

1959

State of Utah v. James L. Hatch and Della L. Hatch : Respondents' Reply to State of Utah's Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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1958

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In the
Supreme Court of the State of Utah

OCT 14 1958

STATE OF UTAH,

— v. —

JAMES L. HATCH and DELLA L.
HATCH,

Appellant,

Respondents.

Supreme Court, Utah

Case No.
8937

APPELLANT'S REPLY BRIEF

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POINT I.

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POINT V.

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ARGUMENT

POINT I.

WHETHER SCHOOL SECTION LANDS ARE HELD BY THE STATE IN ITS PROPRIETARY OR GOVERNMENTAL CAPACITY.

In its initial brief, the appellant, State of Utah, in reliance upon pertinent provisions of the State Constitution as interpreted in *Van Wagoner v. Whitmore*, 58 Utah 418, 199 Pac. 670, asserts that school section lands such as involved in this case are held by the state in trust in its governmental capacity. Respondents' reply makes the contrary contention that such lands are held by the state in its proprietary capacity. The only authority cited by respondents in support of their position is *Strand v. State*, 16 Wash. 2d 107, 132 P. 2d 1011, where it was stated in a suit against the state to quiet title to certain "attached tidelands" that the "accepted rule is that a state acts in its proprietary capacity when it undertakes to dispose of public lands" of that type.

Whatever the rule in Washington may be with respect to "attached tidelands," that state follows a very different rule with respect to school section lands.

O'Brien v. Wilson, 51 Wash. 52, 97 Pac. 1115; *State v. City of Seattle*, 57 Wash. 602, 107 Pac. 827, *Gustavenson v. Dwyer*, 83 Wash. 303, 145 Pac. 458. The foregoing cases constitute the settled law of Washington with respect to school section lands held by the state in its governmental capacity. In fact, *O'Brien v. Wilson*, *supra.*, was cited and relied upon by this Court in announcing the same rule for Utah in *Van Wagoner v. Whitmore*, *supra.*

The two United States Supreme Court cases cited by respondents, *United States v. California & Oregon Land Co.*, 148 U.S. 31, 13 Sup. Ct. 458, and *United States v. Dallas Military Road Company*, 148 U.S. 49, 13 Sup. Ct. 465, are both lifted from the *Strand* case. The cases concern technical rulings with respect to the sufficiency of pleadings; they in no way involved the subject of school sections or the issue of whether the government was acting in its governmental capacity. When the interest of the United States in lands claimed by it in its governmental capacity has been challenged, the United States Supreme Court has not hesitated to declare that such lands are immune from attack based upon principles of laches, estoppel, adverse possession, or negligence of government agents. As stated in the famous "tidelands litigation," *United States v. State of California*, 332 U.S. 19, 39-40, 67 Sup. Ct. 1658, 1669:

" . . . And even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as

a result. The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act."

Cf. also *Hanks v. Lee*, 57 Utah 537, 195 Pac. 302.

The suggestion by respondents that there exists some distinction between a state acting in a proprietary rather than governmental capacity, when "disposing" of property is without warrant. No authority is cited for such a "hat changing" proposition and none exists. Since its pronouncement by Judge Thurman in 1921, the *Van Wagoner* decision has been and remains the law of Utah on this important subject. It has significant implications in the case at bar. If, as the respondents admit, the State of Utah owned the school section here involved, then no unauthorized acts or negligent conduct on the part of its agents, nor any principle of estoppel or laches, could preclude the state from asserting its title. Here, the state officials had authority in 1925 to convey only the surface rights to the school section involved. By virtue of an express provision of the Utah law (65-1-15, Utah Code Annotated, 1953), the mineral deposits were reserved to the State of Utah. Any attempt by state officials to act contrary to this prohibition would be ineffective to bind the sovereign state with respect to lands held in its governmental capacity.

POINT II.

WHETHER THE UTAH STATUTES REQUIRE A RESERVATION OF MINERALS.

The State Constitution, Article XX, Section 1, specifies that state lands held in trust are to be disposed of only "as may be provided by law." It becomes pertinent, therefore, to inquire as to what law or laws the state officials purported to act under in entering into the exchange transaction with respect to the land involved in this case, title to which had vested in the state. Appellant suggests that Sections 65-1-27, 65-1-70 and 65-1-14 and 65-1-17 of the Utah Code Annotated, 1953, constitute the only possible grants of authority. It is further suggested that in view of their terms and history it is unlikely and illogical to assume that either Section 65-1-27 or Section 65-1-70 is applicable. The authority of the State Land Board probably stems from Section 65-1-14 and 65-1-17. Regardless of the correctness or incorrectness of appellant's analysis of these four statutes and regardless of which may contain the necessary grant of power to enter into an exchange transaction, Section 65-1-15 constitutes an unqualified reservation in the state of all mineral deposits, and is a complete bar to any attempt to alienate such minerals except as authorized.

In their reply brief, the respondents do not attempt an analysis of the pertinent statutory provisions, but simply brush aside the appellant's argument as "tedious and meticulous detail." Instead, respondents broadly

assert that Sections 65-1-27 and 65-1-70 are implementary to the federal statutes, 43 U.S.C. Sections 851 and 852.

It may well be that to some extent Section 65-1-27 is implementary to federal legislation applicable to lien selections. But on its face it is clear that Section 65-1-27 has nothing to do with exchanges of vested school sections, since the power of the land board is specifically limited to relinquishing to the United States tracts of land *erroneously listed* to the state and tracts upon which a *bona fide claim had been initiated by an actual settler*. School section lands, title to which is vested in the state, are clearly outside both of the specified categories. No claim is even made by respondents that the subject land was *erroneously listed* or that such land was the subject of a *bona fide claim by an actual settler*. With respect to 65-1-70, it is obvious that the exchange therein contemplated is one between the state and a proprietor other than the United States. At the time of the exchange transaction involved in this case, 65-1-70 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 by the government of the United States to such proprietors or their grantors." In the 1933 Revised Statutes, the phrase "by the government of the United States" was deleted. Appellant agrees with respondents, however, that this deletion did not change the sense of the statute. Plainly, the word "proprietors" in the present day version of the statute means someone other than the United States, just as it did in 1925 and when the statute was first enacted in 1897.

Section 65-1-15 is unqualified in its reservation of minerals in lands belonging to the state. The first sentence of the statute is all inclusive. It states: "All coal and other mineral deposited in lands belonging to the state of Utah are hereby reserved to the state." Respondents contend that this unqualified reservation is limited by the second sentence of the statute which reads: "Such deposits are reserved from sale, except on a rental and royalty basis as herein provided, and the purchaser of any lands belonging to the state shall acquire no right, title or interest in or to such deposits, but the rights of such purchaser shall be subject to the reservation . . ." Respondents argue that the first sentence is limited and restricted by the second sentence, so that the state's mineral reservation is applicable only to "sales" in the strictest sense of that term.

Such a self-defeating construction destroys the sense and intent of the statute. Do respondents seriously contend that the legislature meant to create in one sentence an unqualified reservation of minerals in state owned lands, and in the next sentence restrict the reservation to "sales" in the narrowest sense of that term? To do so would defeat the clear intent of the legislature to create an unqualified mineral reservation in state owned lands. Respondents cite as authority for their argument *Bird & Jex Company, et al., v. Funk, et al.*, 96 Utah 450, 85 P. 2d 831, which deals with the question of whether a proviso in the Liquor Control Act permitting advertising of light beer under regulation by the Commission modified a general prohibition in the Act

forbidding the advertising of all alcoholic beverages, including light beer. This Court held that the proviso had no such modifying effect, and that the general prohibition of the statute remained intact. The citation stands for exactly the reverse of the proposition for which respondents contend and for which they presumably cite the case. See also in this connection *Dunn v. Bryan*, 77 Utah 604, 608, 299 Pac. 253, 254, where this Court rejected a similar argument, stating:

“We are not impressed with these conclusions, nor the argument which attempts to sustain it. In order to determine the meaning of this proviso, we must resort to the ordinary rules of construction, and, when these rules are applied, the legislative intent is reasonably clear.

“‘It is a cardinal rule of construction that significance and effect shall, if possible, be accorded to every section, clause, word or part of the act.’

“‘The several provisions of the statute should be construed together in the light of the general purpose and object of the act and so as to give effect to the main intent and purpose of the legislature as therein expressed.’”

In point of fact, the second sentence of Section 65-1-15 is plainly not a proviso, but is supplementary to the general mineral reservation in the first sentence of the statute. It declares that the mineral deposits reserved in the state are subject to transfer on a rental and royalty basis. This in no way constitutes a modification of the general sweep of the mineral reservation set forth in the first sentence.

As indicated in appellant's initial brief, the word "sale" in the statute must be read as synonymous with the word "disposition" and necessarily includes a reservation of minerals in the disposition or exchange of any state owned lands. Section 65-1-15 should be construed as in *pari materia* with Sections 65-1-14 and 65-1-17. Section 65-1-14 confers broad powers on the State Land Board to direct, manage, and control all state owned lands and to "sell" such lands for the best interests of the state, while Section 65-1-17 states that surface rights may be "sold" in lands subject to a mineral reservation. Appellant submits that Sections 65-1-14 and 65-1-17 rather than 65-1-27 or 65-1-70 are the particular statutes which authorize the State Land Board to enter into exchange transactions with the federal government. In Sections 65-1-14, 65-1-15 and 65-1-17 the words "sell" or "sale" or "sold" should be read to include an "exchange." *Newton v. State Board of Land Commissioners, et al.*, 37 Idaho 58, 219 Pac. 1053; *Bridgforth v. Middleton, et al.*, 184 Miss. 632, 186 So. 837.

" . . . 'Sale' and 'exchange' are used interchangeably in the law, and as a transmutation of property from one party to another in consideration of some price or recompense in value"
Berger v. U.S. Steel Corp., 63 N.J. E. 809, 53 At. 68, 71.

Respondents argue that the House Journal of the Utah State Legislature for 1919 furnishes support for its contention that Section 65-1-15 must be strictly limited to the sale of public lands to private individuals. A report made by a Special Committee on Investigation,

page 469 of the House Journal, discusses auditing irregularities in the State Land Department, and particularly refers to abuses in the sale of public lands for insufficient consideration. It recommends among other things that all sales of public land be suspended for five years. The report contains no discussion nor any suggestion or recommendation with respect to a mineral reservation on the part of the state. Aside from the coincidence that the report and the enactment of Section 65-1-15 were made in the same year, there appears to be no connection between the two events. The report sheds no light upon the intent or meaning of Section 65-1-15.

The appellant has made diligent search to ascertain the legislative history of Section 65-1-15 in the hope of finding some materials which might be helpful to a resolution of the issues in this case. With one exception, this research has not disclosed anything of value. The exception is a notation in the 1919 Senate Journal referring to the mineral reservation Act. The original bill was S.B. No. 58 "an act amending Sections 5575 and 5600, Compiled Laws of Utah, 1917, and adding new Sections to be known as 5575, 5575X1, 5575X2, 5575X3, through 5575X8, relating to the control and management, sales, leasing, occupying and using of state lands, and the reservations of minerals in state lands and leasing of mineral deposits, etc." (Senate Journal 1919, p. 126). On page 267 of the Senate Journal is the following notation:

"Committee on Public Affairs recommends
Bill for passage — with certain amendments.

1. on p. 2 beginning on line 7 strike out the following words: 'except as otherwise expressly authorized by law.'''

Although the appellant has not been able to locate a copy of the original bill, the Session Laws of Utah, 1919, Chapter 107, page 302, probably sets forth the bill as finally enacted in approximately the same format as the original bill. Lines 7 and 8, page 2 of the bill as enacted and set forth in the Session Laws, contain the first sentence of the mineral reservation statute reading: "All coal and other mineral deposits in lands belonging to the state are hereby reserved to the state." Undoubtedly, the stricken phrase "except as otherwise expressly authorized by law" was a modifying clause originally inserted at the end of the first sentence of the statute above quoted. If such were the case, as seems quite certain, the striking of the phrase "except as otherwise expressly authorized by law" from the general reservation of all mineral deposits in the state, makes crystal clear that the legislature intended no exceptions to or limitations upon its general reservation.

The respondents argue that there can be no implied reservation in favor of a grantor of lands. Concededly, such is the applicable rule with respect to conveyances between private individuals. The terms of the conveyance generally control the extent of the grant. But the situation in the case at bar is entirely different. Here certain officials of the State of Utah purported to convey a state owned school section to the federal government without specifying a mineral reservation as expressly required

by existing state law. Can state officials, without authority so to do, thus convey to another mineral rights in a school section held in trust by the state in its governmental capacity? Assume there existed a state statute stating in precise terms that "the State Land Board is hereby prohibited from making any exchange of state owned school sections with the United States, without an express mineral reservation." Under such circumstances, would the respondents argue that in the very teeth of such a statute, state officials could convey the fee simple title to designated school sections to the United States? Under such circumstances would the United States contend that the State of Utah had "waived" its rights to the minerals? The mere statement of these queries provides their own answer. Although no statute as precise as that assumed is set forth in the Utah laws, Section 65-1-15 has exactly the same legal effect. It constitutes an express limitation upon the power of state officials to act. If the officials attempt to act in derogation of that authority, their action cannot be binding upon the state.

The provision of 43 U.S.C. §851 that the "selection of lands in lieu thereof by the state or territory shall be a waiver of its right to said sections" may be operative as far as the federal government is concerned: it certainly cannot bind the state so as to require a waiver of its rights when agents of the state act in derogation of their statutory authority. State law and state law only can control the terms and conditions under which state lands held in a governmental capacity can be conveyed. *State of California v. Deseret Water, Oil & Irrigation Company*,

243 U.S. 415, 37 Sup. Ct. 394; *United States v. Burnison*, 339 U.S. 87, 70 Sup. Ct. 503. The federal statutes (43 U.S.C. §§ 851 and 852) can be no more than permissive. *Newton v. State Board of Land Commissioners*, *supra*. Any other view would invade powers expressly reserved to the State of Utah under the Tenth Amendment of the United States Constitution.

Respondents cite Chapter 56, Laws of Utah, 1927, and Chapter 144, Laws of Utah, 1957. Both statutes involve an authorization to transfer certain public lands owned by the state to the federal government, with an express mineral reservation. According to respondents, these statutes demonstrate a contemporaneous construction by the legislature of Section 65-1-15, since the statutes contain an express reservation of minerals and do not rely upon the general reservation contained in 65-1-15. With equal plausibility, it could be argued that the statutes emphasize the legislature's fixed intention, consistent with the policy declared in 65-1-15, to reserve minerals in the state in connection with the transfer of any public lands to the United States. The transfer in 1925 of the surface rights to the school section here involved required no special statute in view of Sections 65-1-14 and 65-1-17, but the all inclusive mineral reservation contained in Section 65-1-15 obviously applied. Moreover, in Laws of Utah, 1937, Chapter 149, an act authorizing the relinquishment to the United States of certain lands in Bryce Canyon, it was expressly provided that the conveyance would include the mineral rights. On respondents' theory, it could be argued that this indi-

cates that only when there exists a statute expressly authorizing transfer of minerals to the United States will the state be deemed to have departed from its established policy of reserving all mineral deposits.

POINT III.

WHETHER UTAH LAW CONTROLS THE CONSTRUCTION AND EFFECT TO BE GIVEN TO UTAH STATUTES AND THE AUTHORITY OR LACK OF AUTHORITY OF STATE OFFICERS.

A certain amount of confusion has developed in this case with respect to the specific issues said to be controlled by Utah law. Respondents' brief fails to delineate these issues:

1. What is the construction and effect to be given to Section 65-1-15, Utah Code Annotated, 1953, and the earlier enactments from which it was derived?
2. Was that statute intended to reserve minerals to the State of Utah in vested school lands in an exchange with the United States of America?
3. Did the employees and officers of the State of Utah who entered into the exchange transactions have authority to convey or waive the minerals in vested school lands?

Appellant submits that the foregoing questions are controlled by Utah state law and that only a decision by this Court can be finally dispositive thereof.

No attempt is made by respondents to distinguish or explain any of the authorities set forth in appellant's initial brief, except the case of *Newton v. State Board of Land Commissioners, et al.*, 37 Idaho 58, 219 Pac. 1053. An effort is made to distinguish the *Newton* case on the grounds that the State of Idaho had organic provisions prohibiting exchanges. A careful reading of the *Newton* decision will show that it cannot be distinguished on this ground. The Idaho Supreme Court held that the State Board of Land Commissioners lacked authority under Section 5 of the Idaho Admission Bill and under Section 8, Article IX of the Idaho Constitution to effect the contemplated exchange. It obviously makes no difference whether the prohibition is contained in the state constitution or in state statutes. If the prohibition exists, the agents and officers of the state lack authority to effect an exchange. The *Newton* case was commenced in the Supreme Court of Idaho to prohibit the State Board of Land Commissioners from making an exchange of school lands with the United States. Petitioner alleged that the State Board lacked authority under state law to effect such an exchange on the terms proposed. The Idaho Supreme Court held that the question was one of state law and that such authority did not exist. In so holding, the court carefully reviewed and considered *California v. Deseret Water, Oil and Irrigation Company*, 243 U.S. 415, 37 Sup. Ct. 394, characterizing that decision as follows:

“ . . . But as we understand the decision, the Federal Supreme Court expressly disavows any purpose to decide for the state when and under what circumstances it has authority under its Con-

stitution and laws to surrender such school lands, which is the question before us for determination.

* * *

Other portions of the *Newton* opinion are set forth in appellant's prior brief.

In addition to the authorities previously cited, the following additional citations hold that state law is controlling with respect to land litigation:

Brine v. Insurance Company, 96 U.S. 627, 24 L.E. 858

Clark v. Graham, 6 Wheat 577

McGoon v. Scales, 9 Wall 23

Johanson v. Washington, 190 U.S. 179, 23 Sup. Ct. 825

Arndt v. Griggs, 134 U.S. 316, 10 Sup. Ct. 557

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Hidalgo County Water Control and Improvement District No. 7, et al. v. Wyatt C. Hedrick, et al., 226 F. 2d 1 (5th Cir. 1955)

Humble Oil and Refining Company v. Sun Oil Company, 190 F. 2d 191 (5th Cir. 1951)

Respondents argue that "the applicable federal legislation" controls to the exclusion of state statutes. No identification is made of the particular federal statutes deemed applicable. It would appear, however, from the discussion at page 12 of respondents' brief that their con-

tention is that Section 851, Title 43, United States Code, controls to the exclusion of state law. Followed to its logic conclusion, respondents' argument is that Section 851, Title 43 operates to provide that the action of state officers, in making a selection, constitutes a waiver of state's rights, notwithstanding lack of authority under state statutes.

This contention is a far-reaching proposition which cannot withstand analysis. As evidenced by the numerous authorities cited by appellant, the Congress of the United States has no authority to legislate with respect to when and under what circumstances a state, acting in its governmental capacity, may waive its rights in real property. Congress has no power to vest authority in state officers and employees to perform acts which are not authorized under state law. There is no provision in the Constitution of the United States granting such powers to Congress. The Tenth Amendment to the Constitution of the United States expressly provides that all powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people. It is this basic constitutional concept which through the years has brought about a consistent determination by federal and state courts that questions such as those involved in this action are controlled by state law.

The statement is made by respondents at page 17 of their brief that the executive and legislative officers of the State of Utah at no time material to these proceedings believed that implementing and consensual legis-

lation was not in existence. Except for the omission of any mention of a mineral reservation in the Selection Lists, there is not a single shred of evidence in this case which would indicate that any officer of the State of Utah intended to convey the mineral rights in the subject lands to the United States. Even if such an erroneous belief had been held by an officer of the State, such a belief, if in fact contrary to the provisions of the Utah statutes, could have no binding effect upon the State of Utah.

Dyer v. Sims, 341 U.S. 22, 71 Sup. Ct. 557, cited at page 18, of respondents' brief is not in point. That case involved an interstate compact between eight states to control pollution in the Ohio River system. The compact required congressional consent, and direct participation by the federal government was provided by the President's appointment of three members of the compact commission. The Ohio River is an interstate stream which directly affects interstate commerce. The Constitution of the United States expressly provides in Article 1, Section 8, that Congress shall have power to regulate commerce among the several states. Article 1, Section 10 of the Constitution of the United States provides that no state shall, without the consent of Congress, enter into any agreement or compact with another state. The controlling effect given to federal law in *Dyer v. Sims* was obviously predicated upon the foregoing considerations. But application of federal law to a multistate compact concerning an interstate stream is an entirely different matter from determining the law applicable to land

transactions within a state. As recognized by Justice Reed in his concurring opinion, at page 32 and 33, 341 U.S. 22:

“... This Court must accept the State court’s interpretation of its own Constitution unless it is prepared to say that the interpretation is a palpable evasion to avoid a federal rule.”

POINT IV.

WHETHER EXCHANGES NEED NOT BE OF EQUIVALENT ESTATES BUT ONLY OF EQUIVALENT VALUES.

Respondents’ argument under this point assumes two propositions:

1. That federal exchanges must be of equivalent *estates* and that an exchange of equivalent estates was lacking in the subject transaction; and,
2. That if an exchange of equivalent estates was required, then the mineral rights in the subject lands passed from the State of Utah to the United States of America.

Neither of these propositions is a correct statement of the law. There is no provision in Section 851, Title 43, United States Code, which requires that the exchange be one of equivalent estates, nor is there any express provision contained in that statute which requires a conveyance by a state of mineral rights in lands the title to which already has vested in a state. Furthermore, it is significant that not a single decision or statute has been cited by respondents for the proposition that a state can-

not reserve minerals in making an exchange. The Regulations of the Department of Interior relating to exchanges under Section 851 (Code of Federal Regulations, Section 270.3, Title 43), provides only that the lands selected correspond in area with the base tract.

Although the decision of the Supreme Court of the United States in *Wyoming v. United States*, 255 U.S. 489, 41 Sup. Ct. 393, suggests that the Act contemplates an exchange of equivalents, it does not hold that the exchange must be one of equivalent estates.

The entire statutory and regulatory scheme of Congress and the Department of the Interior, as the same pertains to exchanges of land by the United States, contemplates an exchange of equivalent values, not an exchange of equivalent estates. A reading of the various exchange statutes of the United States and the Regulations of the Department of the Interior promulgated pursuant thereto makes evident that the general practice in exchanges of all types has been to look to the value of the interests exchanged, rather than to equivalent estates.

In that connection, it is interesting to note the situation with respect to particular exchanges covered by the federal statutes and regulations.

Provision was made in the Act of June 8, 1934, 48 Stat. 272, popularly known as the Taylor Grazing Act, for the exchange of land by the United States with private proprietors and with the states. The statute itself provides that either party may reserve mineral rights,

easements or other rights of use. The regulations (Section 146.2 and 147.4, Code of Federal Regulations, Title 43) provide simply that the exchange must be of equivalent values.

Provision was made in the Act of March 20, 1922, 42 Stat. 465, 16 U.S.C. 485, for exchanges of land with the United States of America for the consolidation or extension of national forests. The Act expressly provides that mineral rights can be reserved by either party. The Regulations of the Department of Interior (Section 148.5, Code of Federal Regulations, Title 43) provide that the exchange be of equivalent values.

The Act of June 15, 1926, 44 Stat. 746, provides for exchanges by the United States with the State of New Mexico to obtain lands for national forests. This statute expressly permits reservation of mineral, timber or easements. The Regulations of the Department Interior (Section 148.23, Code of Federal Regulations, Title 43) require that the value of selected lands shall not exceed the value of offered lands, taking into account any reservations.

Each of the other exchange statutes and the regulations promulgated pursuant thereto, contemplates an exchange, not of equivalent estates, but of equivalent values. It is apparent, therefore, that there is no provision of federal law which requires an exchange of equivalent estates.

Respondents' argument assumes that if an exchange of equivalent estates was required under federal statute,

that in that event the minerals passed out of the State of Utah, notwithstanding any prohibition contained in the Utah statutes. Even assuming that the federal laws required an exchange of equivalent estates, such a requirement would provide no authority under state law for a conveyance of the mineral rights in vested school lands.

Respondents concede on page 20 of their brief that the federal government followed a consistent practice in connection with exchanges under Section 851, Title 43, of either reserving the mineral rights in selected lands or determining in advance of the approval of exchanges that the selected lands had no mineral value. If federal law required an exchange of equivalents, how can the respondents justify the practice followed by the federal government over the years? How can the exchanges be "of equivalents" if the United States either reserved the minerals or gave up land having no mineral value, unless "equivalents" refers to approximate values rather than estates.

It is significant to note that in exchanges under Section 851, Title 43, between the State of Utah and the United States pertaining to lands which were included in the addition to the Navajo Indian Reservation after May 12, 1919, approval was given by the United States of America to approximately 31 separate approved lists. Of said 31 approved lists there were 9 lists in which either all or part of the selected or lieu lands were exchanged with express reservation in the United States of America of mineral rights. In all instances where an express

reservation of minerals was not made by the United States with respect to the lieu lands, a determination was made prior to the exchange that the lands had no mineral value. If respondents' contentions are correct, the State of Utah in many instances gave up its rights to the minerals in the school lands included in said exchanges and, in turn, received lieu lands which were either determined to have no mineral value or in which the United States expressly reserved such minerals.

POINT V.

WHETHER A RULE OF PROPERTY CAN BE EVOLVED FROM PRIOR EXCHANGE TRANSACTIONS.

Appellant recognizes that there have been a large number of exchange transactions between the State of Utah and the federal government. Although the record in this case is silent as to the number of acres of land involved in such transactions, the number does not even closely approximate the 1,000,000 acres suggested by respondents. Furthermore, respondents have referred to transactions involving all of the different types of exchanges which have been entered into by the State of Utah. It is of no assistance in this case to look to transactions of an unlike character.

The great bulk of the exchanges referred to by respondents relate to lands where title had not vested in the State of Utah. Appellant concedes that the minerals were not reserved in lands where title had not vested in the State prior to the exchange. The mineral reservation contained in Section 65-1-15, Utah Code Annotated,

1953, relates only to lands owned by or belonging to the State of Utah. Transactions involving lands which never vested have no significance. It is also important to determine what part of the exchanges involving vested lands occurred after the effective date of Section 65-1-15. Obviously there was no statutory prohibition against a conveyance of the mineral rights prior to the effective date of May 12, 1919. If such a classification of exchanges were made, it is probable that there would not be found many instances where the precise type of exchange involved in this action has occurred. It is safe to say that the number would not approach anywhere near the dimensions indicated by respondents.

Respondents do not suggest what rule of property is to be evolved from the exchange transactions, although the reference on page 22 of their brief indicates that the rule of property proposed is the "equivalent estate principle." As hereinabove demonstrated, no such rule exists.

The suggestion is made that an estoppel may arise against the State of Utah out of said transactions, even though the state acted in its governmental capacity where necessary to prevent loss and the perpetration of a fraud and such estoppel would not impair the exercise of sovereign power. This broad statement is meaningless in the context of the facts of this case. Appellant has already discussed the law relating to estoppel. It is respectfully submitted that this Court must disregard its prior decisions in order to adopt an estoppel theory in this case. Apart from that consideration, there certainly

is no evidence of fraud in this case, and the application of an estoppel theory here would clearly impair the exercise of the state's sovereign powers.

Even if a theory of estoppel were applicable, it would be necessary for respondents to show proof of the elements of an estoppel. Such proof is entirely lacking in this case. Respondents do not even suggest the type of estoppel claimed, whether estoppel by record, estoppel by deed or estoppel by matter *in pais*. The failure of respondents to offer any evidence or proof of the elements of an estoppel or to treat the subject in an analytical legal fashion by suggesting the type of estoppel and the elements thereof, suggests that their argument is not made with any serious conviction.

CONCLUSION

The respondents' brief fails to meet or answer the arguments set forth in appellant's opening brief. Appellant submits that, in fact, there is no logical answer to the arguments which support the position of the State of Utah. For this reason, this Court respectfully is asked to reverse the judgment of the trial court and enter judgment for the appellant quieting the title of the State of Utah to the mineral deposits in the lands here involved.

Respectfully,

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