of the United States filed herein. Honolulu Oil Corporation and The Superior Oil Company respectfully submit that the judgment of the trial court should be affirmed.

Respectfully submitted,

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