

2016

James Harvey Jordan, Et Al. v. Eddie R. Jensen and Ly-Thi Jensen : Brief of Appellees Jordan Et Al

Utah Supreme Court

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IN THE UTAH SUPREME COURT

James Harvey Jordan, et al.,

Appellees/Plaintiffs,

vs.

Eddie R. Jensen and Ly-Thi
Jensen,

Appellants/Defendants.

Case No. 20150257-SC

Eddie R. Jensen and Ly-Thi
Jensen,

Appellants/Third-Party
Plaintiffs,

vs.

Axia Energy, LLC,
Stonegate Resources, LLC,
Wasatch Oil & Gas LLC
(aka Wasatch Oil & Gas,
LLC),

Appellees/Third-Party
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BRIEF OF APPELLEES JORDAN ET AL.

Appeal from a Final Judgment of the Eighth Judicial
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Honorable Samuel P. Chiara

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STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction in this case pursuant to Utah Code Ann. §78A-3-102(j).

ISSUES PRESENTED FOR REVIEW WITH STANDARDS OF REVIEW

1. Did the trial court correctly determine that the Utah State Tax Commission, not the Uintah County Assessor, assesses and levies on oil, gas and mineral rights? The court reviews the district court's grant of summary judgment for correctness. Keith v. Mountain Resorts Development 2014 UT 32 ¶16, 337 P.3d 213.

2. Did the trial court correctly determine that severed mineral rights that were not assessed or levied by the county are not subject to the county tax sale? The court reviews the district court's grant of summary judgment for correctness. Keith v Mountain Resorts Development 2014 UT 32 ¶16, 337 P.3d 213.

3. Did the trial court correctly determine that due process prevents the running of a statute of limitations on tax titles when no notice was given to the Jordans of the assessment, the imposition of the taxes, the delinquency or the tax sale? The court reviews the district court's grant of summary judgment for correctness. Keith v Mountain Resorts Development 2014 UT 32 ¶16, 337 P.3d 213.

4. Did the trial court correctly rule that Utah Code

Ann. §40-6-1 et seq., not Utah Code Ann. §40-1-12, provides the remedy for payment for oil and gas production if it is determined that Jensens own the oil and gas rights? The court reviews the district court's grant of a motion to dismiss for correctness. America West Bank LLC v State, 2014 UT 49 ¶7, 342 P.3d 224.

APPLICABLE STATUTORY PROVISIONS

Utah Code Ann. §40-6-9 is attached as Addendum 3.

Utah Code Ann. §40-1-12 is attached as Addendum 4.

STATEMENT OF THE CASE

Nature of the Case: Plaintiffs (herein referred to as Jordans) are descendants of Harvey and Edna Peterson, who homesteaded the subject property located in Uintah County, Utah in the early 1900s. The Jordans' predecessors eventually sold the surface rights, retaining the oil, gas and mineral rights. The Jordans leased their oil, gas and mineral rights and the third-party defendants drilled an oil and gas well on the property. Defendants (herein referred to as Jensens) are the present owners of the surface rights and claimed title to the oil and gas rights thru a tax sale.

Jordans filed this lawsuit to quiet title to the oil, gas and mineral rights. Jensens answered, claiming title to the oil, gas and mineral rights based on a tax deed that was issued from a tax sale for 1995 unpaid taxes to Uintah County,

Utah. The assessment, levy and tax sale occurred after the oil, gas and mineral rights had been severed from the fee. Jensens also filed a counterclaim and third-party complaint against Third-Party Defendants, Axia Energy LLC, Stonegate Resources LLC and Wasatch Oil & Gas LLC (collectively referred to herein as Axia), which entities had interests in the oil, gas and mineral rights based on leases and drilling of an oil and gas well on the subject property.

Proceedings Below: Jordans filed their complaint to quiet title on July 5, 2013. R. 1-17. The complaint alleged that the oil, gas and mineral rights were not assessed, having been severed from the surface, and, therefore, were not subject to the tax sale for the 1995 taxes. The complaint further alleged that no notice was given to Jordans or their predecessors of the tax, the delinquency or the sale as required by due process. Jensens filed their answer and counterclaim on August 9, 2013, seeking a declaratory judgment to quiet title to the oil, gas and mineral rights, alleging that Jordans' ownership was barred by the statute of limitations, claiming to have adversely possessed the mineral rights, asserting conversion and trespass and averring that Jordans had violated Utah Code Ann. §40-1-12 (wrongful removal of ore). R. 23-42.

Jordans moved to dismiss the Jensens' cause of action

based on Utah Code Ann. §40-1-12. R. 49-51. That motion was briefed by the parties, and, after oral argument on October 29, 2013, the court (Judge Petersen) granted the motion finding that the Jensens' remedy was under Utah Code Ann. §41-6-1 et. seq. and dismissed that cause of action. R. 166-169, R. 2009. Addendum 2.

Jensens then amended their counterclaim adding a third-party complaint against the Axia entities, which had leased the oil, gas and mineral rights from Jordans or who had drilled the oil and gas well on the property. R. 170-172.

After completing discovery, all parties filed motions for summary judgment. Oral argument was held on the motions for summary judgment on September 24, 2014 before Judge McClellan. At the oral argument, the parties' counsel agreed that the material facts were not in dispute. See pages 9 thru 12 of Transcript of the September 24, 2014 hearing, R. 2010. Prior to issuing his ruling, Judge McClellan recused himself after a potential conflict arose. The case was then assigned to Judge Samuel Chiara.

Disposition at the Trial Court: Judge Chiara, after considering the memoranda submitted by the parties and the transcript of the September 24, 2014 hearing, issued his Ruling and Order on February 18, 2015. That Ruling and Order granted the motions for summary judgment filed by the Jordans

and Axia, and denied the Jensen Motion for Summary Judgment. Addendum 1, R. 1816-1834.

FACTS

The parties stipulated that the material facts were not disputed and that many of the facts listed by the parties in their memoranda were not material. September 24, 2014 hearing transcript pages 8 thru 11, R. 2010. Jensens' statement of facts in their brief includes many of the facts the parties agreed were not material to the issues before the court, and were facts not relied on by the court in entering its Ruling and Order.

The trial court found that the following facts were undisputed and based its ruling on these facts. Addendum 1, R. 1816-1834.

1. The property that is the subject of this case consists of approximately 40 acres in Randlett, Utah, legally described as the Northeast quarter of the Northeast quarter of Section 32, Township 7 South, Range 20 East, Salt Lake Meridian.

2. On October 25, 1954, Olivia Jordan, Marie Robertson, and Caroline Kelley (the "Jordans") acquired the property.

3. The Jordans sold the property to Jonathan Anthony Andrews, reserving the oil, gas and mineral rights. The deed is dated February 3, 1995, and recorded March 15, 1995, at

Book 592, Page 95, in the Uintah County Recorder's Office.

4. The real property tax notice for the 1995 taxes on the property was mailed by Uintah County to Olivia Jordan c/o Jonathan Anthony Andrews, P.O. Box 5451, Gainesville, Fl.

5. The 1995 taxes were not timely paid.

6. The 1996 tax notice was sent to Jonathan Anthony Andrews, at P.O. Box 851981, Richardson, Texas. Those taxes in the amount of \$32.42 were paid on November 21, 1996.

7. The 1997 tax notice was sent to Jonathan Anthony Andrews at the Richardson, Texas address. The 1997 taxes in the amount of \$35.92 were paid on December 10, 1997.

8. On November 17, 1997, \$33.05 was paid on the 1995 taxes. After payment on penalties and interest, there was a balance owing of \$8.94.

9. The 1998 and 1999 tax notices were sent to Jonathan Anthony Andrews at the Richardson, Texas P.O. Box. The taxes for 1998 and 1999 were not paid.

10. For failing to pay the real property taxes assessed for the 1995, 1998, and 1999 tax years, resulting in a past due amount of \$167.19, Uintah County seized and sold the property on May 25, 2000.

11. The record of delinquent taxes prepared by the treasurer and recorder states that the date of the tax lien is January 16, 1996, and date of delinquency is January 16, 1996.

All parties agree this date is incorrect, and likely due to a typographical error. The taxes for the 1996 year were paid. The record should have indicated a tax lien date and delinquency date of January 1, 1995, as there remained a balance due on the 1995 taxes. (This is a footnote to paragraph 11 in the court's Ruling and Order.)

12. The assessment and levy for the 1995 tax year did not occur until on or after May 12, 1995.

13. No notice was ever given to the Jordans of the assessment of 1995, the failure to pay the taxes, or the tax sale.

14. On May 25, 2000, Uintah County executed a tax deed concerning the property. The grantee was Quality Remediation Services ("QRS"), which paid the County \$6,000.00.

15. On December 13, 2000, QRS executed a warranty deed concerning the property. The Jensens were the grantees, and paid \$5,500.00 to QRS.

16. In a January 2001 Real Property Transfer Survey Standard Land Questionnaire, the Jensens indicated they paid fair market value for the property, and that the sale did not include the mineral rights.

17. Prior to March 2013, the Jensens never asserted a claim to own the mineral rights in the property.

18. Since 1995, the Jordans have periodically leased the

oil, gas and mineral rights.

19. In May 2011, Stonegate entered into oil and gas leases with the successors in interest to the Jordans. In August of 2011, Stonegate assigned the working interest in these leases to Axia, reserving for itself and Wasatch a royalty interest.

20. In November 2011, the Jensens entered into a Surface Use Agreement and Grant of Easements, allowing Axia to conduct exploration and drilling operations on the property.

21. Over time, Axia has paid the Jensens \$21,182.00 under the Surface Use Agreement.

22. Axia paid all the taxes associated with the mineral rights in 2012 and 2013, totaling \$84,878.32.

SUMMARY OF ARGUMENT

1. The assessing, levying and taxing of oil, gas and mineral rights are the responsibility of the Utah State Tax Commission. Therefore, the Jordans' oil, gas and mineral rights were not subject to the tax lien or the tax sale by Uintah County, Utah.

2. The Uintah County Assessor knew that she was not responsible to assess and levy on oil, gas and mineral rights, especially when they have been severed from the fee. It is undisputed that the Uintah County Assessor did not assess the Jordans' oil, gas and mineral rights. The law in Utah has long

held that property interests that are not assessed and levied are not subject to the tax lien or the tax sale.

3. The United States Supreme Court, beginning with the case of Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), has held that, if due process requirements of notice are not afforded to the property owner, then the tax sale is void and state statutes of limitation do not bar a subsequent challenge to the tax sale.

4. Utah Code Ann. §40-6-9 provides the remedies for the Jensens, if it is determined that they were not paid for oil and gas production in which they owned an interest, rather than Utah Code Ann. §40-1-12 regarding wrongful removal of ore.

ARGUMENT

I. The Utah State Tax Commission not County Assessors Assess and Levy on Oil, Gas and Mineral Rights.

Jensens first argue that the Uintah County Assessor had a constitutional and statutory duty to assess all oil, gas and mineral rights in the county, even those with no value, those not discovered and those severed from the surface estate. Then Jensens argue that, even though it is undisputed that the Uintah County Assessor did not assess the Jordans' severed oil, gas and mineral rights, those oil, gas and mineral rights were still subject to the county tax sale.

The first flaw in Jensens' argument is that the Utah

State Tax Commission assesses oil, gas and mineral rights, not the County Assessors. Utah Code Ann. §59-2-201(1)(a)(v) and Crystal Lime & Cement Co. v Robbins 116 Utah 314, 209 P.2d 739 (Utah 1949). The Uintah County Assessor was fully aware of her duties when she did not assess the severed oil, gas and mineral rights or any other oil, gas and mineral rights in 1995. R.239-244.

To adopt the Jensens' argument would require this Court to ignore the Constitution of Utah and the statutes regarding taxation of minerals. It would also require the Court to develop a methodology of how to value unknown minerals, and would change the historical valuation and taxing of oil and gas reserves. Such a change would also impact (1) assessors who would then be required to locate all owners of severed mineral rights, (2) owners of severed mineral rights alleged to have been sold at tax sale due to the sale of the surface property, (3) owners of mineral rights who apparently would be owing years of unpaid taxes, and (4) those who have developed mineral rights, as that will place a cloud on all severed mineral rights.

Jordans, pursuant to Rule 24(i) of the Utah Rules of Appellate Procedure, further adopt the arguments on this issue by amicus, The Utah State Tax Commission, the Utah Farm Bureau et. al. and by Appellee Axia.

II. The Severed Oil, Gas and Mineral Rights in This Case Were Not Assessed Nor Levied by the Uintah County Assessor. Therefore, the Severed Oil, Gas and Mineral Rights in This Case Were Not Subject to the Tax Lien.

In the event this Court determines that the Uintah County Assessor had the duty to assess and levy on the mineral rights, Jensens' argument that even though the oil, gas and mineral rights were severed from the fee estate, and not assessed or levied on by the Uintah County Assessor, they were still subject to the tax lien for the taxes for 1995 thru 1999, is counter to decades of Utah law. Utah law is clear that before there is a lien to attach and relate back, the property must first be assessed and levied. See Gillmor v Dale 75 P. 932, 934 (Utah 1904) and Tintic Undine Mining Co. v. Ercanbrack, 93 Utah 561, 74 P.2d 1184, 1189 (Utah 1938). In Hayes v. Gibbs, 110 Utah 54, 169 P.2d 781 (Utah 1946), the Court held that

If property rights which are not included in an assessment are sold or extinguished by a tax sale, there would be a taking of property without due process of law.

Id. at 786. See also H.C. Massey v. Griffiths, 2007 UT 10, ¶10, 152 P.3d 312 (Utah 2007) ("Assessment is the basis of the tax title and only that interest which was properly assessed can be sold."); West Valley City Corp. v. Salt Lake City, 852 P.2d 1000, 1003 (Utah 1993) ("The date of assessment and levy, not the statutory lien date of January 1st, is the relevant

date for determining whether property is within the reach of a taxing entity's power for the purpose of assessing, levying and collecting taxes on the property.").

Jensens, in an attempt to distinguish the factually similar case of Huntington City v. Peterson, 30 Utah 2d. 408, 518 P.2d 1246 (Utah 1974), claim that the holding applies only to tax exempt municipal corporations. A reading of that case shows that was not the basis for the holding in the case, but rather was the position of the dissent. The holding was stated as follows: "[T]he respondent has not shown that the assessment and levy of the tax for the year 1959 were made prior to the time when the city acquired its title." Id. at 412. Cases not involving government entities have reached the same conclusion.

In Mason v. Loveless, 2001 Ut. App. 145, 24 P.3d 997, the court held that a boundary by acquiescence claim was not extinguished by a tax sale, because the holder of the claim was not assessed, and because it would violate due process of law. Id. at ¶¶ 15 and 16. In Hayes v. Gibbs, 110 Utah 54, 169 P.2d 781 (Utah 1946), the court held that a tax sale does not remove easements, building restrictions, or other equitable covenants. There, the court stated, "If the person assessed as owner had no title to the easement, certainly the tax sale could not pass title thereto; the property assessed and the

property conveyed must be the same." Id. at 786. See also Tintic Undine Mining Co. v. Ercanbrack et al., 93 Utah 561, 74 P.2d 1184 (Utah 1938).

Jensens' reliance on Sawey v. Barr, 52 N.M. 358, 198 P.2d 801 (N.M. 1948), is misplaced. The holding in that case was based on the failure to record the deed, so that the assessor was aware that the minerals had been severed. The law in New Mexico is that the mineral estate is assessed separately. See Kaye v. Cooper Grocery Co., 63 N.M. 36, 312 P.2d 798 (N.M. 1957). See also Lien v. Simon, 522 F. Supp. 712 (D. Mont. 1981).

III. Jensen's Statute of Limitations Argument Fails Because the Oil, Gas and Mineral Rights Were Never Part of the Tax Sale. Even if the Oil, Gas and Mineral Rights Were Subject to the Tax Sale, the Tax Deed is Void as a Violation of Due Process.

1. Due Process Requires that Jordans Receive Notice of the Tax Sale.

The trial court found that lack of any notice to Jordans of the taxes or of the sale violated due process and did not prevent the Jordans from challenging the tax title. Addendum 1 pages 11-14, R. 1826 - 1829. The trial court relied on Jones v. Flowers, 547 U.S. 220 (2006) and footnote 14 of Frederiksen v. LaFleur, 632 P.2d 827 (Utah 1981), where Justice Oaks stated, "We expressly reserve opinion on whether the special statute of limitations could protect a tax title acquired by means repugnant to fundamental fairness or whether such an

application of the statute would exceed the limits of statutory intent or constitutional permissibility."

Jensens, while conceding that Jordans received no notice and had a "slam dunk" due process violation, continue to assert that the Jordans cannot challenge the Jensens' title since 4 years had passed since the sale in 2000. Essentially, Jensens argue that the state statute of limitations trumps constitutional rights. The United States Supreme Court has rejected that argument.

First, it should be noted that if this Court agrees that the minerals were not sold at the tax sale, then this argument is moot as the Jordans make no claim to the surface. In the event the court finds that the mineral rights were subject to the tax sale, that sale was void for violating due process and the statute of limitations does not run against a void sale.

The United States Supreme Court has rejected Jensens' argument, that statutes of limitation trump due process, on several occasions. In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), the Court ruled that before any action could affect one's interest in property, the Due Process Clause of the Fourteenth Amendment required that notice be given "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their

objections." *Id.* at 314.

Then, in Schroeder v City of New York, 371 U.S. 208 (1962), the City of New York condemned and diverted water rights that impacted property owned by Schroeder. Notice of the condemnation was given by posting and publication. Actual notice was not given to Schroeder. The statute provided that any action to seek damages was barred by a three year statute of limitations. Schroeder did not file her claim for damages until after three years had passed. The City of New York, like the Jensens, claimed that Schroeder's action was barred by the three year statute of limitations, even if she did not receive notice. The United States Supreme Court disagreed, finding that the notice was insufficient under Mullane and reversed the decision of the New York Court of Appeals that held that the claim was barred. *Id.* at 214.

Following Schroeder, the court again addressed this issue in Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983). In Mennonite, the county posted notice of the tax sale and published it for three weeks. After the tax sale, an owner, occupant or lienholder had a two year period to redeem. If the property was not redeemed, then the purchaser, at the sale, received fee simple absolute title. Adams purchased at the sale and waited the two years. Adams then filed suit to quiet title, claiming, like the Jensens, that he owned the property.

The Indiana courts found for Adams. On appeal, the United States Supreme Court again held that the notice did not meet constitutional requirements and that the two year statute of limitations did not bar the claim, and reversed the decision of the Indiana courts.

Jones v. Flowers followed in 2006, again ruling that the State may not take property and sell it for unpaid taxes without giving the owner notice and opportunity for a hearing. The decision of the Arkansas court upholding the sale was reversed.

In support of their position, Jensens cite Terry v. Anderson, 95 U.S. 628 (1877) and Saranac Land and Timber Co. v. Comptroller of New York, 177 U.S. 318 (1900). Neither of those cases supports the Jensens' argument. Those cases involved the question of reasonableness of the limitation time period. Neither involved facts where there was no notice. Jensens also rely on Swanson v. Pontralo, 238 Iowa 693, 27 N.W.2d 21 (1947). Swanson was decided before Mullane v. Hanover Bank and its progeny were decided, and does not discuss lack of notice and due process impacts on the validity of the tax deed. The case does point out that jurisdictional defects would be unconstitutional and the deed void. The Iowa Courts have since held that, without notice, the deed is void and not subject to the running of the statute of limitations.

Larsen v. Cady, 274 N.W.2d 907, 909 (Iowa 1979) and Robinson v. First American Title Ins., 755 N.W.2d 144 (Iowa App. 2008). See also Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 485-486 (1988).

The Mullane case and the cases following Mullane show that due process is not trumped by statutes of limitation. It is conceded by Jensens that Jordans were not given notice, and that the due process rights were not followed. Therefore, the statute of limitations relied on by Jensens does not bar the Jordan's rights to contest the tax deed.

2. Jensens' Analysis of Whether a Deed is Void or Voidable is Incorrect.

The test for whether documents, such as deeds, are void or voidable "is whether they offend public policy." Bangerter v. Petty, 2010 UT App 49, ¶10, 228 P.3d 1250, citing Ockey v. Lehmer, 2008 UT 37, 189 P.3d 51 (Utah 2008). Failure to give notice renders the document void. See e.g. Migliore v. Livingston Financial, LLC, 2015 UT 9, ¶26, 347 P.3d 394 (judgment void when no notice given). The Mullane, Schroeder, Mennonite, and Jones cases hold that the failure to give notice offends the public policy set forth in the Constitution of the United States, and that the documents involved in those case were void. Surely, those cases were not remanded to have the lower courts say, "Oh well, it was an irregularity and therefore only voidable." Those cases were remanded to set

aside the unconstitutional act, regardless of passage of any statute of limitations. See Luser v. Bank of Chelsea, 730 P.2d 506 (OK 1986), holding that under Mullane and Mennonite notice was a jurisdictional requirement, Id. at ¶13; that notice in that case was insufficient, Id. at ¶18; and therefore, the tax resale deed was void, Id. at ¶19.

Jensens' reliance on Lake Canal Reservoir v. Beethe, 227 P.3d 882 (Colo. 2010) is also misplaced. Colorado, in a case factually similar to this case, has ruled that, when mineral rights are severed, those mineral rights must be separately assessed to be taxed. Mitchell v. Espinosa, 125 Colo. 267, 274, 243 P.2d 412 (1952). See also Webermeier v. Pace, 37 Colo. App. 546, 552 P.2d 1021 (Colo. App. 1976). The failure to assess the mineral rights results in the treasurer not having jurisdiction to tax the mineral rights and the deed is void. Mitchell at 276. See also Lake Canal Reservoir at 889 (holding that a tax deed is void if the taxing authority lacked authority or jurisdiction to issue the deed); Kaye v. Cooper Grocery Co., 63 N.M. 36, 312 P.2d 798 (N.M. 1957) (holding that public policy requires that severed minerals are assessed separate from the fee). In the case before the Court, the deed is void and not subject to the statute of limitations.

3. The Recording of the Tax Deed Did Not Give Jordans' Constitutionally Required Notice.

Jensens, while conceding that the Jordans did not receive due process notice as required by the Mullane line of cases, still argue that since the tax deed was recorded the Jordans had constructive notice of the tax sale and that met the due process requirements. This argument has been rejected by the United States Supreme Court. Mennonite Board of Missions v Adams 462 U.S. 791 (1983) holding that constructive notice provided by the documents in the public record and publication must be supplemented by mailed notice or personal service. Id. 798. See Also Jones v Flowers 547 U.S. 220 (2006) holding that publication and a mailing that was returned was insufficient that notice must be "reasonably calculated to reach the intended recipient. Id. 226.

To adopt the Jensens' argument would require every land owner to periodically go to the county recorders office of each county where they owned an interest in land and conduct a title check to see if anything adverse had been filed. That is not the purpose or requirement of the recording statute. The purpose of the recording statute is to protect a buyer of real property by giving them the opportunity to check the status of title before they purchase real property and to be able to rely on what is recorded. Pioneer Builders Co. of Nev. v KDA Corp. 2012 UT 74, ¶77, 292 P.3d 672.

Jensens do not point out that Jordans' title was recorded

years before Jensens acquired their claim to title and therefore it is Jensens who were on notice of Jordans' title. Jensens, when they purchased the property from QRS, should have followed common practice of title companies and checked the status of the title at the recorder's office. They would have then determined that the mineral rights had been severed. The two cases relied on by Jensens, Kemmerer v Brigham Young Univ. 723 F.2d 54 (1983) and Shelley v Lore 836 P.2d 786 (Utah 1992), also involved parties that had purchased the property after the tax sale and therefore like the Jensens had notice of the sale.

IV. Utah Code Ann. 40-6-1 et seq. Governs Oil and Gas Production and Payment for that Production.

Jensens' complaint alleged that Jordans entered into Oil and Gas Leases with EnCana Oil & Gas and received bonus payments when signing the leases, and that Jordans permitted EnCana's successors (Third-Party Defendants) to drill an oil and gas well and then extract and sell oil and gas from the property. R. 23. Jensens further alleged that Jordans' leasing and the drilling of the oil and gas well, and the extracting of oil and gas, violated Utah Code Ann. §40-1-12 (wrongful removal of ores), and that Jensens were entitled to treble damages. R. 23.

The trial court (Judge Peterson) dismissed that claim, finding that Utah Code Ann. §40-6-1 et seq., as it related to

oil and gas production, specifically addressed payment and remedies for oil and gas production and therefore, §40-6-1 et seq. provided the Jensens their remedy, if any, not §40-1-12. The trial court held "that Chapter 1 has no applicability since the passage of Chapter 6 to oil and gas." R. 2009 Transcript of 10-29-2013 hearing page 18, and R.166, Addendum 2.

The statute, Utah Code Ann. §40-6-1 et seq., governing oil and gas drilling, was established in 1955 and then was amended in 1983. That legislation established the Board and Division of Oil, Gas and Mining. The legislature declared that it was in the public interest to foster, encourage and promote the development and production of oil and gas in the State of Utah. Utah Code Ann. §40-6-1. See also Bennion v. Utah State Board of Oil, Gas and Mining, 675 P.2d 1135, 1137 (Utah 1983) and Cowling v. Board of Oil Gas and Mining, 830 P.2d 220, 224-5 (Utah 1991). That statute provides for the establishment of drilling units, pooling of interests and payment of royalties and costs to non-consenting oil and gas owners. Utah Code Ann. §§40-6-6 and 40-6-6.5. Utah Code Ann. §40-6-9 (Addendum 3) supplies remedies for oil and gas owners who are not paid for production of oil and gas. See e.g. Bennion v. Graham Resources Inc., 849 P.2d 569 (Utah 1993). Those remedies include the right to receive monthly royalty payments, to hold

in an interest bearing escrow account disputed payments (as in this case), to have the board investigate and hold agency hearings, penalties and accountings. See Addendum 3. The trial court correctly decided that Jensens' remedies are governed by those provisions, not the statute regarding wrongful removal of ore.

The rules of statutory construction also show that Utah Code Ann. §40-6-9 regarding payment of oil and gas proceeds applies in this case rather than the ore statute. It is a general principle of statutory construction that if two statutes may apply to an issue that the more specific statute applies. R.P. v. K.S.W., 2014 UT App 38, fn.9, 320 P.3d 1084, Flowell Electric Association Inc. v. Rhodes Pump LLC, 2015 UT 87, ¶10, ___ P.3d ___. In this case, Utah Code Ann. §40-6-9 specifically applies to the question of what remedy Jensens have for unpaid royalties, if it is determined that they own an interest in the oil and gas rights which are the subject of this case.

Finally, the term ore does not include oil and gas. The plain meaning of the statute must be considered. Archuleta v. St. Marks Hosp., 2009 UT 36, ¶8, 238 P.3d 1044. The dictionary definition of ore is a compound of metal and some other substance. Sukut Construction Inc. v. Rimrock CA LLC, 199 Cal. App. 817, 825 (2011) (citing Webster's Dictionary). Further,

the context of the statute is instructive. Utah Code Ann. §40-1-12 is included in the Mining Claims statute. Black's Law Dictionary (1968) defines "mining claim" as "[a] parcel of land, containing precious metal in its soil or rock, and appropriated by an individual, according to established rules" Utah Code Ann. §40-1-1 specifically addresses "lode mining claim[s]", setting forth metes and bounds requirements "along the vein or lode," which requirements have no applicability to the recovery of oil and gas which is located in pools often many thousands of feet below the surface and may be located in various sections thus creating the need for drilling units and pooling. Utah Code Ann. §40-1-12 has no application to the drilling for and extraction of oil and gas which is governed by Chapter 6. Again, Chapter 6 provides the remedies available for Jensens in the event it were determined that they own the oil and gas rights.

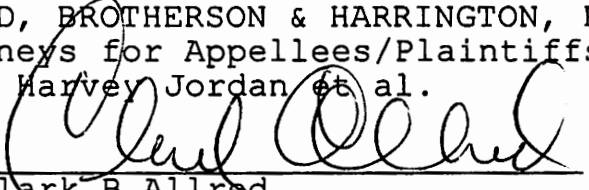
CONCLUSION

For the foregoing reasons, Appellees Jordans respectfully request that the Court affirm the trial court's decision as to all issues before the Court on appeal.

DATED this 26 day of January, 2016.

ALLRED, BROTHERRSON & HARRINGTON, P.C.
Attorneys for Appellees/Plaintiffs
James Harvey Jordan et al.

By:


Clark B Allred

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24 day of January, 2016, two copies each of the foregoing BRIEF OF APPELLEES JORDAN ET AL. were served via U.S. Mail, postage prepaid, on the following:

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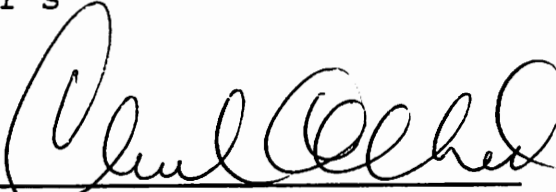
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 24(f)(1)(C) of the Utah Rules of Appellate Procedure, I hereby certify that this Brief contains 5,303 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). I relied on the word count function in WordPerfect X5 to perform this calculation. This Brief complies with the typeface requirements of Utah R. App.P. (27(b) because this Brief has been prepared in a proportionately spaced typeface using WordPerfect X5 in font size 13 and style Courier New.


Clark B Allred

ADDENDUM

- Addendum 1 - Ruling and Order dated February 18, 2015
- Addendum 2 - Order (October 29, 2013)
- Addendum 3 - Utah Code Ann. §40-6-9
- Addendum 4 - Utah Code Ann. §40-1-12

Tab 1

IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

James Harvey Jordan, Trustee of the James H. Jordan Revocable Trust dated June 1, 2007, Martha Jordan Boright, Mary Edna Jordan, Michael C. Kelley, and Jary Anne Kelley, Trustee of the Kelley Joint Trust dated January 7, 2013, Gary E. Kelley, Norma Stroud Dickey, Mara Beth Harner, Jan Rhodes as Trustee of the Revocable Rhodes Family Living Trust dated April 19, 2005, Wendy Sue Pack, Craig McSorley, Deborah J. Bowers, Laura Ward, Mark McSorely,

Plaintiffs/Counterclaim
Defendants,

vs.

Eddie R. Jensen and Ly-Thi Jensen,

Defendants/Counterclaim
Plaintiffs.

Eddie R. Jensen and Ly-Thi Jensen,

Third-Party Plaintiffs,

vs.

Axia Energy, LLC, Stonegate Resources,
LCC, Wasatch Oil & Gas, LLC,

Third-Party Defendants.

RULING AND ORDER

Case No. 130800084

Judge SAMUEL P. CHIARA

This matter is before the Court on the Plaintiffs/Counterclaim Defendants' Motion for

Summary Judgment; the Defendants/Counterclaim Plaintiffs/Third-Party Plaintiffs' Motion for Summary Judgment; and the Third-Party Defendants' Motion for Summary Judgment.

The Court heard oral argument on the Motions on September 24, 2014. The Court has thoroughly reviewed the arguments of counsel, the Motions, the supplemental pleadings, and the relevant case law and statutes. This Ruling and Order will resolve all three of the pending Motions for Summary Judgment.

Initially, the Court recognizes the passage of time in issuing this Ruling and Order. Unfortunately, the necessary recusal of Judge Peterson, followed much later by the recusal of Judge McClellan, as well as the difficulty of the issues, resulted in a longer delay than is typical. The Court thanks the parties and counsel for their patience. The Court would also like to recognize the exceptional quality of each party's arguments and written briefs. The level of professionalism all sides displayed was outstanding. The quality of the legal work is very high. The arguments are well reasoned and thorough, which made the decision difficult, but also left the Court confident the parties have accurately presented the full scope of the law dealing with these issues.

Undisputed Material Facts

1. The property that is the subject of this case consists of approximately 40 acres in Randlett, Utah, legally described as the Northeast quarter of the Northeast quarter of Section 32, Township 7 South, Range 20 East, Salt Lake Meridian.
2. On October 25, 1954, Olivia Jordan, Marie Robertson, and Caroline Kelley (the "Jordans") acquired the property.
3. The Jordans sold the property to Jonathan Anthony Andrews, reserving the oil, gas, and

mineral rights. The deed is dated February 3, 1995, and recorded March 15, 1995, at Book 592, Page 95, in the Uintah County Recorder's Office.

4. The real property tax notice for the 1995 taxes on the property was mailed by Uintah County to Olivia Jordan c/o Jonathan Anthony Andrews, P.O. Box 5451, Gainesville, FL. 32602.
5. The 1995 taxes were not timely paid.
6. The 1996 tax notice was sent to Jonathan Anthony Andrews, at P.O. Box 851981, Richardson, Texas. Those taxes in the amount of \$32.42 were paid on November 21, 1996.
7. The 1997 tax notice was sent to Jonathan Anthony Andrews at the Richardson, Texas address. The 1997 taxes in the amount of \$35.92 were paid on December 10, 1997.
8. On November 17, 1997, \$33.05 was paid on the 1995 taxes. After payment on penalties and interest, there was a balance owing of \$8.94.
9. The 1998 and 1999 tax notices were sent to Johnathan Anthony Andrews at the Richardson, Texas P.O. Box. The taxes for 1998 and 1999 were not paid.
10. For failing to pay the real property taxes assessed for the 1995, 1998, and 1999 tax years, resulting in a past due amount of \$167.19, Uintah County seized and sold the property on May 25, 2000.
11. The record of delinquent taxes prepared by the treasurer and recorded states that the date of the tax lien is January 16, 1996¹, and date of delinquency is January 16, 1996.

¹All parties agree this date is incorrect, and likely due to a typographical error. The taxes for the 1996 year were paid. The record should have indicated a tax lien date and delinquency date of January 1, 1995, as there remained a balance due on the 1995 taxes.

12. The assessment and levy for the 1995 tax year did not occur until on or after May 12, 1995.
13. No notice was ever given to the Jordans of the assessment of 1995, the failure to pay the taxes, or the tax sale.
14. On May 25, 2000, Uintah County executed a tax deed concerning the property. The grantee was Quality Remediation Services ("QRS"), who paid the County \$6,000.00.
15. On December 13, 2000, QRS executed a warranty deed concerning the property. The Jensens were the grantees, and paid \$5,500.00 to QRS.
16. In a January 2001 Real Property Transfer Survey Standard Land Questionnaire the Jensens indicated they paid fair market value for the property, and that the sale did not include the mineral rights.
17. Prior to March 2013, the Jensens never asserted a claim to own the mineral rights in the property.
18. Since 1995, the Jordans have periodically leased the oil, gas, and mineral rights.
19. In May 2011, Stonegate entered into oil and gas leases with the successors in interest to the Jordans. In August of 2011, Stonegate assigned the working interest in these leases to Axia, reserving for itself and Wasatch a royalty interest.
20. In November 2011, the Jensens entered into a Surface Use Agreement and Grant of Easements, allowing Axia to conduct exploration and drilling operations on the property.
21. Over time, Axia has paid the Jensens \$21,182 under the Surface Use Agreement.
22. Axia paid all the taxes associated with the mineral rights in 2012 and 2013, totaling \$84,878.32.

Analysis

Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Ehlers & Ehlers Architects v. Carbon County*, 805 P.2d 789, 791 (Utah App. 1991); Utah R. Civ. P. 56(c). The facts and evidence are viewed in a light most favorable to the nonmoving party. *America Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 957 (Utah App. 1989).

The Motions concern competing claims to title of the oil, gas, and mineral estate. There is no dispute of material fact. Therefore, the issue can be determined as a matter of law.

I. Whether Uintah County's 1995 general assessment included taxing the mineral interest?

The first issue is whether the Jordans' oil, gas, and mineral rights were severed from the surface estate and not assessed or levied on by Uintah County in 1995.

The Jordans² argue that the mineral estate was reserved at the time of conveyance of the surface rights to Mr. Andrews on February 3, 1995. The Uintah County Assessor assessed the property on May 22, 1995. Consequently, the Jordans argue that the County Assessor did not assess the mineral rights because the mineral estate had been severed by that time. Because the County Assessor did not assess the mineral rights, the Jordans argue there was no levy.

The Jensens argue that pursuant to Utah Code Ann. § 59-2-103 the 1995 tax assessment occurred on January 1, 1995, before the February 3, 1995, severance. The Jensens argue that the

² The Jordans and Axia argue for the same result, and largely offer the same arguments and cite to the same case law in their separate Motions and separate replies. For clarity and brevity, the Court will refer to the Jordans when discussing both the Jordans' and Axia's arguments and positions.

lien for the 1995 unpaid taxes attached as of January 1, 1995. As a consequence, the Jensens argue that the mineral rights were levied and properly passed by tax deed at the 2000 tax sale.

"Tax sale proceedings are predicated and founded upon failure to pay a tax assessed against the property, and, therefore, no validity can attach to any sale except of the property assessed and delinquent for failure to pay the tax levied on the assessment as made." *Tintic Undine Mining Co. v. Ercanbrack*, 74 P.2d 1184, 1189 (Utah 1938). "If property rights which are not included in an assessment are sold or extinguishable by a tax sale, there would be a taking of property without due process of law." *Hayes v. Gibbs*, 169 P.2d 781, 786 (Utah 1946). If Uintah County did not assess the mineral estate, the mineral estate was not subject to the tax lien and could not pass at a tax sale. Therefore, the date of assessment, and whether Uintah County had the power to assess the mineral estate, are critical.

Utah Code Ann. § 59-2-103(a) states: "All tangible taxable property . . . shall be assessed and taxed at a uniform rate on the basis of its fair market value, as valued on January 1, unless otherwise provided by law." Also, "[a] tax upon real property is a lien against the property assessed . . . [and] shall attach on January 1 of each year." Utah Code Ann. § 59-2-1325.

Notwithstanding, the issue of when the date of assessment and levy occurs has been authoritatively decided in Utah. In *Huntington City v. Peterson*, 518 P.2d 1246 (Utah 1974), Huntington City bought a parcel of land on April 7, 1959. The Emery County assessor assessed the parcel of land, and the levy for tax was made in August 1959. No notice of the tax assessment was given to Huntington City. The party assessed the 1959 taxes did not pay the taxes and the property was sold at a tax sale. The Utah Supreme Court quieted title to Huntington City, holding that the assessment occurred after Huntington City acquired the

property and that no tax lien attached as a consequence.

In *Gillmor v. Dale*, 75 P.932 (Utah 1904), the Utah Supreme Court held that a property tax “does not become a lien on real estate until the rate thereof is fixed, and the tax levied . . .” because “[t]he city council was not authorized . . . to levy a tax, except on property within its corporate limits, and any levy upon property not within such limits is without authority and void.” *Id.* at 934.

More recently, the Utah Supreme Court in the case of *West Valley City Corp. v. Salt Lake City*, 852 P.2d 1000, 1003 (Utah 1993), found:

The date of assessment and levy, not the statutory lien date of January 1st, is the relevant date for determining whether property is within the reach of a taxing entity’s power for the purpose of assessing, levying and collecting taxes on the property.

See also *H.C. Massey v. Griffiths*, 153 P.3d 312, ¶10 (Utah 2007)(“Assessment is the basis of the tax title and only that interest which was properly assessed can be sold.”)

The Jensens contend that Utah Code Ann. §§ 59-2-1325 and 59-2-103 dictate the lien date as January 1, of the year the property was assessed. The Jensens also attempt to distinguish the above line of cases by arguing that those cases merely apply to property transferred to a tax exempt entity. The Jensens argue the reason for treating a tax exempt entity differently is a tax exempt entity would have no reason to believe that they would be taxed. Therefore, selling a tax exempt entity’s property for failure to pay taxes would be improper.

The Jensens’ argument that a tax lien attaches on January 1, regardless of the date of assessment and levy, is not without support. The dissenting opinion in *Huntington*, 518 P.2d at 1249-50 (Henriod, J., dissenting), also insisted that a tax lien attaches on January 1 pursuant to statute. While the dissenting opinion is well reasoned, the majority rejected it. This Court is

required to follow binding precedent, which is the majority opinion.

Further, if the above line of cases only apply to tax exempt entities, that qualification was not stated explicitly in the holdings, and the reasoning to treat tax exempt entities differently in these scenarios was not explained. If the reason is, as the Jensens suggest, that tax exempt entities would have no reason to suspect tax liability, the same reasoning would apply to the facts here. The Jordans also had no reason to suspect a tax liability to the County because: (1) their mineral interest was severed prior to taxation; (2) the mineral interest was non-productive; (3) counties are not empowered to tax a severed mineral interest under the Constitution and the Act; (4) Uintah County did not believe that they assessed these mineral interests in 1995; (5) the Jordans had never had their mineral estate assessed separately prior to 1995; and (6) the Uintah County Record of Delinquent Taxes showed the wrong lien date for the property. Based on these factors, the Jordans would have had no reason to believe that their mineral interest was taxed by Uintah County for the 1995 year.

Because the property was not assessed by the Uintah County assessor until after the February 3, 1995, severance date, the mineral estate was not assessed by the County. Uintah County only assessed the surface rights. The tax lien did not attach to the mineral rights. Consequently, authority and jurisdiction to sell the mineral rights were not acquired by the County, and the mineral interests were not sold at the May 2000 tax sale.

II. Whether Uintah County had the authority to assess the severed mineral interest?

The Jordans argue Uintah County does not have the authority to separately assess, levy, and seize mineral rights. The Jordans point to Utah Code Ann. §§ 59-2-201 and 59-5-102, et

seq., which directs that counties tax the surface interest, and the Utah State Tax Commission taxes the mineral interest. The Jordans also cite to case law which hold the same. *See Telonis v. Staley*, 144 P.2d 513, 515 (Utah 1943)("Where there is separate ownership of the respective rights [referring to severed surface and mineral rights], separate levy and separate sale would necessarily follow. . . ."); *Kanawha & Hocking Coal & Coke Co. v. Carbon County*, 535 P.2d 1139, 1140 (Utah 1975)(holding Utah State Tax Commission taxes mineral rights and counties tax surface rights).

The Jensens argue Uintah County was required to tax the mineral interests as part of the general assessment. The Jensens argue that "all tangible property in the State that is not exempt . . . shall be" assessed and taxed. Utah Constitution, Article XIII, Section 2. Pursuant to Utah Code Ann. § 59-2-301, counties are required to assess all property not assessed by the Utah State Tax Commission. The Jensens argue the Commission is obligated to assess only valuable mineral deposits. The Jensens argue that the mineral estate was not valuable until 2012 when the mine started producing. Therefore, the Jensens argue Uintah County was required to assess the mineral estate in 1995 when it was not valuable, or at least, had not had a value applied to it.

Admittedly, this is a difficult issue. On one hand, if it is true that the Commission is only required to tax producing or valuable mineral interests, and counties are only authorized to tax surface rights, then there is seemingly a gap left that allows unproductive mineral interests to go untaxed. Although those unproductive mineral interests are not producing, in many instances they perhaps have some undetermined value. On the other hand, if counties are required to tax non-producing mineral interests, the practical problem of determining the value of an unproductive mineral interest arises. Additionally, Uintah County does not attempt to determine

a value or apply a tax rate to severed mineral interests. Neither does Uintah County send separate tax bills, notices, or notices of sales to owners of severed mineral interests. Following Jensen's reasoning, severed unproductive mineral interests have unknowingly passed at numerous tax sales. Because Uintah County does not notify owners of severed mineral interests of assessments or tax sales, it is likely that many owners of severed mineral interests find themselves in an identical position to the Jordans. Finally, where surface and mineral interests have been severed, such as is likely the case with hundreds or even thousands of parcels in Uintah County, the county's general assessment results in only one tax bill even though there are at least two owners. That tax bill is uniformly assessed to and paid by the surface owner. Would mineral interest owners be liable to pay some portion of the tax where the mineral interest is nonproductive and not otherwise taxed? How would the property owners divide the bill? What would happen if one party paid the full amount of the bill?

The Court determines that undeveloped or undiscovered minerals underlying a piece of property are akin to an intangible asset. As an intangible asset, the undiscovered minerals fall outside the scope of Article XIII, Section 2, of the Utah Constitution, and are not subject to taxation. It follows that counties are not responsible for determining the value of undeveloped or undiscovered minerals and are not authorized or required to tax valueless property. The Jensens provide no support for their argument that counties are responsible for taxing valueless property, and the Court is not aware of any. Valueless property cannot be taxed. Applying a tax rate to property that has either no market value or an undetermined market value is pointless because the resulting tax obligation would be zero. Valuable mineral interests whose fair market value can be determined are required by statute and the Utah Constitution to be assessed by the Utah State

Tax Commission. Therefore, Uintah County did not have the authority to assess the severed mineral estate in 1995, as the mineral estate at that time was not producing, the minerals were undiscovered, and the value of the mineral estate was unknown.

III. Whether the statute of limitations bars any challenge to the May 2000 tax deed, despite no notice given to the Jordans?

If the mineral estate was properly assessed by Uintah County, and a tax lien attached, the next question is whether the Jordans' constitutional challenge based on lack of notice is barred by the statute of limitations for tax deeds.

The Jensens argue that any challenge to their purchase of the mineral estate at the May 2000 tax sale is barred by the four-year statute of limitations. Utah Code Ann. § 78B-2-206 bars any challenges to tax title after four years from the date of the sale. Section 206 states:

an action or defense to recover, take possession of, quiet title to, or determine the ownership of real property may not be commenced against the holder of a tax title after the expiration of four years from the date of the sale, conveyance, or transfer of the tax title to any county, or directly to any other purchaser at any public or private sale. This section may not bar any action or defense by the owner of the legal title to the property which he or his predecessor actually occupied or possessed within four years from the commencement of an action or defense. . . .

The Jensens have held the May 2000 tax title beyond the four-year period set forth in Section 206. There is no argument that the Jordans did not actually possess the mineral estate at any time during the four-year time period between May 2000, and May 2004.³

³The Court notes here the inequality the statute would create for owners of legal title to unproductive mineral estates, as they would never be able to show actual possession of an unproductive mineral estate. While it's not necessary to the outcome here, the Court finds that the Jordans exercised as much actual possession or control of the mineral estate as possible, by periodically leasing the minerals over the many years following the tax sale.

The parties have offered extensive case law on this issue from a variety of jurisdictions. The Court has reviewed the cases cited in the Motions and supplemental pleadings and found them useful for gaining a general understanding of the law on this issue. Reliance on only two of the cases is necessary and sufficient for this decision. In *Jones v. Flowers*, 547 U.S. 220 (2006), the U.S. Supreme Court found that selling a person's property at a tax sale without notice was a violation of the person's Fourteenth Amendment due process rights. The Court determined that notice of the tax sale must be reasonably calculated to reach the intended person to be deemed constitutionally sufficient. *Id.* at 226; *see also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Utah Supreme Court has addressed the issue of application of the tax title statute of limitations where the tax sale included a procedural error. *Frederiksen v. LaFleur*, 632 P.2d 827 (Utah 1981). In *Frederiksen*, the Court upheld the application of the statute of limitations barring a challenge based on a procedural defect in the tax sale (the county auditor's appointment was not made in writing, and had failed to take an oath of office, as required by statute). The Court reasoned that the purpose of the statute of limitations was to provide certainness and finality to tax sales, even if the sale was invalid because of procedural defects in the execution. Importantly for our purposes, however, is footnote 14 of the *Frederiksen* opinion, in which Justice Oaks stated in dicta, "We expressly reserve opinion on whether the special statute of limitations could protect a tax title acquired by means repugnant to fundamental fairness or whether such an application of the statute would exceed the limits of statutory intent or constitutional permissibility." *Id.* at 831, fn. 14.

Here, the Jordans were not given notice of the 1995 assessment or any assessment thereafter. The Jordans were not listed on the assessment roll. Mr. Andrews was the only one

given notice of the taxes levied after the severance. The general assessments made on the Jordans' property prior to the 1995 severance never explicitly included an assessment for the mineral estate. Neither the Jordans, nor their predecessors, were ever given notice of the May 2000 tax sale. Uintah County had the addresses for the Jordans and their attorney. The County had previously sent tax notices for years prior to 1995 to Olivia Jordan.

The Court finds that this is one particular instance that Justice Oaks alluded to where the special statute of limitations does not apply. One of the most critical and fundamental due process rights is the right to notice, particularly when notice pertains to a government seizure of property. A statute of limitations that eliminates a person's right to challenge a tax sale, even when notice was not given, runs afoul of Constitutional protections. The facts here are not similar to those in *Frediksen*, where the error in the tax sale involved a minor procedural issue. The error here was substantive and significant. Consequently the tax deed was not merely voidable and subject to the statute of limitations, as the Jensens suggest. The tax deed is void because the lack of notice to the Jordans is a jurisdictional defect of the sale. Without jurisdiction, the statute of limitations did not start, let alone expire. Selling the Jordans' mineral interest at a tax sale without notice was an unconstitutional taking and a violation of due process. The Court finds that selling property at a county tax sale without any notice to the legal owner of the property is repugnant to fundamental fairness.

Further, record notice does not absolved the County of the problem. First, record notice does not satisfy the requirements outlined in *Jones v. Flowers*. Second, the record notice showed that the tax lien date was January 16, 1996, which all parties agree was a clerical error, but nonetheless would not have given the Jordans accurate notice that their mineral interest may be

in jeopardy of being sold. The County also admits that the Uintah County Assessor did not assess the mineral rights in this case and did not believe he was required to do so. Therefore, even if the Jordans had reviewed the record and inquired of the County concerning a potential sale of their interest, the County would have affirmed that their property was not subject to the tax sale. Finally, an actual inspection of the land during the time of the tax sale or four years after would not have given the Jordans any indication that their mineral interest had been sold at a tax sale. There was no development on the overlying surface property, nor was there any physical evidence of production of the mineral interest.

Because there was no actual notice of the tax sale, record notice was insufficient and inaccurate, and because there was no physical evidence to suggest to the Jordans that the property might have been sold, the Court finds that the sale was repugnant to fundamental fairness. The sale, if intended to convey the severed mineral interests, was without due process of law, and resulted in an unconstitutional taking. Consequently, pursuant to *Frederiksen* footnote 14, the statute of limitations does not apply to bar the Jordans' challenge to the tax sale.

IV. Whether the heirs of Marie Robertson and Caroline Kelley have standing to assert the due process claims?

Finally, the Jensens argue that the heirs of Marie Robertson and Caroline Kelley lack standing to assert the due process rights. Marie Robertson and Caroline Kelley passed away in 2003 and 2002, respectively. Ms. Robertson's and Ms. Kelley's heirs are some of the Plaintiffs claiming and interest in the property.

"[I]n Utah, as in the federal system, standing is a jurisdictional requirement." *Brown v.*

Div. of Water Rights of Dep't of Natural Res., 2010 UT 14, ¶ 12, 228 P.3d 747. "As a general rule, courts do not permit a party to assert the constitutional rights of a third party." *Shelley v. Lore*, 836 P.2d 786, 789 (Utah 1992). "[A] litigant must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.*

However, "it has long been recognized that the surviving claims of a decedent must be pursued by a third party." *Hodel v. Irving*, 481 U.S. 704, 711 (1987). "[P]ermitting appellees to raise their decedent's claims is merely an extension of the common law's provision for appointment of a decedent's representative. It is therefore a 'settled practice of the courts' not open to objection on the ground that it permits a litigant to raise third parties' rights." *Id.* at 712.

There are "two factors to be considered in determining when the third-party rule should be suspended: the relationship of the litigant to the person whose right he seeks to assert, and the ability of the third party to assert his own right." *Irving v. Clark*, 758 F.2d 1260, ¶18 (8th Cir. 1985). In *Lewis v. Grinker*, 111 F. Supp 2d 142, 168 (E.D.N.Y. 2000), the court explained:

[m]oreover, as other courts have observed, the relationship between a parent and child is much closer than those involved in other cases in which third-party standing has been found to exist . . . [t]he relationship between parent and child has been deemed to be "more than sufficient to address the concerns that underlie the prudential doctrine" of third-party standing. *Elias v. United States Dep't of State*, 721 F. Supp. 243, 246-47 (N.D.Cal. 1989). Other courts have permitted a child to assert his or her parent's equal protection rights in challenging the validity of statutes that conferred United States citizenship on the foreign-born offspring of United States citizen fathers, but not United States citizen mothers, see *Wauchope v. United States Dep't of State*, 985 F.2d 1407, 1411 (9th Cir. 1993); *Elisa*, 721 F. Supp. at 246-47, or which chilled the parent's right to adopt a child, see *Lindley ex rel. Lindley v. Sullivan*, 889 F.2d 124, 129 (7th Cir. 1989) . . . Further, the effectiveness of a parent's representation of his or her child is reflected in the well-established tradition that permits parents to sue as the representatives of their minor children and to "maintain litigation that rests directly on the standing of the children themselves." 13 Wright *et al.*, Federal Practice and Procedure: Jurisdiction 2d § 3531.9 (2d ed. 1984); see also, e.g., *Sherman v. Community Consol. Sch. Dist. 21*, 980 F.2d 437, 441 (7th Cir.

1992).

Here, Marie Robertson and Caroline Kelley are deceased and cannot pursue their constitutional claims. As set forth above, they did not receive notice, and were not aware of their potential constitutional claims before they died. Because they did not receive notice, they were not able to pursue their constitutional claims before their deaths. The Plaintiffs, as heirs of Marie Robertson and Caroline Kelley, also did not receive notice of the assessment, taxes, or sale.

As in *Wauchope v. U.S. Dept. Of State*, 756 F. Supp. 127 (N.D. Cal. 1991), it is “undisputed Plaintiffs’ interests are harmonious with and at least as strong as the interest that (their) mother would have asserted.” The Plaintiffs, as children of Marie Robertson and Caroline Kelley, have a sufficiently close relationship to satisfy the relationship factor in the third-party standing test. The Court finds that the Plaintiffs have third-party standing to assert the constitutional claims.

V. Whether Portions of Rolene Rasmussen’s Affidavit should be Stricken?

In a separate motion, but in conjunction with its Motion for Partial Summary Judgment, Jensens moved the court to strike certain portions of Rolene Rasmussen’s testimony contained in an affidavit. Jensens argue that the offending portions of the affidavit are legal conclusions not based upon personal knowledge, rather than statements of fact. The particular paragraphs complained of read as follows:

6. The Uintah County Assessor’s office does not assess mineral rights. Mineral rights are handled by the Utah State Tax Commission.

7. The mineral rights on the Property would not have been included in and would not

have been part of the Uintah County assessment of the Property in 1995 or any years thereafter.

9. Mineral rights are not included in any appraisal of real property by the Uintah County Appraiser's office since the mineral rights are not assessed by the county.

The Court finds that the statements can be read either as statements of fact or as legal conclusions. The statement that the Uintah County Assessor's office does not assess mineral rights can be taken as a statement of fact if Rasmussen has knowledge that the office makes no attempt to value or assess mineral rights. Further, if Rasmussen knows that the office doesn't separately assess mineral rights that have been severed from surface rights, such is a statement of fact. Finally, if Rasmussen knows that appraisers in Uintah County don't attempt to value minerals when performing appraisals for assessment purposes, such is a statement of fact. The Court accepts Rasmussen's statement to establish these facts.


To the extent that Rasmussen's statement attempts to reach the ultimate legal conclusions in this case, the Court disregards Rasmussen's statement for that purpose.

Order

The Jordans' and Axia's Motions for Summary Judgment are granted. The Jensen's Motion for Summary Judgment is denied. The Court quiets title to the mineral interest in the Jordans. Pursuant to *Code v. Utah Dept. of Health*, 162 P.3d 1097 (Utah 2007), and Utah R. Civ. P. 7(f)(2), the parties are notified that this is the final ruling and order in this case. The parties need not prepare or submit any other order.

Dated this 18 day of Feb, 2015.

BY THE COURT:



SAMUEL P. CHIARA, District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 130800084 by the method and on the date specified.

MANUAL EMAIL: CLARK B ALLRED vernal@abhlawfirm.com
MANUAL EMAIL: MARK L BURGHARDT MLBurghardt@hollandhart.com
MANUAL EMAIL: CHRISTOPHER R HOGLE CRHogle@hollandhart.com
MANUAL EMAIL: DANIEL A JENSEN djensen@parrbrown.com
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MANUAL EMAIL: RICK L KNUTH rknuth@joneswaldo.com
MANUAL EMAIL: BRADY L RASMUSSEN brasmussen@joneswaldo.com
MANUAL EMAIL: RONALD G RUSSELL rrussell@parrbrown.com
MANUAL EMAIL: TERRY E WELCH twelch@parrbrown.com

02/18/2015

/s/ JUSTIN MAGSARILI

Date: _____

Deputy Court Clerk

Tab 2

The Order of Court is stated below:

Dated: November 13, 2013 /s/ Edwin T. Peterson
11:42:23 AM District Court Judge



CLARK B ALLRED - 0055
ERIN BRADLEY - 13152
ALLRED, BROTHERRSON & HARRINGTON, P.C.
Attorneys for Plaintiffs
148 South Vernal Ave., Suite 101
Vernal, Utah 84078
Telephone: (435)789-7800

IN THE EIGHTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY

STATE OF UTAH

James Harvey Jordan, Trustee
of the James H. Jordan
Revocable Trust dated June 1,
2007,
Martha Jordan Boright,
Mary Edna Jordan,
Michael C. Kelley and
Jary Anne Kelley, Trustees
of the Kelley Joint Trust
dated January 7, 2013,
Garey E. Kelley,
Norma Stroud Dickey,
Mara Beth Harner,
Jan Rhodes as Trustee of the
Revocable Rhodes Family
Living Trust dated April 19,
2005,
Wendy Sue Pack,
Craig McSorley,
Deborah J. Bowers,
Laura Ward,
Mark McSorley,

Plaintiffs,

vs.

Eddie R. Jensen and Ly-Thi
Jensen,

Defendants.

ORDER

(October 29, 2013 hearing)

Civil No.: 130800084

Judge: Edwin T. Peterson

The above captioned matter came before the Court on October 29, 2013 for argument on the Plaintiffs' Motion to Dismiss the first Count Fifth (Utah Code Ann. §40-1-12) in the Defendants Counter Claim and the Defendants' Motion for Leave to Amend

Counterclaim and Request for Revised Notice of Event Due Dates (the "Motion to Amend").

Plaintiffs were represented by their attorney, Clark Allred. Defendants were present and represented by their attorney Matthew E. Jensen. Having read the relevant memoranda and after hearing oral argument from counsel the court stated on the record its reasoning and based thereon:

Orders as follows:

1. The Plaintiffs' Motion to Dismiss the first Count Fifth of the Counterclaim based on Utah Code Ann. §40-1-12 is granted and that cause of action is dismissed.

2. Based on stipulation of counsel on the record, the Motion to Amend is withdrawn.

3. For purposes of scheduling and discovery only, this matter will proceed as if a Tier 2 case under Rule 26 of the Utah Rules of Civil Procedure. For all other purposes, including allowable damages, this case will be considered a Tier 3 case under Rules 8 and 26 of the Utah Rules of Civil Procedure.

4. If either party needs more discovery than is allowed under tier II they can request the court for leave to conduct additional discovery.

DATED this ____ day of November, 2013.

BY THE COURT

Edwin T. Peterson
District Court Judge

Approved as to form:

/s/ Matthew E. Jensen

Signed by Clark Allred
with permission of
Matthew E. Jensen,
Attorney for Defendants

Tab 3

alties, and production finding, either in the supplemental order, or so approved. If the interest in that unit operations within a on which the order the order shall be board unless for good e. ions may be amended e same manner and ginal order providing

only the rights and of the amendment by alty, production pay- are free of costs shall

shall change the per- as established for al order, or change established for any order.

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cated to any tract, the property and rights of royalty are allocated or operations.

lating to the sale owned tract shall it operations but allocated to such a the provisions

affected agree and roviding for unit transfer of all or und gas rights in whether real or ct of unit opera- account of the

owners within the unit area and shall be the property of the owners in the proportion that the expenses of unit operations are charged, unless otherwise provided in the plan of unit operation.

(12) This section shall apply only to field or pool units and shall not apply to the unitization of interests within a drilling unit as may be authorized and governed under the provisions of Section 40-6-6. 2012

40-6-9. Proceeds from sale of production — Payment of proceeds — Requirements — Proceeding on petition to determine cause of nonpayment — Remedies — Penalties.

(1)(a) The oil and gas proceeds derived from the sale of production from any well producing oil or gas in the state shall be paid to any person legally entitled to the payment of the proceeds not later than 180 days after the first day of the month following the date of the first sale and thereafter not later than 30 days after the end of the calendar month within which payment is received by the payor for production, unless other periods or arrangements are provided for in a valid contract with the person entitled to the proceeds.

(b) The payment shall be made directly to the person entitled to the payment by the payor.

(c) The payment is considered to have been made upon deposit in the United States mail.

(2) Payments shall be remitted to any person entitled to oil and gas proceeds annually for the aggregate of up to 12 months accumulation of proceeds, if the total amount owed is \$100 or less.

(3)(a) Any delay in determining whether a person is legally entitled to an interest in the oil and gas proceeds does not affect payments to other persons entitled to payment.

(b) (i) If accrued payments cannot be made within the time limits specified in Subsection (1) or (2), the payor shall deposit all oil and gas proceeds credited to the eventual oil and gas proceeds owner to an escrow account in a federally insured bank or savings and loan institution using a standard escrow document form.

(ii) The deposit shall earn interest at the highest rate being offered by that institution for the amount and term of similar demand deposits.

(iii) The escrow agent may commingle money received into escrow from any one lessee or operator, purchaser, or other person legally responsible for payment.

(iv) Payment of principal and accrued interest from the escrow account shall be made by the escrow agent to the person legally entitled to them within 30 days from the date of receipt by the escrow agent of final legal determination of entitlement to the payment.

(v) Applicable escrow fees shall be deducted from the payments.

(4) Any person entitled to oil and gas proceeds may file a petition with the board to conduct a hearing to determine why the proceeds have not been paid.

(5) Upon receipt of the petition, the board shall set the matter for investigation and negotiation by the division within 60 days.

(6)(a) If the matter cannot be resolved by negotiation as of that date, the board may set a hearing within 30 days.

(b) If the board does not set a hearing, any information gathered during the investigation and negotiation shall be given to the petitioner who may then seek a remedy in a court of competent jurisdiction.

(7)(a) If, after a hearing, the board finds the proceeds have not been deposited in an interest bearing escrow account in accordance with Subsection (3), the board may order that:

(i) a complete accounting be made; and

(ii) the proceeds be subject to an interest rate of 1-1/2% per month, as a substitute for an escrow account interest rate, accruing from the date the payment should have been suspended in accordance with Subsection (3).

(b) If, after a hearing, the board finds the delay of payment is without reasonable justification, the board may:

(i) if the proceeds have been deposited in an interest bearing escrow account in accordance with Subsection (3):

(A) order a complete accounting;

(B) require the proceeds and accruing interest to remain in the escrow account; and

(C) assess a penalty of up to 25% of the total proceeds and interest in the escrow account; or

(ii) if the proceeds have not been deposited in an interest bearing escrow account in accordance with Subsection (3), assess a penalty of up to 25% of the total proceeds and interest as determined under Subsection (7)(a).

(c) (i) Upon finding that the delay of payment is without reasonable justification, the board shall set a date not later than 90 days from the hearing for final distribution of the total sum.

(ii) If payment is not made by the required date, the total proceeds, interest, and any penalty as provided in Subsection (7)(b) shall be subject to interest at a rate of 1-1/2% per month until paid.

(d) If, after a hearing, the board finds the delay of payment is with reasonable justification and the proceeds have been deposited in an interest bearing escrow account in accordance with Subsection (3), the payor may not be required to make an accounting or payment of appropriately suspended proceeds until the condition which justified suspension has been satisfied.

(8) The circumstances under which the board may find the suspension of payment of proceeds is made with reasonable justification, such that the penalty provisions of Subsections (7)(b) and (7)(c)(ii) do not apply, include, but are not limited to, the following:

(a) the payor:

(i) fails to make the payment in good faith reliance upon a title opinion by a licensed Utah attorney objecting to the lack of good and marketable title of record of the person claiming entitlement to payment; and

(ii) furnishes a copy of the relevant portions of the opinion to the person for necessary curative action;

(b) the payor receives information which:

(i) in the payor's good faith judgment, brings into question the entitlement of the person claiming the right to the payment to receive that payment;

(ii) has rendered the title unmarketable; or

(iii) may expose the payor to the risk of liability to third parties if the payment is made;

(c) the total amount of oil and gas proceeds in possession of the payor owed to the person making claim to payment is less than \$100 at the end of any month; or

(d) the person entitled to payment has failed or refused to execute a division or transfer order acknowledging the proper interest to which the person claims to be entitled and setting forth the mailing address to which payment may be directed, provided the division or transfer order does not alter or amend the terms of the lease.

(9) If the circumstances described in Subsection (8)(a) or (b) arise, the payor may:

(a) suspend and escrow the payments in accordance with Subsection (3); or

(b) at the request and expense of the person claiming entitlement to the payment, make the payment into court on an interpleader action to resolve the claim and avoid liability under this chapter.

Tab 4

103-66 or other federal law, a statement that the fee was paid in a timely manner.

(3) The affidavit, or a certified copy, shall be prima facie evidence of the facts stated in the affidavit.

(4) The amendments made in this section do not affect any act or right accruing or which has accrued or been established or any suit or proceeding commenced before May 1, 1995. 1999

40-1-7. District recorders — Office abolished.

From and after the termination of the office of any mining district recorder now holding office in this state such district shall be abolished and such office shall become vacant. 1933

40-1-8. Vacancy and removal — County recorder to receive records.

(1) If there is a vacancy in the office of recorder of any mining district, or if there is no person in the mining district authorized to retain the custody and give certified copies of the records, the person having custody of the records shall deposit them in the office of the county recorder of the county in which the mining district, or the greater part of the mining district, is situated.

(2) That county recorder shall take possession of the records and may make and certify copies from the records, including any other copies of records and papers in the recorder's office pertaining to mining claims.

(3) Those certified copies shall be receivable in evidence in all courts and before all officers and tribunals.

(4) The production of a certified copy shall be, without further proof, evidence that the records were properly in the custody of the county recorder. 1999

40-1-9. County recorder may certify district records.

(1) When the books, records, and documents pertaining to the office of mining district recorder have been deposited in the office of a county recorder, the recorder may make and certify copies from those records.

(2) Those certified copies shall be receivable in all tribunals and before all officers of this state in the same manner and to the same effect as if the records had been originally filed or made in the office of the county recorder. 1999

40-1-10. Certified copies of records evidence.

Copies of notices of location of mining claims, mill sites and tunnel sites heretofore recorded in the records of the several mining districts, and copies of the mining rules and regulations in force therein and recorded, when duly certified by the district or county recorder, shall be receivable in all tribunals and before all officers of this state as prima facie evidence. 1933

40-1-11. Interfering with notices, stakes, or monuments — Penalty.

Any person who intentionally or knowingly tears down or defaces a notice posted on a mining claim, or takes up or destroys any stake or monument marking the claim, or interferes with any person lawfully in possession of the claim, or who alters, erases, defaces, or destroys any record kept by a mining district or county recorder, is guilty of a class B misdemeanor, and shall be punished by a fine of not less than \$25 nor more than \$100, or by imprisonment for not less than 10 days nor more than six months, or by both the fine and imprisonment. 2007

40-1-12. Damages for wrongful removal of ores.

When damages are claimed for the extraction or selling of ore from any mine or mining claim and the defendant, or those under whom he claims, holds, under color of title adverse to the claims of the plaintiff, in good faith, then the reasonable value of all labor bestowed or expenses incurred in necessary developing, mining, transporting, concentrating, selling or

preparing said ore, or its mineral content, for market, must be allowed as an offset against such damages; provided, however, that any person who, wrongfully entering upon any mine or mining claim and carrying away ores therefrom, or wrongfully extracting and selling ores from any mine, having knowledge of the existence of adverse claimants in any mine or mining claim, and without notice to them, knowingly and willfully trespasses in or upon such mine or mining claim and extracts or sells ore therefrom shall be liable to the owners of such ore for three times the value thereof without any deductions either for labor bestowed or expenses incurred in removing, transporting, selling or preparing said ore, or its mineral content for market. 1943

40-1-13. Repealed.

CHAPTER 2

COAL MINE SAFETY ACT

Section

40-2-1 to 40-2-17. Repealed/Renumbered.

Part 1

General Provisions

| | |
|-----------|--------------------------------------|
| 40-2-101. | Title. |
| 40-2-102. | Definitions. |
| 40-2-103. | Scope and administration of chapter. |
| 40-2-104. | Rulemaking authority. |

Part 2

Utah Office of Coal Mine Safety

| | |
|-----------|--|
| 40-2-201. | Utah Office of Coal Mine Safety created. |
| 40-2-202. | Appointment of director. |
| 40-2-203. | Mine Safety Technical Advisory Council created — Duties. |
| 40-2-204. | Coal Miner Certification Panel created — Duties. |
| 40-2-205. | Utah Research Institute for Mine Safety and Productivity — Designation — Duties. |

Part 3

Safety Conditions

| | |
|-----------|---|
| 40-2-301. | Commission and office responsibilities. |
| 40-2-302. | Reporting of an unsafe condition in coal mines — Adverse action prohibited. |
| 40-2-303. | Annual report on coal mine safety. |

Part 4

Certification of Coal Miners

| | |
|-----------|-----------------------------|
| 40-2-401. | Necessity of certificate. |
| 40-2-402. | Certification requirements. |

40-2-1 to 40-2-17. Repealed/Renumbered.

PART 1

GENERAL PROVISIONS

40-2-101. Title.

This chapter is known as the "Coal Mine Safety Act." 2008

40-2-102. Definitions.

As used in this chapter:

