

2016

**James Harvey Jordan, Et Al. v. Eddie R. Jensen and Ly-Thi Jensen
: Combined Reply Brief of Appellants Eddie r.jensen and Ly-Thi
Jensen**

Utah Supreme Court

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IN THE UTAH SUPREME COURT

JAMES HARVEY JORDAN, ET AL.,

Appellees,

vs.

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JENSEN,

Appellants.

EDDIE R. JENSEN AND LY-THI
JENSEN,

Appellants,

vs.

JAMES HARVEY JORDAN, MARTHA
JORDAN BORIGHT; MARY EDNA
JORDAN; AXIA ENERGY, LLC; AND
STONEGATE RESOURCES, LLC,

Appellees.

Appeal No. 20150257-SC

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Appeal from the Ruling and Order by the Eighth Judicial District Court for Uintah
County, State of Utah, the Honorable Samuel P. Chiara Presiding

**FILED
UTAH APPELLATE COURTS**

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ARGUMENT

Axia Energy, LLC (“**Axia**”), Plaintiffs (the “**Jordans**” and together with Axia “**Appellees**”)), and the Utah Farm Bureau group of amici (the “**Bureau**”) seek to perpetuate what they assert is the status quo: owners of nonproductive minerals holding real property without any duty to pay taxes. But their theory of tax-free ownership directly contradicts the Utah Constitution.¹ Eddie and Ly-thi Jensen (the “**Jensens**”) purchased the entire 40-acre tract at issue in this case (the “**Property**”) from Quality Remediation Service Inc., who was granted the Property by tax deed from Uintah County (the “**Tax Deed**”). The Jensens paid all taxes on the Property from 2000 through 2011, but in 2013, after Axia began producing petroleum from the Property, the Jordans brought this suit asserting ownership of the Property’s mineral estate (the “**Mineral Rights**”). As discussed below, based on the undisputed material facts,² the Jensens own the Mineral Rights because (I) the relevant general property assessments, and the resulting Tax Deed, covered all attributes of the Property, including the Mineral Rights; (II) the tax lien predicate to the Tax Deed attached on January 1, 1995, to the unsevered Property; and (III) Utah Code section 78B-2-206 (“**Section 206**”) bars all challenges to the Tax Deed.

¹ The Utah State Tax Commission (the “**Commission**”) filed an amicus brief giving background on its valuation methods for valuable minerals and recognizing that nonproductive minerals could be included in a county’s general assessment.

² Contrary to the Jordans’ assertion (Jordan Brief at 5), the facts that the parties stipulated were immaterial do not include those recited in the Jensens’ opening brief. (R.2010:8-20; *see also* R.1605-1616.) Furthermore, neither the parties nor this Court are limited to the district court’s list of facts, which included disputed and immaterial facts and omitted certain undisputed, material facts. (*See, e.g.*, R.1819, ¶16.)

I. The Relevant County Assessments, and the Resulting Tax Deed, Covered All Real Property, Including the Mineral Rights.

The general assessment from 1995–1999 and, consequently, the Tax Deed included the Mineral Rights. There is no dispute that the property assessed and the property sold by tax deed must be the same. Utah Code § 59-2-1325; *Hayes v. Gibbs*, 169 P.2d 781, 786 (Utah 1946). The property sold by the Tax Deed included the Mineral Rights because: (A) under the Utah Constitution and the Property Tax Act (the “Act”), Utah Code §§ 59-2-101 *et seq.*, the Mineral Rights were included in the general real property assessment; (B) the intent of a county assessor in valuing the Property is immaterial; and (C) general assessment of nonvaluable mineral rights harmonizes current practice and policy interests with the Act.

A. The Act Did Not Require Commission Assessment of the Mineral Rights, But It Did Require Inclusion of the Mineral Rights in the General Assessment.

The Utah Constitution requires that “*all* tangible property in the State that is not exempt . . . *shall* be . . . taxed at a uniform and equal rate.” Utah Const. art. XIII, § 2 (emphasis added). The Act achieves this constitutional mandate by requiring the county assessor to “assess all property located within the county which is not required by law to be assessed by the commission.” Utah Code § 59-2-301. Although the Commission is required to assess “mines,” Utah Const. art. XIII, § 6, Utah Code § 59-2-201,³ the Mineral

³ Appellees and the Bureau incorrectly ascribe responsibility to the Commission for functions the Act allocates to counties, such as levying and collecting taxes. Although the Commission values certain types of property, it is the counties that compile the tax levies and collect the taxes. Utah Code §§ 59-2-210, -924, -1317; *Crystal Lime & Cement Co. v. Robbins*, 209 P.2d 739, 742 (Utah 1949). (Comm’n Brief at 6 n.6.)

Rights were outside the Commissions purview between 1995 and 1999 because they were (1) taxable, tangible property but (2) not a “mine” as that term is used in the Utah Constitution and (3) not a “mine” as defined in the Act.

1. Mineral Rights Are Taxable, Tangible Property

Appellees’ claimed property tax system results in nonproductive mineral rights avoiding taxation. This system violates the Utah Constitution unless, as Appellees claim, nonproductive mineral rights are “akin to an intangible asset.”⁴ “Tangible property, for tax purposes, has a physical aspect and has value in and of itself.” *Salt Lake City S. R.R. Co. v. State Tax Comm’n*, 1999 UT 90, ¶ 9, 987 P.2d 594.⁵

Axia concedes, as it must, that the Mineral Rights have a “physical aspect,” but asserts that they “lack[ed] value, because they [were] non-producing.” (Axia Brief at 13.) This argument merely highlights the fiction on which Appellees rely—that mineral rights “lack value” until production. Indeed, Axia concedes that claiming “non-producing mineral interests lack value [is] a dubious proposition at best.” (Axia Brief at 12.) Non-producing mineral rights have value based on the potential for future discovery of a valuable mineral deposit. *See Montana Ry. Co. v. Warren*, 137 U.S. 348, 352 (1890) (concluding that the “uncertain and speculative . . . prospect [of future mineral production] has a market value”); *Cornish Town v. Koller*, 817 P.2d 305, 314 (Utah 1991).

⁴ The Commission agrees with the Jensens that “[m]ineral reserves are clearly tangible.” (Comm’n Brief at 10 n.7.)

⁵ The value element may be illusory. Contaminated land often has no value, yet it is tangible and appears on county assessment rolls. *See Salt Lake Cnty. Bd. of Equalization v. Utah State Tax Comm’n ex rel. Baggett*, 2005 UT App 360.

Furthermore, a mineral owner has an implied easement on the surface as reasonably necessary to extract minerals, *Flying Diamond Corp. v. Rust*, 551 P.2d 509, 511 (Utah 1976), and a surface owner would place value on clearing that encumbrance even without mineral development potential. Thus, the Mineral Rights were at all times tangible property subject to taxation.

2. The Constitution Requires Commission Assessment of Mines, But the Mineral Rights Were Not a Mine until at least 2012.

The Utah Constitution uses the term “mine” as it is commonly used, and before 2012, the Mineral Rights were not a “mine” under that definition. While Article XIII, section 6 of the Utah Constitution provides that the Commission shall “assess mines,” neither the Constitution nor *Kennecott Corp. v. Salt Lake County*, 702 P.2d 451 (Utah 1985), support Appellees’ argument that the Commission has exclusive authority to assess all mineral interests. The Utah Constitution “should be interpreted and applied according to the plain import of [its] language as it would be understood by persons of ordinary intelligence and experience.” *T-Mobile USA, Inc. v. Utah State Tax Comm’n*, 2011 UT 28, ¶ 30, 254 P.3d 752 (internal quotation marks omitted, modification in original). Under this rule, the word “mine” should be read as its common meaning—an excavation from which minerals are extracted.

The issue in *Kennecott* was only whether a district court had authority to modify the Commission’s assessment of a mine. 702 P.2d at 457.⁶ Because Kennecott Copper Mine

⁶ This Court determined that district courts lack authority to modify commission assessments, *id.*, but the electorate later amended the Constitution on this point, Utah Const. art XIII, § 6(4).

is one of the most famous “mines” in the world, there was no reason to consider whether the term “mine” extends beyond its common meaning. The constitutional text in 1931, however, elucidates the intended meaning. A 1931 constitutional amendment created the Commission and mandated its assessment of “mines.” S.J.R. No. 3, 1930 Utah Laws 23; Utah Const. of 1933, art. XIII, § 11; currently at Utah Const. art. XIII, § 6. A concurrent amendment then clarified the assessment method for “[a]ll other mines or mining claims and other valuable mineral deposits, including lands containing coal or hydrocarbons” S.J.R. No. 5, 1930 Utah Laws 24; Utah Const. of 1933, art. XIII, § 4. Because these amendments were passed by the electorate at the same time and both related to property taxes, a person of ordinary intelligence would understand “mine” to have the same meaning in both amendments. Further, “mine” could not include “other valuable mineral deposits, including lands containing . . . hydrocarbons” or the language identifying such deposits would be entirely superfluous in S.J.R. 5. Thus, such deposits were not “mines” as used in the Utah Constitution, and the Commission was not constitutionally bound to assess them.

3. The Mineral Rights Were Not “Valuable” Between 1995 and 1999 and Were Therefore Included in the General Assessment

Although the Commission is not constitutionally required to assess “other valuable mineral deposits,” the Act requires Commission assessment of such deposits. All other mineral rights are assessed as part of a county’s general assessment. The word “mine” is defined in the Act to include “a natural deposit of . . . nonmetalliferous *valuable* mineral,” Utah Code § 59-2-102(24) (emphasis added), and the Commission is tasked with assessing “all mines,” *id.* § 59-2-201(1)(a)(v). The key question here is whether non-productive and

unknown petroleum deposits are “valuable” within the meaning of the Act. If they are “valuable,” then the Commission has sole assessment jurisdiction. Otherwise, the county assessor is obligated to include these unknown deposits in its general assessment. *See id.* §§ 59-2-102(33) (defining “Real estate” or “real property” to include “all mines, minerals, and quarries in and under the land”), 59-2-301 (“The county assessor shall assess all property . . . which is not required by law to be assessed by the commission.”).

There is a distinction between having market value, which all mineral rights have (Part I.A.1), and being “valuable” for purposes of the Act. The definition of “mine” as a “deposit of . . . valuable minerals” was first added to the Act in 1975. S.B. 5, 1975 Utah Laws 807. The word “valuable” in this definition has three potential meanings: “1. Having monetary value; being, or capable of being, sold for (such) a price[.]” “2. Having relatively great monetary value[.]” And “4. *Obs.* a Capable of being valued or equated in value.” Webster’s New International Dictionary 2814 (2d ed. 1959) (attached as Addendum A). But only the second definition is consistent with the plain language of the Act.

Appellees and the Bureau assume that the first definition—not worthless—is correct. But under common usage and the canons of statutory construction, this is not a reasonable construction of valuable.⁷ First, the dictionary definition qualifies this definition as used “chiefly in comparisons; as, at present, silver is less *valuable* than some base metals.” *Id.* And in common parlance, use of the adjective “valuable” in isolation

⁷ Although Appellee’s arguments are premised on this definition, assertions in their briefs indicate a contrary understanding. Axia states that mineral rights lacking value is a “dubious proposition.” (Axia Brief 12.) Similarly, the Bureau worries of significant tax bills if counties can assess non-valuable mineral rights. (Bureau Brief 4.)

would mean more than “not worthless.” For example, one would not generally describe a paper clip as “valuable” but would describe a gold ring as “valuable.” More importantly, the word “valuable” in the definition of “mine” cannot be read in isolation but must be read in the context of the full Act to produce a “harmonious whole.” *Anadarko Petroleum Corp. v. Utah State Tax Comm’n*, 2015 UT 25, ¶ 11, 345 P.3d 648. As Appellees have noted, taxes cannot be levied against worthless property because property is taxed “in proportion to its fair market value.” Utah Const. art. XIII, § 2(1); Utah Code § 59-2-103(1). Indeed, the requirement of “value” is inherent in the definition of “property” in the Act. *Id.* § 59-2-102(30). Further, the definition of “real property” includes “all mines, minerals, and quarries.” *Id.* § 59-2-102(33). Thus, if valuable meant not worthless, then all minerals having any value would be included within the definition of “mine,” and the inclusion of the word “minerals” in addition to “mines” in the definition of “real property” is superfluous. Likewise, the word “valuable” is itself superfluous under this definition because the requirement of value is already inherent in every type of property, including mines. Thus, Appellees’ and the Bureau’s preferred definition is not a reasonable construction of the word “valuable.”

Under either of the other two definitions, the Mineral Rights were not “valuable” and, as such, were not required to be assessed by the Commission. Nevertheless, it is unlikely that the legislature intended valuable to mean “able to be valued” where that usage is obsolete. Webster’s New International Dictionary, at 2814. Regardless, the Commission observed in its brief that undeveloped “reserves are hidden, undiscovered, and of indeterminate value. To try to separately value all undeveloped reserves apart from the

real property on a uniform basis is impractical because that would require finding and uniformly valuing all of the copper, oil, gas, salt, etc. under the land of every farmer, rancher, and other landowner in Utah.” (Comm’n Brief, 10; *also* Axia Brief at 16; Bureau Brief at 5–6.) While it is unlikely that the legislature intended valuable to mean able to be valued, if the Court applies this definition, the Mineral Rights were not, between 1995 and 1999, able to be separately valued and thus, not valuable under the Act.

Reading valuable as “[h]aving relatively great monetary value” best harmonizes the constitutional, statutory, and practical constraints of assessing mineral rights. The Act requires Commission assessment of “all mines and mining claims.” Utah Code § 59-2-201(1)(a)(v). Neither the juxtaposition of the term “mines” and “mining claims” nor the use of the word “valuable” as a defining characteristic of both is a coincidence. Mining claims are created under the Mining Law of 1872, 30 U.S.C. § 21 *et seq.* (the “**Mining Law**”), and their validity depends on the discovery of a “valuable mineral deposit[.]” 30 U.S.C. § 22. Indeed, the word “valuable” is used frequently in the Mining Law and has been exhaustively interpreted in that context. *See, e.g., id.* §§ 21–23, 29, 37; *Castle v. Womble*, 19 L.D. 455, 457 (1894); *U.S. v. Coleman*, 390 U.S. 599, 601 (1968). Axia nevertheless asserts that “the [Mining Law] has nothing whatsoever to do with the taxation of mineral deposits.” (Axia Brief at 13.) The phrase “mining claims” is meaningless without reference to the Mining Law, and creation of a mining claim signifies that the

property is chiefly valuable for minerals. Thus, mining claims must be assessed by the Commission until it determines otherwise. Utah Code § 59-2-201(1)(a)(v).⁸

Use of the terms “mines” and “mining claims” within the same subsection indicates that these property interests are of a similar character. *Compare id.* § 59-2-201(1)(a)(ii), (iii), (iv), (v), *and* (vi). The legislature intended that essentially the same threshold for Commission assessment apply to both types of mineral property. *Crystal Lime & Cement Co.* is instructive on this point. 209 P.2d 739. There, the court noted that “mineral land or mining property . . . is assessable by the State Tax Commission,” and “where title is derived from the Federal government by the issuance of a patent as mining property, there is a presumption that it is property of that character until it is proved otherwise.” *Id.* at 319. Thus, the threshold for Commission assessment is whether the property is “mineral land” (i.e., chiefly valuable for mineral production). *Id.*; *Burke v. Southern Pac. R.R. Co.*, 234 U.S. 669, 678 (1914).⁹ This is the very inquiry that the discovery standard is designed to answer. *See Coleman*, 390 U.S. at 602 (noting that the marketability test facilitates “determination that a mineral deposit is ‘valuable’”).

⁸ The county shall assess mining claims if the Commission determines that they are “used for other than mining purposes.” *Id.* If, as asserted by Appellees, “mines” include all mineral deposits, then this section would be unconstitutional. *See Kennecott*, 702 P.2d at 457.

⁹ *Burke* also illustrates the significance of *when* valuable minerals are discovered. *Id.* at 688. Just as a subsequent determination that lands were mineral in character does not defeat a prior nonmineral land patent, *see id.*, the Commission can only assess valuable mineral deposits upon learning of them. In other words, subsequent discovery of valuable minerals does not retroactively modify a county assessment to exclude such minerals.

The valuableness determination allows the Commission to uniformly apply its assessment responsibilities. And Commission practice is consistent with this reading of valuable. For mining claims, it assesses as a matter of course. (Commission Brief at 2 n.2.) For non-petroleum minerals, the Commission assesses only “proven and probable reserves,” which are “capable of economic extraction.” (*Id.* at 4–5.) For petroleum, the Commission only values “productive underground oil and gas rights.” (*Id.* at 4 (internal quotation marks omitted).) For all the reasons stated by the Commission and the Bureau, it is difficult to value nonproductive petroleum rights. (Comm’n Brief 10-11; Bureau Brief 5-6.) Indeed, operators, even after significant study, often drill dry wells. *See, e.g.*, John Hollenhorst, *Computers Being Used to Locate Oil/Gas Fields*, KSL.com, October 9, 2003 at <http://www.ksl.com/?nid=148&sid=88519> (reporting that “[n]early nine out of ten [wildcat wells] end up as dry holes”). These factors illustrate the wisdom in recognizing the point of economic production as the valuableness threshold for petroleum.

Applying this framework to the present dispute, there was no mineral production from the Property until 2012. (R.1219.) Axia admitted that it did not “know how well this property would produce” and that its 2012 drilling was “highly exploratory.” (R.1218.) Against this backdrop, the 1995 through 1999 tax assessments occurred at a time long before the Mineral Rights were able to be separately valued, and long before there was any indication that the Mineral Rights could be known to have “relatively great monetary value.” Furthermore, the Jordans or their predecessors never filed a statement under Utah Code section 59-2-207 asserting ownership of a valuable mineral deposit. (R.1055.)

Thus, because the Commission was not required by either the constitution or the Act to assess the Mineral Rights between 1995 and 1999, the county was required to assess the Mineral Rights. Utah Code § 59-2-301; Utah Const. art. XIII, § 2(1). The county fulfilled this obligation through its general assessment of the Property.

B. An Assessor's Intent in Valuation Is Immaterial: The General Assessment Presumptively Includes All Real Property Not Assessed Elsewhere

Axia asserts that the intent of the assessor controls the scope of the assessment; the scope required by law being irrelevant. (Axia Brief at 10.) But as discussed below, (1) it is conclusively presumed that general assessments include all interests and attributes not assessed elsewhere; and (2) if the intent of the assessor were material, then summary judgment would have been barred based on a dispute of material fact.

1. The Assessment Is Conclusively Presumed to Include Real Property Interests Not Assessed with Other Properties

Axia's assertion that assessor intent is controlling is contrary to this Court's precedent and would infuse significant uncertainty in every tax sale. First, in property taxation, "valuation" and "assessment" are not synonymous. Second, there is a conclusive presumption that the assessment includes all legally required property. And third, cases on which Appellees rely support this presumption.

First, Appellees mistakenly conflate the terms valuation and assessment. Assessors specifically consider attributes of property that separately affect its overall value, but even those attributes not separately valued are included in the general assessment. In *In re West Side Properties Associates*, a building not valued by the county assessor was not escaped property, but was deemed included in the general assessment. 2000 UT 85, ¶ 24, 13 P.3d

168. Any other rule would yield absurd results. For example, if an assessor were unaware of an addition to a home, and the property valuation therefore did not consider that addition, would a tax sale leave ownership of the addition in the tax debtor? Certainly not. Otherwise, every tax sale would be subject to attack based on whether the assessor specifically considered a certain aspect of the property in its valuation. Indeed, Axia concedes that if the surface and minerals are owned by the same owner, a tax sale would convey both estates. (Axia Brief at 16.) But this contradicts Axia's view that assessor intent governs because neither severed nor nonsevered minerals are separately valued. Thus, mineral interests not separately valued must be assessed as part of the general assessment.

Second, in *Hayes v. Gibbs*, notwithstanding contrary assessor testimony, the assessment was "conclusively presumed" to be fixed according to the correct bundle of rights. 169 P.2d 781, 786 (Utah 1946). Axia argues *Tintic Undine Mining Co. v. Ercanbrack*, 74 P.2d 1184, 1189 (Utah 1938), provides that the scope of a tax sale depends on the assessment "as made." (Axia Brief at 10.) But neither Appellee explains why the presumption outlined in *Hayes* eight years after *Tintic* does not apply. Thus, the assessment "as made" is presumed to include all rights required by law.

Third, the cases cited by Appellees are consistent with the *Hayes* presumption. Appellees argue that *Telonis v. Staley*, 144 P.2d 513, 515 (Utah 1943), and *Kanawha & Hocking Coal & Coke Co. v. Carbon Cnty.*, 535 P.2d 1139, 1140 (Utah 1975), require separate assessment of severed surface and mineral estates, but a 1989 amendment to the Act removed the statutory requirement recited in *Telonis*. 1989 Utah Laws 536, 537.

Further, *Kanawha* involved a known coal bed assessed separately even prior to severance. *See* 535 P.2d at 1140 (concluding that tax sale effected severance).

The other cases cited by Appellees illustrate how the *Hayes* presumption works in practice. In *Hayes*, the court determined that a tax sale did not extinguish the CC&Rs even though an assessor testified that he valued the property with no knowledge of the CC&Rs. 169 P.2d at 786. *Hayes* explains that the servitude was carved out of the servient estate and added to the dominant estate. *Id.* Viewing the *Hayes* presumption in the context of an access easement, the import of this principal becomes clear. If a dominant estate is subject to a tax sale, the assessment would be presumed to include the associated easement, and the tax sale would likewise include that easement. Thus, the presumption avoids both double taxation and escaped property—the easement is taxed to the dominant but not the servient estate. The presumption also secures a marketable title (one not lacking access) to a potential tax purchaser.

Mason v. Loveless also implicitly applies the *Hayes* presumption. 2001 UT App. 145, 24 P.3d 997. In that case, the tax sale did not extinguish plaintiffs' title acquired by boundary by acquiescence. *Id.* ¶¶ 15–16. It is unlikely the assessor was aware of the boundary by acquiescence claim, yet the assessment to plaintiffs was presumed to include the disputed property while the assessment to the tax deed defendants was presumed to not include the disputed property. *See id.* If the facts were switched, a tax purchaser of the plaintiffs' property would presumably receive, in addition to the described property, the strip of land acquired by acquiescence. Ultimately, the recourse if a valuation fails to

account for a property interest such as an easement is a valuation challenge, not a challenge to the scope of a tax deed. *See* Utah Code §§ 59-2-1004, -1006, -1007.

Applying the presumption to this case, the general assessment of the Property included the Mineral Rights. Unlike the dominant rights to the CC&Rs in *Hayes* or the strip of property acquired by acquiescence in *Mason*, the Mineral Rights were not assessed or taxed elsewhere. The Jordans were not faithfully paying taxes on the Mineral Rights as part of a different assessment. Rather, they paid no property taxes to the County between 1995 and 2011. (R.1055) Thus, because the County was required to assess the Mineral Rights, the Mineral Rights are conclusively presumed to have been included in the general assessment of the Property—the only assessment of the Property between 1995 and 1999.

2. If Assessor Intent Is a Material Fact, Then It Is in Dispute

If the *Hayes* presumption does not apply, and if the intent of the assessor is material, then summary judgment was inappropriate based on a dispute of fact as to what, in fact, the assessor intended to assess. The District Court did not list among its list of undisputed material facts any assertion as to the assessor's intended scope of the general assessment. (R.1817–19.) Rather, the court indicated at the hearing that the scope of the assessment is “a legal conclusion.” (R.2010 at 7:21 to 8:2.) If the assessor's intent were material, however, the Jensens properly disputed the facts on which Appellees rely to assert that intent. (R.945–47 (cataloguing evidence that intent of general assessment included nonproductive mineral rights)). Ultimately, the intent of the assessor is not material to determining the legal scope of the Tax Deed, but if it is material, then summary judgment was improper because Appellees' propounded evidence of intent was properly disputed.

C. General Assessment of Non-Valuable Minerals Promotes Clarity and a Robust Property Tax System.

Appellees and the Bureau describe a parade of horrors resulting if the Court applies the Act as written, but many of these result from their strained reading of “mines.” First, county assessors and the Commission already conduct assessments in accordance with the Act by valuing nonproductive mineral rights as part of the general assessment. (See R.974 at 38:25–39:1 (“We do not extract the value of the minerals separate and assess it.”)). The market valuation involved in a general assessment typically contemplates inclusion of the entire fee simple estate because it is based on property sales of entire fee estates. Indeed, it would be very difficult for an assessor to value a property less nonproductive petroleum rights. (See Bureau Brief at 5–6.) Furthermore, by continuing the holistic valuation approach, the tax burden on farmers, ranchers, and other property owners will be unchanged. Unless petroleum production begins, their mineral rights will be valued the same way almost every homeowners’ mineral rights are valued: as part of the value of the whole. Thus, the valuation and tax burden concerns expressed by the Bureau are obviated by simply continuing to value nonproductive petroleum rights as part of the general assessment.

Second, including the value of nonproducing petroleum rights in the general assessment is a clear, objective rule that promotes payment of taxes, vigilance by mineral owners, and clarity and marketability of tax titles. Identifying the point of production as the point at which the Commission is required to assess petroleum rights leaves no doubt as to who assesses petroleum rights on each property. The assessment authority and

method is consistent across the state, whether the minerals are severed or not. The scope of tax liens and their related deeds is also clear. Under this rule, mineral owners must ensure that property taxes based on the general assessment are paid. But this is no more onerous a burden than for other holders of property interests such as life estates, leasehold estates, remainder estates, mortgagors, or other lienholders. Further, this responsibility promotes payment of taxes so that fewer tax sales are necessary. Finally, if a tax sale is necessary, the tax title is marketable and its scope clear.

Conversely, Appellees' and the Bureau's system would result in at least the following concerns: (1) there would be a systematic and intentional gap in assessment in violation of Article XIII, section two of the Utah Constitution; (2) either every tax sale would create a split estate leaving the unassessed mineral rights in the defaulting taxpayer's ownership, or mineral taxation across the state would lack uniformity—unsevered mineral owners having a tax obligation while severed mineral owners have none; and (3) under Appellees' system where only the Commission can assess mineral rights, there is a much greater likelihood that the Commission would be required to identify and separately value non-productive petroleum rights—a gargantuan if not impossible task.

Thus, while the county's general assessment of nonvaluable mineral rights may frustrate some mineral owners' false security in being immune from tax liability, and may even cause some former owners who did not ensure payment of taxes to discover that they have lost their mineral rights, the interests of tax title holders who have faithfully paid taxes and the interests of taxing entities in having a robust and clear assessment, taxing, and

collection system outweighs these concerns. Further, these perceived costs do not justify imposing a strained or unconstitutional reading of the Act.

II. The Tax Lien Attached In Rem to the Property as It Existed on January 1, 1995, and the Tax Deed Conveyed that Same Property.

Even if the general assessment of the Property after severance did not include the Mineral Rights, the Mineral Rights nevertheless passed through the Tax Deed because the tax lien attached to the Property on January 1, 1995, before the Mineral Rights were severed. Utah Code section 59-2-1325 provides that “[a] tax upon real property is a lien against the property assessed. . . . [and] shall attach on January 1 of each year.” Thus, the lien attaches *in rem* to the property assessed. *Id.*; see also *Crossroads Plaza Ass’n v. Pratt*, 912 P.2d 961, 968 (Utah 1996) (“While taxes on leasehold improvements may be assessed and collected from the lessee . . . , owners of the underlying real property are ultimately responsible for taxes due”). On January 1, 1995, when the tax lien attached, the Jordans’ predecessors were the owners of both the surface and mineral estates. The subsequent sale of the surface estate and reservation of the mineral rights could not somehow cancel the lien on the mineral estate any more than a post-lien-date subdivision would cancel the lien on some of the resulting lots. Appellees nevertheless assert that (A) a post-lien-date severance prevents attachment of the lien to the Mineral Rights, and (B) the lien date is actually after severance based on a record of delinquency recorded by Uintah County. Each of these arguments is refuted below.

A. No Judicial Exception Prevents Attachment of the Tax Lien on January 1, 1995 as Provided in the Act

Appellees argue for a judicial exception to the lien date based on the post-lien-date severance. (Axia Brief at 17; Jordans Brief at 12.)¹⁰ Appellees, quoting *Gillmor v. Dale*, 75 P. 932 (Utah 1904), assert that a “tax does not become a lien on real estate until the rate thereof is fixed, and the tax levied.” But they omit the remainder of the sentence, which states: “but when the rate is so fixed, the amount determined and levied, a lien . . . attaches . . . as of the [January 1st] preceding the levy.” *Id.* at 934 (internal quotation marks omitted). Thus, unless there is some intervening circumstance that renders a property exempt from taxation, the lien attaches retroactively as of January 1st of the tax year. *Id.* This Court has identified only two circumstances that affect the statutory lien date. First, if a property, after the lien date but before the levy, is taken out of the jurisdiction of a particular taxing entity (e.g., is disconnected from one city and annexed into another), then a taxing entity cannot rely on the lien date as justification to collect taxes on property outside its jurisdiction. *See id.*; *W. Valley City Corp. v. Salt Lake Cnty.*, 852 P.2d 1000, 1003 (Utah 1993). Second, if a property is transferred to a tax exempt entity after the lien date but before levy, then no taxes are due and no lien can attach. *See Utah Parks Co. v. Iron Cnty.*, 380 P.2d 924, 925 (Utah 1963); *Huntington City v. Peterson*, 518 P.2d 1246, 1249 (Utah 1974); *but see* Utah Code § 59-2-1101(2)(b) (requiring proportional payment of taxes for

¹⁰ Axia argues that a post-lien-date severance automatically prevents attachment of the lien to mineral rights on the one hand (Axia Brief at 12), and that the assessor’s intent governs on the other hand (*id.* at 10). But the assessor’s office did not know about the mineral severance when assessing the property. (R.978 Rasmussen Dep. 53:1-5.)

period before exempt ownership). *Utah Parks* states, however, that it is “undoubtedly true if the parties involved do not enjoy a tax-exempt status” that an “enforceable lien exists as of [January 1st] regardless of any transfers of ownership that might occur prior to subsequent assessment and levy.” *Utah Parks Co.*, 380 P.2d at 925.

Here, there is no taxing entity claiming taxes from a property no longer within its jurisdiction. And the Jordans have never enjoyed tax-exempt status. Thus, there is no precedent that a mineral reservation transforms taxable real property into untaxable property, and there is no basis to extend the *Huntington City* exception such that property taxable on January 1 automatically escapes taxation based on a subdivision of surface from mineral. Thus, the lien date is January 1, 1995, before severance of the Mineral Rights.

B. The Record of Delinquent Taxes Has No Effect on the Statutory Lien Date

Appellees next claim that even though the lien date is January 1st under the Act, the county was free to, and did, select a different date. Specifically, Appellees claim that because the Record of Delinquent Taxes (the “**Record**”) (attached as Addendum B) specified January 16, 1996 as the lien date, that date should apply rather than January 1, 1995. Indeed, Axia tries to brand the Record as the “tax lien.” (Axia Brief at 6.) But the Act distinguishes the tax lien from the Record. The tax lien arises by operation of law under Utah Code section 59-2-1325, which uses the mandatory language that the lien “shall attach on January 1.” Conversely, the Record was required under Utah Code section 59-2-1338, which neither contemplates recording nor requires identification of the lien date.

The District Court recognized that “[a]ll parties agree this date is incorrect, and likely due to a typographical error.” (R.1818, Ruling and Order, at 3.) Yet Axia advances

the argument that the county intentionally selected an alternate lien date and no law prevented them from doing so. (Axia Brief at 23.) In essence, Axia seems to argue that the county waived its rights to assert the statutory lien priority of January 1, 1995. But the assessment and tax sale records refute any such intent. First, the Record identifies delinquencies in 1995, 1998, and 1999, but identifies the 1996 taxes as paid. Second, the Record recites the owner as "Jordan, Olivia," referencing the ownership as of January 1, 1995. Third, the Tax Deed expresses that the tax sale was made for the 1995 delinquency, and the Act requires specification in the tax deed of the delinquent tax year. And fourth, the tax sale could not have occurred until 2001 if it were made based on a 1996 tax lien, but the county consummated the sale in 2000, consistent with the 1995 lien date. Indeed, it is commonly understood in real estate circles that a tax lien attaches as of January 1. The Record, which was recorded with the Tax Deed and unknown to the Jordans until 2013, cannot justify assumption of an advantageous lien date in the face of so much contrary evidence. Thus, the tax lien attached by operation of law on January 1, 1995, it attached to the entire fee estate that was owned by the Jordans' predecessors on that date, and the Tax Deed sold that same property.

III. Section 206 Bars All Challenges to the May 2000 Tax Sale.

The Jensens satisfied the requirements of Section 206 because (1) they held tax title beyond the four-year statutory period following the tax sale, and (2) the Jordans did not actually possess the minerals during the same four-year statutory period. (Jensens Brief, at 35.) Appellees do not challenge these arguments, claiming only that Section 206 does not bar challenges based on insufficient notice. Appellees argument would give tax

sale notice challenges a perpetual shelf life, introducing uncertainty to tax titles across the state.¹¹ Section 206 does, however, bar notice challenges because (A) it applies to protect all but void tax deeds from challenge, and (B) insufficient notice renders a tax deed voidable, not void.

A. Barring Challenges to the Recorded Tax Deed Based on Section 206 Does Not Violate Due Process.

Appellees argue that Section 206 cannot bar the Jordans' due process claim for two reasons. First, Appellees misconstrue the Jensens' position as asserting that constructive notice of a tax sale is sufficient to satisfy due process. (Axia Brief, 28; Jordans Brief, 19). But the Jensens have conceded that the notice of the tax sale was deficient. Rather, the Jensens' position is that constructive notice is sufficient to trigger Section 206, the expiration of which bars the Jordans' due process claim. (Jensens Brief, 45-46.) Second, Appellees argue that the Jordans did not have constructive notice despite record notice of the tax sale and despite having reason to check the record during the limitation period. Appellees' arguments are incorrect under controlling law.

1. Actual Notice is Not Necessary to Trigger Section 206.

The distinction between the notice required for the tax sale and the notice required to trigger Section 206 is critical but is ignored by Appellees. Rather, Appellees rely on a series of U.S. Supreme Court cases inapposite to determining the notice required to trigger Section 206. These cases are distinguishable as follows:

¹¹ This is not merely a hypothetical concern. *See, e.g., Bailey v. Elder*, No. 79 MDA 2015, 2015 WL 6954488, 3–4 (Pa. Super. Ct. Nov. 9, 2015) (rejecting due process notice defense first raised in 2013 and concluding that severed minerals passed by 1910 tax deed).

a. *Jones v. Flowers* and *Mennonite Board of Missions v. Adams*.

The Jensens distinguish *Jones v. Flowers*, 547 U.S. 220 (2006), in their opening brief. (Jensen Brief, at 42). *Flowers* addresses the quality of notice required to satisfy due process in the first instance, not whether a statute of limitations can bar a due process claim once notice fails to comply with *Flowers*. (*Id.*) Appellees' reliance on *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), fails for the same reason. There, under the operative statute, a tax deed is not recorded, and cannot impart constructive notice to the mortgagee, until after the redemption period expires. *Id.* at 794. *Mennonite* says nothing about the required result had the mortgagee brought its claim after a deed was recorded and after the expiration of a generally applicable statute of limitation.

b. *Schroeder v. City of New York*.

In *Schroeder v. City of New York*, 371 U.S. 208 (1962), the court considered “whether the City of New York deprived [Schroeder] of due process of law by failing to give her adequate notice of condemnation proceedings” affecting her riparian water rights. *Id.* at 209. The city acquired the right to divert water from the river twenty-five miles upstream under its water supply act, which provided only for publication and posting notice and barred ‘all claims for damages resulting from the city’s acquisition . . . after three years.’ *Id.* at 209–10. The City published notice in two small towns remote from Schroeder’s property, and posted notices on trees and poles along the river but not on Schroeder’s property. *Id.* at 210. After the three-year period, Schroeder discovered the taking and filed suit, complaining that the city deprived her of property in violation of due process for failure to provide adequate notice. *Id.* at 210-11. The court held that, under the

facts of the case, publication and posting notice was constitutionally insufficient and, although injunctive relief was not available, Schroeder was not barred from seeking damages against the City for the taking. *Id.* at 211 n.5, 214.

Schroeder does not address, however, whether a statute of limitation can bar a due process claim to notice. It twice references without discussion or analysis the water supply act's three-year deadline for seeking damages, *id.* at 210, 214, but the opinion never suggests that the deadline is a generally applicable statute of limitation. Rather, the precise issue before the court related only to the quality of notice required by due process—a nonissue here. *Id.* at 209. In *Schroeder*, nothing was posted on her property, nothing was recorded against her property, and the publication was made in two small-town papers remote from the property. *Id.* at 209-11. In short, Schroeder could only learn of the condemnation by “[c]hance alone.” *Id.* at 212. Thus, the most that can be implied from *Schroeder* regarding claim deadlines is that a complete failure of meaningful notice can toll application of such a deadline. *See id.* at 214. In other words, a due process claim for failure of notice, like other constitutional claims, is subject to the equitable discovery rule. *See, e.g., Indus. Constr. Corp. v. U.S. Bureau of Reclamation*, 15 F.3d 963, 968-69 (10th Cir. 1994) (applying equitable discovery rule to constitutional claim for deprivation of property). But because the Tax Deed was timely recorded and the Jordans had reason to check the record during the limitation period, (Jensens Brief, at 45), the Jordans had constructive notice and inquiry notice of the tax sale and “could have discovered [their] claims within the limitations period” “through the exercise of reasonable diligence.”

Helfrich v. Adams, 2013 UT App 37, ¶ 12, 299 P.3d 2. Thus, Section 206 was not tolled in this case under the equitable discovery rule. *Id.*

Schroeder must also be reconciled with the U.S. Supreme Court's later holding in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). The mineral lapse statute at issue in *Texaco* "provid[es] that a severed mineral interest that is not used for a period of 20 years automatically lapses and reverts to the current surface owner of the property, unless the mineral owner files a statement of claim in the local county recorder's office." *Id.* at 518. The statute further provides "a 2-year grace period" for filing the statement of the claim. *Id.* Thus, *Texaco*, like *Schroeder*, involves a statute that cuts off rights after a certain time period, but unlike *Schroeder* the *Texaco* statute does not require actual notice of the lapse. *Id.* at 520. So the *Texaco* statute provides even less notice than *Schroeder*, yet the court draws a distinction between a property interest that is taken "only after a specific determination that the deprivation was proper" and those where the legislature merely "establishes the circumstances in which a property interest will lapse through the inaction of its owner." *Id.* at 537. *Schroeder* does not discuss this distinction, but it is critical here.

Further, in *Schroeder*, the City passed the water supply act, condemned the water rights, and benefited from the limitations of damages. In *Texaco*, the state legislature passed the dormant mineral law but its application depended on twenty years of inactivity and failure to file notice within two years of the statute—the legislature had no control over what specific properties would be affected. Similar to *Texaco*, the Utah legislature passed Section 206, the application of which depends on owners not paying taxes and a county collecting those taxes through a tax sale. In other words, even more clearly than the

dormant mineral statute in *Texaco*, Section 206 is a self-executing statute of limitations such that its application to the Jordans is not a violation of due process.

c. *Tulsa Professional Collection Services, Inc. v. Pope*.

Finally, in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988), the court considers an Oklahoma nonclaim statute that barred creditors' claims to a decedent's estate unless the creditor presented its claim within two months of the executor giving publication notice of the probate proceeding. *Id.* at 481. The appellant in *Pope* failed to file its claim within the two-month period but argued that the nonclaim statute's notice provision was unconstitutional. *Id.* at 483-84. The *Pope* court acknowledged that "the mere running of a general statute of limitations" is "generally [in]sufficient to implicate due process." *Id.* 485-86. But the court distinguished Oklahoma's nonclaim statute and determined that the *state's involvement* in the nonclaim statute was sufficient to implicate due process. *Id.* at 486-87. Specifically, "[w]here the legal proceedings themselves trigger the time bar, even if those proceedings do not necessarily resolve the claim on its merits, the time bar lacks the self-executing feature . . . necessary to remove any due process problem." *Id.* at 487. Thus, because "the statute operates in connection with Oklahoma's probate proceedings to 'adversely affect' [Tulsa's] property interest," the court held that due process required actual notice of the proceedings if Tulsa's identity as a creditor was known or reasonably ascertainable. *Id.* at 491.

Axia seeks to extend *Pope*, claiming that, because Section 206 is triggered by the tax sale, it runs from state action and therefore, just like *Pope's* nonclaim statute, is not self-executing. (Axia Brief, at 28). In other words, it reads *Pope* as giving a perpetual shelf-

life to any due process claim for lack of notice. But *Pope* does not stretch that far. In *Pope*, the creditor had a claim against the deceased's estate, which the court construed as a property interest, and the nonclaim statute purported to cut that interest off with only publication notice, which the court concluded was a violation of due process. *Id.* at 485, 491. Thus, analogizing *Pope* to the present case, the county was required to give the Jordans actual notice before the tax sale. This principle is not disputed. But *Pope* says nothing about whether due process allows the Jordans to sit on their claim for more than a decade in the face of an otherwise applicable four-year statute of limitations. Indeed, the *Pope* court acknowledged that it was not dealing with a general statute of limitations. *See id.* at 486 (recognizing that nonclaim statutes possess “some attributes of statutes of limitations” (emphasis added)). *Pope* included no discussion, for example, of a discovery-rule type analysis of when Tulsa should have discovered its cause of action, and it did not address whether a general statute of limitation would have cut off the subject claim in due course.

With the above cases, Appellees hope to cast the Jensens' case as an attempt to trump constitutional rights. (See Axia Brief, at 26; Jordans Brief, at 14). But this misconstrues the nature of statutes of limitation. “A time-bar dismissal does not imply a simultaneous determination of governmental power to act outside constitutional bounds. It merely indicates that a particular litigant has forfeited a right to complain about such ultra vires acts.” *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 2012 UT 66, ¶ 50, 289 P.3d 502. This was the result in *Howard v. Detroit*, in which the Sixth Circuit applied a statute of limitation to bar a challenge to a tax sale “more than 16 years after the recording of the State's deed.” 73 Fed. Appx. 90, 102 (6th Cir. 2003).

Notwithstanding a claim based on lack of actual notice, *id.* at 98, the *Howard* court recognized the recording of the tax deed as the trigger for the applicable statute of limitation, *see id.* at 101 (stating that “upon the recording of the deed the plaintiffs clearly had the right to bring whatever claims they had to the land” and that “the recording of the deed is the time when the plaintiffs are put on constructive notice of a contrary claim to the land”).

Consistent with *Horne* and *Howard*, the Jensens seek only the determination that the Jordans waited too long to assert their rights. And the fact that such rights are constitutional in nature does not alter the general rule that a statute of limitation can bar any right so long as the limitations period is reasonable. *Terry v. Anderson*, 95 U.S. 628, 632–33 (1877); *Saranac Land & Timber Co. v. Roberts*, 177 U.S. 318 (1900).¹²

2. The Jordans Had Constructive Notice of the Tax Sale.

Appellees argue that even if constructive notice were sufficient, they did not have it in this case. (Axia Brief, at 28-29; Jordan Brief, 19-20.) First, Axia argues that “there would

¹² Appellees assert that *Anderson* and *Saranac* address only whether the limitations period was reasonable. (Axia Brief, at 28; Jordans Brief, at 16). But that these cases address the exception to the rule (i.e., the length of the limitations period) does not render the rule statement itself (i.e., limitations can bar even the highest of rights) inapplicable to this case. Indeed, if there is no dispute about the length of the limitation period—and in this case there is none—the inference to draw from these cases is that Section 206 is constitutional.

The Jensens also relied on *Swanson v. Pontralo*, 27 N.W.2d 21 (Iowa 1947), which the Jordans claim was overruled by *Larsen v. Cady*, 274 N.W.2d 907 (Iowa 1979) and *Robinson v. First American Title Ins.*, 755 N.W.2d 144 (Iowa App. 2008). (Jordan Brief, at 16-17.) In fact, neither of these cases overrules *Swanson*. Rather, the Supreme Court of Iowa clarified that the characterization of the statute at issue in *Swanson* as a statute of limitation was inaccurate. *Dohrn v. Mooring Tax Asset Grp., L.L.C.*, 743 N.W.2d 857, 864 (Iowa 2008). There is no indication, however, that *Swanson*’s reasoning was incorrect had its characterization of the statute been accurate.

have been no way for the Jordans to have learned that their mineral interest had been included in the sale.” Axia’s support for this assertion and the Jensens’ counterarguments are each detailed below:

“(1) [T]he recorded lien date was January 16, 1996, almost a year after the mineral interest had been severed.” Part II.B. above details why the error in the Record of Delinquency is insufficient to overcome the legal reality that a tax lien attached on January 1, 1995, and the Jordans are deemed to know the law on that point. *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925).

“(2) [T]he tax deed did not expressly indicate that it included the mineral interest.” The Tax Deed contained no express reservations or exceptions, (Jensens Brief, at Addendum 6), which provided constructive notice that the entire fee estate was conveyed.

“(3) [T]he Jordans were not given notice of delinquent taxes for the 1995 or any year after that.” While it is undisputed that the Jordans did not receive notice of delinquent taxes, it is unclear how this fact defeats constructive and inquiry notice subsequent to the tax sale. As discussed below, the Jordans had record notice and constructive notice as a result of county records.

“(4) [I]f contacted, Uintah County would have said that it did not assess the mineral interest.” Even assuming this fact, which is disputed (Part I.B.2.), advice from the county cannot defeat the legal consequences of recorded documents and such hypothetical advice is irrelevant where the Jordans sought no advice until long after Section 206 expired.

“(5) [N]either the Jensens or their predecessor in interest made any claim to the mineral interest until 2013, even though the Jordans had issued multiple leases of record.”

The Parties stipulated that the Jensens' intent was immaterial (R.2010:8:10-24; *see* Part I and II). Additionally, Axia and the Jensens signed an agreement in 2011 acknowledging the Jensens mineral ownership. (R.1307.) Ultimately, the Jensens had no obligation to notify the Jordans or anyone else of their mineral ownership.

In arguing that the Jordans could not have learned of the tax sale, Axia ignores record notice, which the Jordans received along with all other persons upon recordation of the Tax Deed. *See* Utah Code § 57-3-102 (stating recorded documents "impart notice to all persons of the contents"). Further, Axia's argument is contradicted by the undisputed facts of this case: the two law firms Axia asked to check the county record both discovered that the Mineral Rights had potentially passed in the Tax Deed. (R.1225,1321,1334).

Next, the Jordans argue that adoption of the Jensens' position "would require every land owner to periodically go to the county records office of each county where they owned an interest in land and conduct a title check to see if anything adverse had been filed." This Court need not decide whether land owners must periodically check county records because the Jordans had reason to check the records. The Jordans warranted title to mineral rights in leasing their claimed mineral interest in 2003, but they "did nothing to investigate [their] title" at that time. (R.1029).

The Jordans then argue that the Jensens should have checked the record and discovered that the mineral rights had been severed. (Jordan Brief, at 19-20.) As argued above (Parts I and II), despite being severed, the Tax Deed included the Mineral Rights and the Jensens' learning of the severance would have changed nothing.

Ultimately, it is unreasonable for the Jordans to sit on a taxable property interest for seventeen years and then complain they had no notice of taxes. All property owners have notice that they must pay taxes or risk losing their property. *See Martin v. Kearl*, 917 P.2d 91, 93 n.5 (Utah Ct. App. 1996) (“[T]hose purporting to own land . . . are already ‘on notice’ that they should be paying property taxes to maintain their ownership of that land . . . [and that] if they are not properly paying property taxes and are not in possession of the land someone else—the county or an adverse possessor—could be laying claim to their land.”); *see also Howard*, 73 Fed. Appx. at 101 n.12 (stating “plaintiffs should have known that something was amiss with [the property] when they did not receive a tax bill on the land”). Given the undisputed facts—no payment of taxes for seventeen years, a recorded Tax Deed with no exceptions, and the Jordans’ giving warranties of title in 2003—the Jordans had both constructive and inquiry notice, which, if pursued, would have led them to their due process claim within the limitation period. The Jordans’ challenge to the Tax Deed is therefore barred.

B. Application of Section 206 is Not Fundamentally Unfair.

Appellees both rely on a footnote in *Frederiksen v. LaFleur*, 632 P.2d 827 (Utah 1981) to argue that application of Section 206 would be fundamentally unfair, (Axia Brief, at 29; Jordan Brief, at 13), but they fail to address the Jensens’ treatment of this case in their opening brief, (*see* Jensen Brief, at 44.) The *Frederiksen* footnote is pure dicta, does not create a legal standard apart from due process, and application of Section 206 would not be fundamentally unfair to the Jordans. (*See* Jensen Brief, at 44.).

The most that can be said about *Frederiksen* is that Utah courts have not yet decided whether application of Section 206 in a case such as this one would be unfair. Nevertheless, Axia cites *Pangea Technologies, Inc. v. Internet Promotions, Inc.*, 2004 UT 40, ¶ 8, 94 P.3d 257, for the proposition that notice is a “fundamental feature of due process” and then, based on this proposition, asserts that “[l]ack of notice is repugnant to fundamental fairness.” (Axia Brief, at 29.) But this assertion skirts the issue, which is not whether lack of notice is repugnant to fundamental fairness but rather whether application of Section 206 to bar a claim based on lack of notice would be unfair. *Pangea* says nothing on this issue.

Axia next cites *Kemmerer Coal Co. v. Brigham Young University*, 723 F.2d 54 (10th Cir. 1983) and offers the court’s characterization of an unconstitutional taking as “repugnant to fundamental fairness” as a basis for concluding that application of Section 206 to the Jordans is also unfair. (Axia Brief, at 29-30.) Here again, the court’s characterization related to the constitutional violation only and not the relevant issue of the application of the statute of limitation. As to that issue, the court stated, “we do not believe it fundamentally unfair to apply the statute of limitations to Kemmerer who bought the coal land in the face of record notice of a rival claim” *Id.* at 58. *Kemmerer* therefore is consistent with the Jensens’ position that it is not unfair to apply Section 206 to the Jordans, who had record notice of the Jensens’ tax deed. (Jensen Brief, at 44-45.)

Finally, Axia cites *Frederiksen*, 632 P.2d 827, *Layton v. Holt*, 449 P.2d 986 (Utah 1961), and *Peterson v. Callister*, 313 P.2d 814 (Utah 1957) and argues that Section 206 has only been applied to “technical” defects in a tax sale, not substantive ones like lack of

notice. (Axia Brief, at 27). But there is nothing in the cases to suggest Section 206 is limited to technical defects. Indeed, the contrary is true. *Frederiksen* holds “tax purchasers may avail themselves of [Section 206] regardless of either the invalidity of their tax title or their inability to establish an affirmative claim to title apart from their tax title.” 632 P.2d at 831 (footnote omitted). *Layton* states that “the legislature intended to include within [Section 206] tax titles which were initiated by tax sales the records of which would not show that each statutory step had been followed with exactitude.” 449 P.2d at 987. And *Peterson* states that Section 206 “prevents the assertion of a defense by a record owner . . . after one has received a tax title thereto, valid on its face, and this is true whether the tax title is valid or not.” 313 P.2d at 815. There is nothing in any of these constructions that limits Section 206 to technical defects.

The same is true for the plain language of Section 206, which references “[a]n action or defense to recover, take possession of, quiet title to, or determine the ownership of real property” without distinguishing between “technical” and “substantive” actions or defenses. Utah Code § 78B-2-206. Indeed, the very purpose of Section 206—“to lay at rest claims against tax titles”—would be frustrated by Axia’s proposed limitation. *Peterson*, 313 P.2d at 815. Therefore, this Court should reject any attempt to place due process claims outside the reach of Section 206.¹³

¹³ Axia’s claim that the “Jensens have cited no case, from Utah or any other jurisdiction, where a statute of limitation or repose has been applied to prevent a due process challenge for lack of notice” (Axia Brief 27), overlooks *Lake Canal Reservoir Co. v. Beethe*, 227 P.3d 882 (Colo. 2010), which Axia attempts to distinguish (*id.* at 31). *Howard v. Detroit*, 73 Fed. Appx. 90 (6th Cir. 2003), discussed in Section III.A.2, is another example. And although not specifically addressing notice claims, *Industrial*

C. The Jensens' Tax Deed was Voidable within the Statutory Period, and the Jordans Failed to Void It.

The Jordans' due process claim depends on the Jensens' tax title being void as a result of insufficient notice. This argument directly conflicts with this Court's decision in *Hansen v. Morris*, which established the controlling rule that a tax deed is only void if it is "not valid on its face or . . . not issued by the proper governmental authority." 283 P.2d 884, 885 (Utah 1955). Appellees attempt to distinguish *Hansen* on a number of grounds, each of which fail.

First, Axia argues that *Hansen* is incompatible with *Tulsa*, *Mennonite*, and *Schroeder*. (Axia Brief, at 30-31). As argued in Part III.A.1 above, these case are distinguishable and therefore do not conflict with *Hansen*. Second, Axia argues that *Hansen* addressed only statutory procedural requirements and did not address^e the "particulars" of the constitutional challenge. (Axia Brief, at 31). Although *Hansen* explicitly rejected the constitutional challenge, which the court characterized as "necessary for this decision," the distinction between statutory and constitutional procedure is ultimately irrelevant under the *Hansen* rule. The *Hansen* court stressed that its decision applies to all conveyances "valid on their face . . . and executed by the same authority that could have passed good title if each and every statutory step in perfecting a tax title had been followed, without the aid of a limitations statute." 283 P.2d at 887. Here, there is no question that the tax deed was valid on its face, and the county authorities could have

Constructors Corp., 15 F.3d 963, and *Fundamentalist Church of Jesus Christ of Latter-Day Saints*, 2012 UT 66, both apply limitation periods to bar important constitutional claims.

passed good title if each and every statutory step, including notice to the Jordans, had been followed. Thus, under *Hansen*, the Jensens' tax title is voidable.

Next, citing only *Tintic Undine Mining Co.*, 74 P.2d 1184, and *Home Owners' Loan Corp. v. Stevens*, 97 P.2d 744 (Utah 1940), Axia argues that this Court "has consistently held that the failure to give proper notice renders a deed void." (Axia Brief, at 31). This argument ignores *Hansen*, which was decided after *Tintic* and *Home Owners*, so it is unclear how either of these cases could control over *Hansen*. Further, *Hansen* specifically referenced *Home Owners* as an example of prior court practice that the legislature intended to address through statutes of limitation like Section 206. *Hansen*, 283 P.2d at 885 & n.1. As a result of its misapplication of *Tintic* and *Home Owners*, Axia's attempt to distinguish *Lake Canal Reservoir Co.*, 227 P.3d 882, on the basis that Colorado law differs from Utah law also fails. In fact *Lake Canal* and *Hansen* are consistent, as argued in the Jensens' opening brief. (Jensen Brief, at 41.)

Axia also attempts to distinguish *Lake Canal* on the basis that the neighbors were not entitled to actual notice, unlike the Jordans here. (Axia Brief, at 30.) This analysis is wrong. The statute at issue in *Lake Canal* required, "by personal service or mail, notice 'on every person in actual possession or occupancy,'" and the neighbors asserted that "notice was ineffective because . . . notice was not served on everyone who had an interest or possession" 227 P.3d at 889-90. Thus, the type of notice at issue was, in fact, actual notice, just like here, and the *Lake Canal* court began its analysis by "[a]ssuming that insufficient notice was given." *Id.* at 890. Accordingly, the court's analysis accounts for

lack of actual notice, and the language quoted by Axia, (Axia Brief, at 32), would not change the court's decision had the petitioners been owners of record.¹⁴

Finally, the Jordans argue that the Jensens analysis of whether a deed is void or voidable is incorrect. In support of this argument, they cite a series of distinguishable or non-controlling cases, including the following: *Bangerter v. Petty*, 2010 UT App 49, 228 P.3d 1250, which is a court of appeals case that cannot control over *Hansen*; *Ockey v. Lehmer*, 2008 UT 37, 189 P.3d 51, which does not address a tax deed (*Hansen* is unique to tax deeds and does not apply generally to other contracts or deeds); *Migliore v. Livingston Financial, LLC*, 2015 UT 9, 347 P.3d 394, which discusses a judgment, not a tax deed; and *Mullane*, *Shroeder*, *Mennonite*, and *Jones*, which do not address the notice required to trigger a general statute of limitation, as discussed in Section III.A.1.¹⁵

In sum, Appellees have provided no reason to stray from the rule in *Hansen* that a tax deed valid on its face is merely voidable as a result of insufficient notice. The Jordans failed to void the Tax Deed within Section 206's limitation period, and they are barred from doing so now.

¹⁴ The Jordans also attempt to distinguish *Lake Canal* by relying on Colorado cases decided before *Lake Canal*. (Jordan Brief, at 18 (citing *Mitchell v. Espinosa*, 243 P.2d 412 (Colo. 1952) and *Webermeier v. Pace*, 552 P.2d 1021 (Colo. App. 1976)). According to the Jordans, these cases are more applicable than *Lake Canal* because they require separate assessment of minerals. But Utah does not have this requirement. (Part I.B.1.)

¹⁵ Appellees cite a number of out-of-state cases that void tax deeds for insufficient notice, (Axia Brief, at 27 n.6; Jordan Brief, at 18), but these cases are inconsistent with Utah law and are not persuasive in the face of controlling Utah precedent, like *Hansen*.

IV. The Legislature's Intended Meaning for "Ore" Includes Petroleum.

Appellees make two primary arguments against the applicability of Utah Code section 40-1-12 (the "Ore Statute"): (1) the wrongful removal of oil and gas is governed by Utah Code section 40-6-9, not the Ore Statute, and (2) the term "ore" does not include oil and gas. (Axia Brief, at 33-34; Jordans Brief, at 21-22). Both arguments are wrong.

First, the Legislature created the Board and Division of Oil, Gas, and Mining in 1983 to "foster, encourage, and promote the development, production, and utilization of natural resources of oil and gas in the state of Utah." *Id.* § 40-6-1. But this chapter says nothing about removing oil and gas from the purview of the Ore Statute. Indeed, the chapter expressly provides that "[n]othing in this chapter . . . shall impair, abridge, or delay any cause of action for damages that any person may have or assert against any person violating any provision of this chapter, or any rule or order issued under the authority of this chapter." *Id.* § 40-6-11(7)(a) Thus, by its terms, chapter 6 does not supersede the Ore Statute, which applies to this case if the 1898 Legislature intended the term "ore" to include petroleum.

On this issue, Axia argues that oil and gas are not "minerals" and therefore cannot fall within the Jensens' proposed definition of "ore." But Axia's quote of the definition of "mineral" leaves out critical language: "(b) In miner's phraseology, *ore*" and "(d) Any natural resource extracted from the earth for human use, e.g., ores, salts, coal, *or petroleum*." Dictionary of Mining, Mineral, and Related Terms 347 (2d. ed. 1997) (emphasis added) (attached as Addendum C). Thus, the Jensens' argument that the term ore could include oil and gas stands, and the historical context of the Ore Statute mandates inclusion of petroleum within the term "ore." (Jensens Brief, at 47.)

CONCLUSION

For the reasons discussed above, this Court should reverse the District Court and remand to the district court for entry of summary judgment quieting title to the Mineral Rights in the Jensens and for trial on the Jensens' remaining claims, including their claim under the Ore Statute.

DATED this 18th day of May, 2016.

PARR BROWN GEE & LOVELESS, P.C.

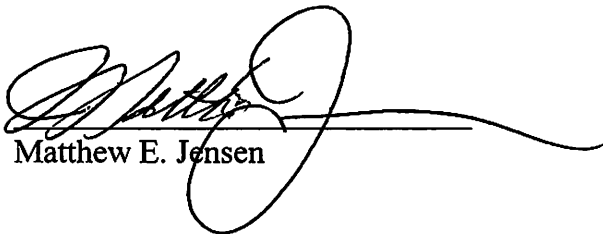
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 24(f)(1)(C) of the Utah Rules of Appellate Procedure, I hereby certify that this Brief contains 11,934 words, exclusive of the items set forth in Rule 24(f)(1)(B), and therefore complies with the type-volume limitation set forth in Rule 24(f)(1)(A) as modified by this Court's Order dated April 18, 2016 allowing 12,000 words for this Reply Brief. I relied on the word count function in Microsoft Word to perform this calculation.


Matthew E. Jensen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of May, 2016, two copies each of the foregoing
**COMBINED REPLY BRIEF OF APPELLANTS EDDIE R. JENSEN AND LY-THI
JENSEN** were served via U.S. Mail, postage prepaid, on the following:

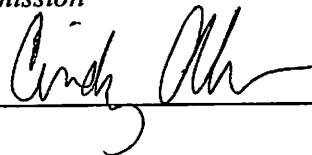
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Tab A

ADDENDUM A

Tab B

ADDENDUM B

TC-705
REV. 1/96

ENTRY 200002767
Box 732 Page 239

PAGE: _____

PROPERTY DESCRIPTION: 1/2 E 1/4, SE 1/4, T2S, R2E, S3E.	NAME & ADDRESS OF OWNER: JORDAN, OLIVIA % ANDREWS JONATHAN ANTHONY P O BOX 5451 GAINESVILLE, FL 32602	DATE OF ORIGINAL DELINQUENCY: 16-JAN-96
------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------	-----------------------------------------------

DELINQUENT 1985 TAXES				DELINQUENT 1986 TAXES			DELINQUENT 1987 TAXES			DELINQUENT 1988 TAXES			DELINQUENT 1989 TAXES			
EXPLANATION:				EXPLANATION:			EXPLANATION:			EXPLANATION:			EXPLANATION:			
DATE	RECEIPT NO	DEBIT	CREDIT	BALANCE	DEBIT	CREDIT	BALANCE	DEBIT	CREDIT	BALANCE	DEBIT	CREDIT	BALANCE	DEBIT	CREDIT	BALANCE
11/17/91	864.01	41.99	33.05	8.94		Paid			Paid		36.04			88.61		
	864.01	10.00	10.00								10.00			10.00		
			11.04													
ENTRY 2000502567 Book 732 Pmc 225 30.40 75-41420 1 02137 RANDY SIMMONS JUDGE, JUDICIAL COUNTY, IOWA JUDICIAL COUNTY CLERK/AUDITOR 157 EAST MAIN REC BY SYLERE MCINTOSH DEPUTY																

CERTIFICATE NUMBER

ALIEN'S ENDORSEMENT OF TAX DEED PROPERTY
The undersigned do to the property described in this entry
was on the 25th day of May, 2000 sold and
conveyed to the County of Utah in payment of (\$4444)
being charged against the same.
Pat M. Dine

JENSEN000025

Tab C

ADDENDUM C

and the term imports neither learning nor skill. (Ricketts, 1943) (j) Abbrev. for continuous miner. (Nelson, 1965)

mineragraphy *ore microscopy*.

mineral (a) A naturally occurring inorganic element or compound having an orderly internal structure and characteristic chemical composition, crystal form, and physical properties. Cf: *metallic*. (AGI, 1987) (b) In miner's phraseology, ore. See also: *ore*. (Fay, 1920) (c) *mineral species; mineral series; mineral group*. (d) Any natural resource extracted from the earth for human use; e.g., ores, salts, coal, or petroleum. (e) In flotation, valuable mineral constituents of ore as opposed to gangue minerals. (f) Any inorganic plant or animal nutrient. (g) Any member of the mineral kingdom as opposed to the animal and plant kingdoms.

mineral acre The full mineral interest in 1 acre (0.4 ha) of land. (Williams, 1964)

mineral adipocire *hatchettite*.

mineral assessment (a) The process of appraisal of identified and undiscovered mineral resources within some specified region, and the product of that appraisal. (Barton, 1995) (b) The estimation of mineral endowment, meaning the number of deposits or the tonnage of metal that occurs in the region, given some minimum size of accumulation (deposit), minimum concentration (grade), and maximum depth of occurrence. Syn: *predictive metallogeny*. (DeVerle, 1983)

mineral association A group of minerals found together in a rock, esp. in a sedimentary rock. (AGI, 1987)

mineral belt An elongated region of mineralization; an area containing several mineral deposits. (AGI, 1987)

mineral blossom Drusy quartz. (Fay, 1920)

mineral bruto Sp. Raw ore. (Hess)

mineral caoutchouc *elaterite; helenite*.

mineral carbonatado Sp. Carbonate ore. (Hess)

mineral charcoal (a) A pulverulent, lusterless substance, showing distinct vegetal structure, and containing a high percentage of carbon with little hydrogen and oxygen, occurring in thin layers in bituminous coal. Called mother of coal by miners. (Fay, 1920) (b) Another name for fusain. (BS, 1960)

mineral claim A mining claim. (Mathews, 1951)

mineral cleavage Mineral breakage along specific crystallographic planes in all specimens due to fewer or weaker chemical bonds in those directions. Cf: *mineral parting*.

mineral deed A conveyance of an interest in the minerals in, on, or under a described tract of land. The grantee is given operating rights on the land; easements of access to the minerals are normally implied unless expressly negated. (Williams, 1964)

mineral de fusion propia Sp. Self-fluxing ore. (Hess)

mineral deposit (a) A mass of naturally occurring mineral material; e.g., metal ores or nonmetallic minerals, usually of economic value, without regard to mode of origin. Accumulations of coal and petroleum may or may not be included; usage should be defined in context. Syn: *orebody*. (AGI, 1987) (b) A mineral occurrence of sufficient size and grade that it might, under favorable circumstances, be considered to have economic potential. See also: *ore; ore deposit*. (USGS, 1986)

mineral deposit model The systematically arranged information describing the essential attributes (properties) of a class of mineral deposits. The model may be empirical (descriptive), in which instance the various attributes are recognized as essential even though their relationships are unknown; or it may be theoretical (genetic), in which instance the attributes are interrelated through some fundamental concept. See also: *model*. (SME, 1992)

mineral dresser A machine for trimming or dressing mineralogical specimens. (Standard, 1964)

mineral dressing (a) Physical and chemical concentration of raw ore into a product from which a metal can be recovered at a profit. (ASM, 1961) (b) Treatment of natural ores or partly processed products derived from such ores in order to segregate or upgrade some or all of their valuable constituents, and/or remove those not desired by an industrial user. Mineral dressing processes are applied to industrial wastes to retrieve useful byproducts. See also: *mineral processing; ore dressing*. (Pryor, 1960)

mineral economics Study and application of the technical and administrative processes used in management, control, and finance connected with the discovery, development, exploitation, and marketing of minerals. (Pryor, 1963)

mineral endowment The physical aggregate of mineral occurrences in a region above some lower cutoff. (Shanz, 1983)

mineral engineering Term covers a wide field in which many resources of modern science and engineering are used in discovery, development, exploitation, and use of natural mineral deposits. (Pryor, 1963)

mineral entry The filing of a claim for public land to obtain the right to any minerals it may contain. (Craigie, 1938)

mineral facies *metamorphic facies*.

mineral fat *ozocerite*.

mineral fiber (a) Fibrous mineral whose fibers are longer than 5 μm and with an aspect ratio (length over width) equal to or greater than 3:1 as determined by the membrane filter method at 400X to 500X magnification (4-mm objective) phase contrast illumination. (ACGIH, 1993-1994) (b) The smallest elongated crystalline unit that can be separated from a bundle or appears to have grown individually in that shape, and that exhibits a resemblance to organic fibers. (Campbell)

mineral field Scot. A tract of country in which workable minerals are found; a mineral leasehold.

mineral filler A finely pulverized inert mineral or rock that is included in a manufactured product—e.g., paper, rubber, and plastics—to impart certain useful properties, such as hardness, smoothness, or strength. Common mineral fillers include asbestos, kaolin, and talc. (AGI, 1987)

mineral fuel Coal or petroleum. See also: *fossil fuel*. (Pearl, 1961)

mineral group Two or more mineral species having identical or closely related structures; e.g., hematite group or zeolite group. See also: *mineral*.

mineral interests Mineral interests in land means all the minerals beneath the surface. Such interests are a part of the realty, and the estate in them is subject to the ordinary rules of law governing the title to real property. (Ricketts, 1943)

mineral inventory An accounting of the mineral reserves and resources contained in known mineral deposits including inactive mines, operating mines, and undeveloped sites. (Shanz, 1983)

mineralization The process or processes by which a mineral or minerals are introduced into a rock, resulting in a valuable or potentially valuable deposit. It is a general term, incorporating various types; e.g., fissure filling, impregnation, and replacement. (AGI, 1987)

mineralize To convert to a mineral substance; to impregnate with mineral material. The term is applied to the processes of ore formation and also to the process of fossilization. (AGI, 1987)

mineralized bubble In flotation, one of the bubbles that rise from the pulp loaded with particles of desired mineral. (Pryor, 1963)

mineralizer *ore-forming fluid; geologic mineralizer*.

mineralizing agent *ore-forming fluid; geologic mineralizer*.

mineral land Land that is worth more for mining than for agriculture. The fact that the land contains some gold or silver would not constitute it mineral land if the gold and silver did not exist in sufficient quantities to pay to work. Land not mineral in character is subject to entry and patent as a homestead, however limited its value for agricultural purposes. Cf: *stone land*. (Ricketts, 1943)

Mineral Lands and Mining The leasable minerals include oil, gas, sodium, potash, phosphate, coal, and all minerals within acquired lands. Acquisition is by application for a Government lease and permits to mine or explore after lease issuance. (SME, 1992)

mineral lease *mining lease*.

mineral occurrence (a) The presence of useful minerals or rocks in an area under examination. (Shanz, 1983) (b) A concentration of a mineral (usually, but not necessarily, considered in terms of some commodity, such as copper, barite, or gold) that is considered to be valuable or that is of scientific or technical interest. In rare instances (such as titanium in a rutile-bearing black sand), the concentration of the commodity might be less than its average crustal abundance. (USGS, 1986)

mineralogical guide A mineral that is present near an orebody and is related to the processes of ore deposition. Guides help locate ore and may constitute targets for ore search.

mineralogical phase rule Any of several modifications of the fundamental Gibbs phase rule, taking into account the number of degrees of freedom consumed by the fixing of physical-chemical variables in the natural environment. The most famous such rule, that of Goldschmidt, assumes that two variables (taken as pressure and temperature) are fixed externally and that consequently the number of phases (minerals) in a system (rock) will not generally exceed the number of components. The Korzhinskii-Thompson version takes into account the external imposition of chemical potentials of perfectly mobile components, and thereby reduces the maximum expectable number of minerals in a given rock to the number of inert components. Syn: *Goldschmidt's phase rule*. (AGI, 1987)

mineralogist Person who studies the formation, properties, use, occurrence, composition, and classification of minerals; a geologist specialized in mineralogy. Syn: *oryctologist* (obsolete).

mineragraphy *ore microscopy*.

mineralogy The study of minerals: formation, occurrence, use, properties, composition, and classification. Adj. mineralogic, mineralogical.

mineraloid Minerallike constituent of rocks which is not definite enough in chemical composition or in physical properties to be considered a mineral. Hydrocarbons, volcanic glass, and palagonite are classed as mineraloids. (Hess)

mineral paint *mineral pigment*.

mineral parting Mineral breakage along specific crystallographic planes in some specimens due to twinning, exsolution lamellae, or chemical alteration. See also: *parting*. Cf: *mineral cleavage*.