

1960

Southern Pacific Company v. Mrs. Helen Sheehan Arthur et al : Brief of Defendants Respondents and Cross-Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

SOUTHERN PACIFIC COMPANY,
a corporation, *Plaintiff and Appellant,*

—vs.—

MRS. HELEN SHEEHAN ARTHUR,
and MRS. GLENERA SHEEHAN
HUNTER,

Defendants and Respondents,

—vs.—

NICK CHOURNOS and WIFE,

Defendants and Respondents,

—vs.—

MILTON A. OMAN et al,

*Defendants, Respondents, and
Cross-Appellants.*

Case No.
9123

BRIEF OF DEFENDANTS, RESPONDENTS,
AND CROSS-APPELLANTS

OMAN & SAPERSTEIN
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and Cross-Appellants*

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Case No.
9123

BRIEF OF DEFENDANTS, RESPONDENTS, AND CROSS-APPELLANTS

PRELIMINARY STATEMENT

The appellant is a private interestate railroad corporation, operating a rail line westward from Ogden, Utah, across or through a portion of the waters of Great

Salt Lake in Box Elder Conty, Utah (Tr. 328, Ex. 1). In the exercise of its statutory power of eminent domain (Utah Code Annotated for 1953, Secs. 78-34-1 to 17) appellant condemned and took several million cubic yards (Tr. 239, 243, 344, 361-3) of sand and gravel from the lands of respondents (Ex. 1, Tr. 14). It is important to note that this eminent domain proceeding did not involve the usual taking by the condemnor of the title to the land. This was a proceeding by the condemnor to enter upon the lands of the respondents for the sole purpose of removing therefrom the sand and gravel and other material which were contained within these lands, and to use these minerals in building a new railroad bed by the appellant railroad company.

The three separate cases which appellant had initiated in the lower court to take the sand and gravel from the three separate ownerships of land involved (Tr. 17-18) were, with the consent of the parties, tried together before a jury to determine the damages to be awarded each of the defendants (Tr. 7-8). From the awards made and the judgment entered in the two cases Nos. 8071 and 8191 and from the denial by the lower court of appellant's motion for a new trial as to each of the three cases, including Case No. 8192, appellant prosecutes this appeal. The case involving the Sheehan sisters, Mrs. Hunter and Mrs. Arthur, was designated in the lower court as No. 8071. The case in which Nick Chournos and his wife were named as defendants was there designated as No. 8191. And the third case designated in the lower court as No. 8192 was against Milton A. Oman, Nick

Chournos, Sam Chournos and each of their wives. This third case involved placer mining property owned by the said six defendants. The lands in each of the two first above-mentioned cases were patented lands owned by the respective parties.

As to the patented lands, Case Nos. 8071 and 8191, the lower court submitted to the jury a special form of verdict requiring that it separately determine the value per cubic yard, and the total value of all sand and gravel taken by appellant from the respective lands, and in each of those two cases the court also requested the jury to fix the damages, if any, caused by the severance of the use of the lands from which the gravel and sand was removed, to their remaining lands. In each of those two cases, the jury found a damage to the respective defendants (respondents) for the quantity of sand and gravel taken from their lands, and also found that a severance damage was caused in each of those cases and fixed the amount thereof. In each of these cases, the court entered judgment to conform to the verdict as soon as the verdict was returned in June, 1959 as to the value of the sand and gravel only, but reserved for some time, until July 21, 1959, the entry of judgment as to the severance award.

As to the third case, the case involving the sand and gravel placer mining claim, designated in the lower court as No. 8192, the court submitted a special form of verdict to the jury requiring them to determine the value per cubic yard and the total value of the sand

and gravel removed therefrom as was done in each of the other two cases. But no severance damage was involved in that case and no request was made by the court that the jury make any finding relative thereto. The jury found and determined the same value per cubic yard of the sand and gravel taken by appellant in this case as in each of the other two cases. Of course, no severance damage was found by the jury in connection with the placer mining claim case. Upon the urging of appellant's counsel, the court withheld entry of any judgment in this mining claim case until November 2, 1959. From the judgment which the court finally entered in this one case on November 2, 1959, the defendants in the lower court bring a cross appeal, herein contained. But this same case is also here on appeal by Southern Pacific Company from denial by the lower court of its motion for a new trial.

The respondents in the lower court cases Nos. 8071 and 8191 agreed to a conditional order of the court that they file notice of willingness to accept one half the severance damage awarded by the jury in each case, plus the full award made on the value of the gravel and sand. The respondents filed their acceptance of this condition, but the appellant refused to pay the judgments even on that reduced basis. The court then entered judgment in each of those cases for the full jury award, both as to the value of the sand and gravel and also as to the severance damage award. The lower court then denied the motion for a new trial which the appellant filed as to each of the three cases. From that

particular denial appellant prosecutes this appeal on all three cases.

But as to the placer mining case, lower court No. 8192, it is here also by way of a cross-appeal from the judgment which the court finally entered, in that case. The brief of the appellants (defendants) in that case is included under this same cover at the conclusion of the brief for respondents answering the brief of Southern Pacific Company, appellant. This appeal on behalf of the defendants below in the placer mining case is included here by agreement of the parties and with the verbal permission granted by this court, to save time and expense of printing separate briefs in and pursuing that case in a separate appeal.

STATEMENT OF FACTS

Appellant determined upon a project to replace the trestle or bridge which it had previously used in supporting its railroad trackage across Great Salt Lake (Tr. 328). A 13-mile earth fill was to be constructed through the lake (Tr. 286) to replace this trestle, and it involved a great earth moving project requiring 44 million cubic yards of sand and gravel (Tr. 303), the project costing \$50 million (Tr. 304, 328). Only certain types of sand and gravel could be used to properly construct this road bed and tests were made and test holes drilled in different areas by appellant to locate and determine ideally suited materials (Tr. 290, 302, 305, 316). Location of these materials was also important

to appellant from the standpoint of their distance from place at which the great fill was to be built (Tr. 305). Appellant looked at and tested materials at other sites and locations, but finally determined that the area in which respondents' lands were located along the west side of Promontory Mountain near the east end of the proposed fill was most suitable (Ex. 1, Tr. 286, 302, 303, 304, 305). The sand and gravel of respondents was so ideally located with relation to the proposed project that the loaded conveyor belts and trucks used in hauling this material from the beds of deposit to the fill moved down grade with the loads (Tr. 303). Appellant actually owned a gravel pit of its own in this area but use of that material would have involved an expensive, approximately 5-mile additional truck haul of the sand and gravel (Tr. 305, 306, Ex. 1).

It is important to note that the sand and gravel involved in the cases herein was not condemned until two or three years after the project concerned had begun. It was as early as 1955 that appellant was negotiating for the purchase of sand and gravel for use in this project, and it signed a contract on August 15 of that year with one Del H. Adams to pay to him \$100,000 for up to 56 million cubic yards of materials to be taken from lands he owns which are adjacent to the lands of respondents herein (Ex. 1, Ex. 8, Tr. 308, 314, 326, 331). Also, the respondents herein were well aware of this project by reason of an eminent domain proceeding not involved herein which appellant had filed against the same Mrs. Glenora Sheehan Hun-

ter, who is involved here as respondent in the lower court case No. 8071. That case was prosecuted by the appellant herein for the purpose of taking by condemnation the right to construct the large conveyor belt used in transporting the sand and gravel across the lands of Mrs. Hunter located in the southeast corner of the same Section 2, T. 6 N., R. 6 W., as is involved in this appeal (Ex. 1, Tr. 211).^{*} Appellant also had previously secured the use of an 80-acre tract in Section 11 of this township owned by the respondent herein, Mr. Chournos, upon which to build its construction townsite (Tr. 320-1).

It was more than two years after the date of the said contract with Mr. Adams for purchase from him of sand and gravel (Tr. 290, 292, 309) and after the project had been under way for approximately the same period of time (Tr. 23) that eminent domain proceedings were begun to secure the right to take the materials from the adjacent lands of respondents herein. The Summons in the proceeding herein against the Sheehan sisters, Mrs. Hunter and Mrs. Arthur, to take sand and gravel from their lands in Section 1 and 2 of the above township was served on October 11, 1957 (Tr. 296). It was about seven months after that date, or on June 11, 1958, that the proceedings (designated in the lower court as Nos. 8191 and 8192) were initiated in the other two cases involved here to take similar materials from the Chournos fee lands and from the placer claim (Tr.

^{*}The summons in that case was served on June 20, 1956 and that case is designated in the same lower court as No. 7857.

296, 300). Test holes had been drilled upon respondents' lands by appellant to determine the quality and amount of suitable sand and gravel located therein (Tr. 291).

The quantity of sand and gravel taken by the appellant from the parcels of lands involved herein owned by the different respondents was stipulated by the parties at the consolidated trial of the three cases and the yardage involved in each of the cases was:

From the lands in Case No. 8071....1,909,449 cu. yards

From the lands in Case No. 8191....2,052,698 cu. yards

From the lands in Case No. 8192....1,222,899 cu. yards

(Tr. 239-243, 344, 361-3).

There was no showing that there was any difference in the market value in place of the sand and gravel taken from respondents' lands as of the two different dates involved, October 11, 1957 and June 11, 1958. It was stipulated that the value in each was to be as of October 22, 1957. The jury found that value to be 3c per cubic yard in each case, and the court entered judgment accordingly in the case Nos. 8071 and 8191, but reserved entry of judgment in the remaining case (Tr. 361-3).

At the trial ~~appellant~~^{respondents} produced eight well qualified witnesses as to the value of the sand and gravel in place at the time of the service of summons in these cases. Six of these testified (Tr. 21-141) and the parties stipulated that if the remaining two witnesses were called to testify for respondents that their testimony would

be cumulative and substantially as had been previously testified (Tr. 142-3).

A qualified professional appraiser, Charles E. Story, called by respondents testified the value per cubic yard to be 5c as of October 1957, (Tr. 30) and the same value as of June 1958 (Tr. 31).

J. P. Gibbons, president of the well-known western construction firm of Gibbons and Reed of Salt Lake City, a person with many years experience in the use, purchase and sale of materials of the type with which we are involved here used in construction projects of different types (Tr. 40-45), also fixed the damage to respondents for the taking of their sand and gravel herein at 5c per cubic yard (Tr. 46). He would have paid 5c per yard for this material had he been building this project (Tr. 47). Mr. Douglas J. Fife, also a person engaged for many years in the construction business (Tr. 64) and the owner of a gravel pit near Brigham City, Utah (Tr. 64) also testified that the average value of respondents' sand and gravel for the time involved was 5c per cubic yard (Tr. 68). He sells sand and gravel at his own pit near Brigham City, Utah, at \$1.15 per cubic yard. (Tr. 78).

The above testimony as to the value in place of the sand and gravel involved was supported by the testimony of two additional construction company owners, Melbourne Ford of Provo, Utah, (Tr. 89-115) and Jack Parsons (Tr. 131-142).

Douglas H. Brammer was called as a witness for respondents in connection with the quality of the sand and gravel which appellants had removed from respondents' pits. He is a graduate civil engineer employed with the firm of Sumner-Margetts Company of Salt Lake City which performs soil analyses work (Tr. 82). His testimony was that some of these sands and gravel were of such high quality that they were suitable for concrete aggregate use without washing or treatment (Tr. 83-84), and that this sand and gravel compares favorably with like material from other pits (Tr. 84).

The State of Utah owns the Section 36 on the north wall of the canyon known as Little Valley adjacent on the north to the Section 1 from which most of the sand and gravel herein was taken by appellant from respondents' lands (Ex. 1). Lee E. Young, Manager and appraiser for the Utah State Land Board in charge of the management of the lands of the State, testified that this section was rocky, (Tr. 120) with much waste and that it was inaccessible (Tr. 123). Yet interest in a rock and gravel lease of this entire section was developed in 1955 and was entered into with a private party, J. T. Underwood of Ogden, at 1½c per cubic yard, with the State charging \$320 per section as the lease fee, or 50c per acre, in addition to the price per cubic yard for any material dug out of this section, plus a royalty to be paid back to the State (Tr. 123). This was before appellants had built its conveyor belt into Little Valley but it was doing the exploration work at that time (Tr. 123).

A considerable part of the material purchased by appellant from the Del H. Adams lands could only be secured by breaking up rocky ledges with world record-size explosive charges which involved considerable expense for appellant in the building of tunnels under the rock and in the use of explosives (Tr. 335-36). No such expense was necessary in securing and moving the sand and gravel of any of these respondents. It was scooped up from its natural location and loaded directly onto the conveyor belt (Tr. 336). It was a down grade haul from the place where these materials were located to the site of use (Tr. 303).

It costs considerable to haul this material, about 50c per ton per mile on the highways (Tr. 51, 71, 110) and that element weighed favorably in connection with the taking by appellant of respondents' near-by, quality material (Tr. 305). Appellant's own gravel pit located on this same mountain was too far away from the place of use to be acceptable to them (Tr. 306).

Respondents' sand and gravel was available and accessible along an old road which extended through this Little Valley (Tr. 161). It was a smooth, wide canyon, not steep (Ex. 5, 6, 7, Tr. 154), the heart or center of which was removed by the hauling out of this sand and gravel (Tr. 162), located on the same side of the Promontory Mountain as the fill which appellant was to construct (Exs. 1, 5, 6, 7).

Above is set forth the factual statement relating to the market value, in place, of the sand and gravel which

appellant removed from the lands of respondents involved in each of the three cases which were tried together. There is present here an additional element of damage in two of the cases only; that is, in the lower court Cases, No. 8071 in which the Sheehan sisters, Mrs. Hunter and Mrs. Arthur, are respondents, and in No. 8191 in which Nick Chournos et ux are the only respondents. The sand and gravel placer mining claim is not involved in this additional element of damage. Below is set forth the factual statement relating to the damage done the remaining lands of the respondents involved in the two above-named cases, through the excavation by the appellant of the sand and gravel from their Little Valley lands.

The respondents, in each of the two said cases, own thousands of acres of grazing lands of which the area from which the sand and gravel was taken by appellant was a very important part (Tr. 145-7, 148, 154, 174, 186). Chournos has owned and used in his life-time grazing operation (Tr. 144) about 110,000 acres of range lands (Tr. 145-7) a very important part of which is within and surrounding the lands upon which appellant dug out its vast pits. (Ex. 1, 5, 6, 7). The 12,000 acres owned by the respondents, Mrs. Hunter and Mrs. Arthur, are similarly located with regard to these excavations (Tr. 186, Ex. 1, 5, 6, 7). The lands of these sisters have also been continuously used in livestock operations for many years — since 1931 to the knowledge of Mr. Chournos and the witness Mr. Keller (Tr. 169, 221). Prior to that time and before the death of their father, their parents

had lived upon this ranch now owned by the daughters (Tr. 169). These lands were valuable in the grazing and protecting of sheep during the winter months (Tr. 146, 148, 154, 170, 191). Appellant's excavations destroyed for all time a vital and key part of these lands (Tr. 154, 170-71, 324, 333).

Regarding this severance or consequential damage problem, it is to be noted that the lands of the respective respondents, from which appellant dug up and removed the sand and gravel, constituted a part, not only of a larger tract from which these materials were removed (Ex. 1), but they were a part of a very much larger acreage of disconnected lands owned in each instance by the respective respondents within this same Promontory Mountain area (Ex. 1) and were being used in connection with the unified use by the parties of all of their said lands at the time appellant took possession under its eminent domain proceedings (Tr. 147, 174, 186, 191). As to the respondent Chournos, he owns considerable other acreage, in addition to his Promontory Mountain lands, (Tr. 144-5) and the value of all of which lands and the use thereof in his one unified business was adversely affected (Tr. 184).

The respondent Nick Chournos has owned and operated his own sheep outfit in Box Elder, Cache and Rich Counties in the northern end of Utah for the last 36 years. In these three counties he owns widely separated acreages of range lands used in his single, unified sheep operation. He owns and grazes a total of 110,000

acres of lands in these three counties, and leases approximately 23,000 acres from the State of Utah adjoining his owned lands. He also grazes some public domain lands (Tr. 144-5). To round out his year-long grazing operation, his sheep are moved from one of his land areas to another as the seasons change. He grazes during the summer season upon his approximately 20,000 acres of high elevation ranges in the Monte Cristo area of Rich and Cache Counties (Tr. 146-7, 219). In the winter months, he moves his sheep to his approximately 70,000 acres of owned range and the intermingled State lease and public domain lands in Western Box Elder County near the Nevada State Line (Tr. 145-6, 219). The 20,000 acres which he owns upon the Promontory Mountain are grazed during a part of the winter and for the spring lambing season (Tr. 146, 185, Ex. 1).

The respondent Chournos operates approximately 6,000 ewes, which annually produce approximately the same number of lambs, and all of which 12,000 head of sheep are taken back to the said high summer ranges in May or June after the lambs are born and docked out. Here they are all grazed until the lambs are sold as meat animals about September of each year (Tr. 145-6-7-8). All of the said Chournos lands are used and required to round out a year-long operation during the different seasons (Tr. 147-8, 176). About 2500 of these ewes are lambd out upon these Promontory Mountain ranges (Tr. 148). These lands and their use in this sheep grazing operation constitute one unified business operation (Tr. 147). Each of these different range areas sup-

plements the other to round out this year-long grazing business (Tr. 147).

Upon this same Promontory Mountain and adjacent to and intermingled with the Chournos lands in this area, in such a way that a grazing use of the area means a use of the lands of all, the respondent sisters, Mrs. Arthur and Mrs. Hunter, own 12,000 acres of grazing lands (Ex. 1, Tr. 174, 177, 186, 200, 213, 265). The Del H. Adams, heretofore referred to herein, also owns about 8,000 acres of grazing lands on this same Promontory Mountain, and, though his lands are substantially in the south end of this peninsula, they are also intermingled somewhat with the Hunter-Arthur and Chournos ownership and, particularly with that of Chournos (Ex. 1, Tr. 213, 251, 265, 267-268). With the exception of about a thousand acres of public domain which the Government has reserved in this area, and a few placer mining claims owned by Mr. Chournos and others, and one of which claims is alone involved in this same appeal, as heretofore explained, and except for a gravel pit owned by appellant itself, (Tr. 306), the above said 40,000 acres of land constitute the total ownership for several miles in all directions from the gravel pits involved here (Ex. 1, 216). Mr. Chournos alone holds the right to graze the said small acreage of public domain (Tr. 176-7, 186).

While neither Mrs. Hunter nor Mrs. Arthur are actively engaged in the livestock business, their lands are valuable for this use and were leased for many years (as early as 1931) by the respondent Chournos

(Tr. 169) and later by Boyd Keller (Tr. 221). For about the last five years, they have been leased by the said Del H. Adams at an annual rental of \$7,000, or approximately 50c per acre (Tr. 170, 191).

The Promontory Mountain lands of Chournos and of the Sheehan sisters, Mrs. Hunter and Mrs. Arthur, lie in substantial acreages on both sides of this high, steep mountainous ridge or range, which projects due southward into the north end of Great Salt Lake, in a strip of land from about $4\frac{1}{2}$ to $6\frac{1}{2}$ miles in width, for some 25 miles, and the south 13 miles of which is owned, with the exceptions heretofore noted, by these respondents (Ex. 1, Tr. 260, 273-4, 284) extending from the lake shore on the east to the lake shore on the west (Ex. 1).

In grazing this entire Promontory Mountain land area of respondents during the winter and lambing season, it is necessary from the standpoint of the need for continuously changing feed and in the use of snow, water and to meet the challenge of winter weather conditions, that the sheep move back and forth from the lands on one side of this mountain to the lands on the other side (Tr. 156, 157, 158, 159, 161, 162, 198, 215, 225, 227). This Little Valley or canyon from which appellant took the sand and gravel from respondents and from the adjacent land of others provided the only road across this mountain, through Maple Canyon on the east side of the ridge and down Little Valley on its west side (Tr. 161, 227).

Little Valley extends from the west lake shore due east to the head of Maple Canyon (Tr. 158, 161, Exs. 5, 6, 7) through which this only road extended (Tr. 161, 227) and a low pass lay due east through Little Valley across the top of the mountain which livestock did and could use in passing back and forth from one side of the mountain to the other (Tr. 155, 161, 235). This Little Valley canyon was the biggest one on the mountain, the finest piece of range in that area, not too steep, the key canyon to the rest of the range (Tr. 154). It would, alone, take care of 1200 of the 2500 ewes which Chournos lambled in this area with their lambs. It would care for these ewes and lambs for 45 days in the spring (Tr. 148, 159, 160). Appellant destroyed the folage producing capacity upon the lands within the pit for all time (Tr. 171).

Before this pit was constructed, the sheep could feed and graze in a natural way, not being driven, through Little Valley (Tr. 161, 162, 198, 225) and either down Maple Canyon on the east side (Ex. 1, Tr. 161, 227) or over a pass immediately south of the head of Maple Canyon to the east shore lands (Tr. 161, 225, Ex. 1). This passageway was very important in making a natural utilization of the forage types on each side of the mountain (Tr. 160, 162) and the only water available for these sheep is at the mouth of Little Valley on the west lake shore (Tr. 157, 158, 162, 215). While sheep can secure their water requirements from snow, when that is available to them, and Little Valley provided a natural place at its head for this (158, 225), they must

have stream or spring water when the snow is gone. This dry condition is found in this area both in the fall before snow has arrived and in the spring after it has melted away, and the mouth of Little Valley provided this water (Tr. 157, 158, Ex. 1). Occasionally, snows, too deep for sheep to survive will fall, and in this condition, Little Valley offered a safe and gradual retreat to lower elevation ranges (Tr. 156, 157, 226, 227, 228, Ex. 1, 5, 6, 7).

In conditions when the snow is too deep, it will always be and remain deeper on the east side of the mountain (Tr. 231), and the west side in and near Little Valley offers the only safe winter range in these extreme conditions (Tr. 229). There are only 2½ to 3 sections of range which is safe for livestock in these extreme winter conditions in this entire range area. (Tr. 226, 231)

The forage growing along the north side of Little Valley would grow earlier in the season than that along its south canyon wall, with different species growing on different sides, (Tr. 158, 159) all of which could be grazed as the sheep satisfied their changing needs for forage in moving back and forth from the water at the mouth of Little Valley on the lake shore to the feeds up through Little Valley and down to different feeds on the east side of the mountain (Tr. 158, 159, 162, 225). It provided a natural salt feed for the livestock so that in securing this, it eliminated the necessity of feeding them salt (Tr. 162).

All these advantages are now destroyed by the ex-

cavation which appellant gouged from the wide bottom of this long canyon (Ex. 1, 5, 6, 7). The very center of this canyon, from wall to canyon wall, was dug out by appellant (Tr. 171, 178, Ex. 5, 6, 7) in the creation of its 335-acre gravel pit (Tr. 205) which is two miles long (Tr. 155). Removal of the sand and gravel destroyed the forage growing on the land for all time (Tr. 236, 333, 171). No more can this biggest and best forage-producing canyon in the entire range (Tr. 154) be used as a grazing or as a lambing range, because sheep cannot and will not go this long distance without feed through this gravel pit to reach range on the different sides of the mountain (Tr. 162, 164, 178, 211). This only source of fresh water can no longer be used to service livestock to utilize the wide forage area through Little Valley and beyond as was done before the pit was dug. The range on the east side of the mountain is now segregated from the range on the west side of the mountain (Tr. 161, 162, 178, 211).

The high, perpendicular banks of this excavation are very dangerous to the lives of sheep which might try to graze the fringe lands left in this canyon. Considerable numbers of sheep, up to a thousand at a time, have been known to be frightened or otherwise caused to plunge over banks of the kind left by appellant in this pit and be killed (Tr. 164, 166, 203, 208, 228, 230). This condition is also dangerous to herders of the flocks, particularly at night and in the slippery weather of winter (Tr. 165). This dangerous condition could be corrected at a cost of \$28,000.00 (Tr. 207-8), but even

if this were done, it would not correct the fact that sheep would not use this area to get back and forth from one side of the mountain to the other, because no forage will grow in these pits (Tr. 168, 170-171), and it is too far for them to travel through the barren pits to reach forage. (Tr. 162, 164, 178, 211)

To try to use Little Valley again with ewes and lambs would only result in the death of many of the sheep by falling over the banks (Tr. 164, 203, 208, 228, 230) and would only result in the making of many "bum" or orphan lambs which are practically worthless (Tr. 163-4). And this has been an excellent lambing ground (Tr. 159, 160, 198, 213).

Little Valley will not again be available as the passageway for livestock in utilizing the ranges on either side of the mountain (Tr. 162, 164, 178, 211). The Little Valley canyon and the area from which appellant mined out the sand and gravel had the same relationship to the lands of Mrs. Arthur and Mrs. Hunter as it had to those of Mr. Chournos (Tr. 170). For all period of time Chournos has grazed, trailed and traveled through this Little Valley in his livestock operations upon all of the lands contained therein, which was the same for the Sheehans and their lessee operations (Tr. 177).

The remaining lands of these respondents are less valuable as a result of this destruction of Little Valley by appellant. The lands of Mrs. Hunter and Mrs. Arthur had been leased for an annual rental of \$7,000 per year at the time appellant took possession of them and began

its railroad project (Tr. 170, 191). They have been damaged to the extent of 20% to 25% of their former value or to the extent of 20% to 25% of \$7,000 yearly (Tr. 171, 172) or to the total extent of \$28,000.00 to \$35,000.00 on a permanent basis (Tr. 184, 186, 188, 192, 195, 197, 206, 207), which is capitalizing the annual damage on a 20-year basis (Tr. 173, 174, 175, 231).

The Chournos lands were damaged in an even more serious way than is the case with the Sheehan lands, since he owns a much greater acreage than is owned by the Sheehan sisters (Ex. 1, Tr. 144-45) and all of which has been used for many years in one unified sheep operation in which the Little Valley and the Promontory Mountain lands contributed an important use (Tr. 146, 185). From the standpoint of his Promontory Mountain lands, standing apart from his other holdings, his damage was not less than that for Mrs. Hunter and Mrs. Arthur (Tr. 185-6, 195, 197, 203, 206-7).

Appellant had entered into a contract with Del H. Adams to pay a total of \$100,000 for the taking of material from the lands of Mr. Adams within this Little Valley (Tr. 314, 320, 321, 326, 332, 343), and although the contract provided for payment at the rate of 2 mills per yard, Mr. Adams had been convinced that this contract would provide him a payment in the total sum of \$100,000 for the sand and gravel to be taken from his lands (Tr. 321, 326, 343). He was also to receive \$2500 per year for the period the appellant was occupying his lands while building the project, for the

nuisance or inconvenience to his livestock operations (Tr. 336, 321, 322). The jury awarded Mr. Chournos \$3200 for the one year appellant similarly interfered with his operations while building its project and after taking possession of his property in addition to the \$32,000 awarded to him as permanent severance damage (Tr. 362). An identical permanent severance award was made in the Hunter-Arthur case (Tr. 361).

STATEMENT OF POINTS

POINT I.

THE PROCEEDINGS BELOW WERE FREE FROM ERROR WITH RESPECT TO THE VALUATION OF RESPONDENTS' GRAVEL DEPOSITS.

(a) THE EVIDENCE BELOW AS TO THE VALUE OF RESPONDENTS' GRAVEL DEPOSITS WAS PROPER AND COMPETENT TO SUPPORT THE VERDICT OF THE JURY.

(b) THERE WAS NO ABUSE OF DISCRETION BY THE COURT BELOW IN ADMITTING EVIDENCE OF OTHER SALES.

(c) ADMISSION OF CERTAIN INFORMATION CONTAINED IN NOTES ON PLAINTIFF'S EXHIBIT 2 WAS NOT PREJUDICIAL AND ANY ERROR IN CONNECTION THEREWITH HAS BEEN WAIVED.

(d) THE PROPER MEASURE OF VALUATION IS THE FAIR MARKET VALUE OF THE RESPONDENTS' GRAVEL DEPOSITS SEPARATELY EVALUATED.

POINT II.

THE TRIAL COURT PROPERLY SUBMITTED TO THE JURY THE QUESTION OF DAMAGES TO RESPONDENTS'

REMAINING LANDS AND THE VERDICTS RETURNED THEREON ARE SUPPORTED BY SUFFICIENT AND COMPETENT EVIDENCE.

(a) THE TESTIMONY CLEARLY SHOWS THAT THERE WAS NO POSSIBILITY OF REPLACING THE LANDS WHICH WERE DESTROYED BY APPELLANT IN EXCAVATING THE GREAT PIT FROM THE FLOOR OF THE LITTLE VALLEY CANYON; AND APPELLANT OBJECTED TO RESPONDENTS' QUESTIONS DESIGNED TO POINT UP CLEARLY THE UNAVAILABILITY OF OTHER LANDS.

(b) THE DAMAGES AWARDED BELOW FOR THE DEPRECIATION IN THE VALUE OF THE RESPONDENTS' REMAINING LANDS WERE PROPER UNDER THE CONSTITUTION AND STATUTES OF THE STATE OF UTAH.

(i) The Award Below for Damages to Respondents' Remaining Lands Can Be Properly Sustained as Proper "Consequential Damages" As That Term Is Used Herein.

(ii) The Award Below for Damages to Respondents' Remaining Lands Can Be Sustained as Proper "Severance Damages" As That Term Is Used Herein.

(c) THE DAMAGES AWARDED BELOW TO RESPONDENTS' REMAINING LANDS WERE FOR THE DEPRECIATION IN THE VALUE OF THOSE LANDS AND NOT LOSSES TO THE BUSINESS CONDUCTED THEREON.

(d) THE DAMAGES AWARDED TO RESPONDENTS' REMAINING LANDS WERE NOT THE RESULT OF ADDING VALUES FOR THE DIFFERENT USES OF THE LANDS TAKEN.

(e) THERE IS COMPETENT EVIDENCE OF RECORD UPON WHICH THE JURY PROPERLY BASED THEIR FINDING OF DAMAGES TO RESPONDENTS' REMAINING LANDS.

POINT III.

BASED ON THE COMPETENT EVIDENCE OF RECORD, IT CANNOT BE SAID THAT THE VERDICT BELOW WAS EXCESSIVE AND THE RESULT OF PASSION AND PREJUDICE.

POINT IV.

THE TRIAL COURT ERRED IN PERMITTING THE PAYMENT OF THE JUDGMENT ENTERED BELOW IN CASE NO. 8192 TO BE HELD IN ABEYANCE PENDING THE DETERMINATION OF THE CHALLENGE BY THE UNITED STATES TO THE VALIDITY OF RESPONDENTS' MINING CLAIMS.

ARGUMENT AND AUTHORITIES

POINT I.

THE PROCEEDINGS BELOW WERE FREE FROM ERROR WITH RESPECT TO THE VALUATION OF RESPONDENTS' GRAVEL DEPOSITS.

(a) THE EVIDENCE BELOW AS TO THE VALUE OF RESPONDENTS' GRAVEL DEPOSITS WAS PROPER AND COMPETENT TO SUPPORT THE VERDICT OF THE JURY.

Each of the four witnesses (Storey, Gibbons, Fife and Ford) who were called below in behalf of the respondents and who expressed an opinion as to the market value in place of the gravel deposits with which we are here concerned, fixed a fair market value on such deposits at 5c per cubic yard (Tr. 29, 31, 46, 68, 100). The jury returned a verdict in the case of each respondent determining such value to have been 3c per cubic yard

(Tr. 361-362). Three of these witnesses, Gibbons, Fife and Ford, were then actually engaged in the general contracting and sand and gravel business and represented a combined experience in the Idaho-Utah-Nevada area in that business of nearly 65 years (Tr. 41, 64, 90).

The only contrary evidence was that adduced from the sole witness called in behalf of appellant, namely, Mr. Bagley, the project-engineer for Morrison-Knudson Company, the very company having the contract for the construction of the project here involved and for whom appellant condemned respondents' gravel deposits (Tr. 290, 292), who prior to his employment by Morrison-Knudson purchased fill material upon only one prior occasion (Tr. 293). His estimate as to the market value of respondents' deposits was two mills per cubic yard (Tr. 300), or nearly $1/25$ of the value fixed by Mr. Storey, Mr. Gibbons, Mr. Fife and Mr. Ford.

In addition to the opinions expressed to the jury by respondents' expert witnesses, respondents presented to the jury evidence of other comparable sales of fill material. Defendants' Exhibit 2 reflected the price paid per ton and per cubic yard by Gibbons & Reed Construction Company for gravel deposits belonging to third parties (Tr. 61) from the year 1953 to 1959, and showed a range of 2c per ton to 6c per ton. On the converted basis of cubic yards (1 cubic yard of gravel is approximately 3,000 pounds, or $1\frac{1}{2}$ tons) (Tr. 59), this price range would then be from approximately 3c per cubic yard to as high as 9c per cubic yard. This

exhibit further reflected sales from remote pit areas near Wells, Carlin, and Ely, Nevada, and Dunsmuir, California at a price of 3-1/3 cents per ton, or approximately 4.9c per cubic yard.

Witness Ford further testified that fill purchased near Soda Springs, Idaho, an area as remotely situated as Promontory (Tr. 98, 100) was 5c per ton or an "equivalent to about six or seven cents a yard." (Tr. 109)

Witness Parsons ranged his prices from 1½c to 8c (Tr. 137, 138) per cubic yard for gravel purchased from undeveloped areas (Tr. 141) in Northern and Western Utah (Tr. 137).

It was shown that the State of Utah leased undeveloped gravel pits even in remote areas for from 1½c to 5c per cubic yard (Tr. 124) and leased gravel in Section 36, a desolate and inaccessible area on Promontory for 1½c per cubic yard prior to the construction activity in that area (Tr. 123).

Witness Brammer, called in behalf of respondents, testified that, as a result of an analysis performed upon samples of respondents' gravel, it was his opinion that said gravel was suitable for concrete aggregate and compared favorably with gravel taken from developed pit areas in the Salt Lake Valley (Tr. 83, 84).

Despite the overwhelming evidence of record to support a verdict of 3c per cubic yard for respondents' gravel deposits, appellant now insists that the only competent evidence of value was that offered by the

salaried employee of Morrison-Knudson Company, Mr. Bagley, to wit: 2/10th cents per cubic yard. It is discernible from the tone of appellant's cross examination and appellant's brief that appellant's position is based upon the theory that inasmuch as there was no ready market for respondents' materials in October of 1957 and June of 1958, the valuation placed thereon is based upon future, remote and speculative uses.

This case presents a somewhat curious and unusual situation. We are here involved with a commodity, suitable and adaptable, both in quality and quantity, for concrete aggregate, fill purposes, roadbed concrete, and all the many uses to which gravel from almost any source in this State or elsewhere may be put (Tr. 49, 75, 83, 93, 134). It is contended, however, by appellant that this commodity was valueless because situated in a remote area and far from "market," the haulage cost thereof making its commercial use economically infeasible. (Testimony was elicited to show the prohibitive rate of shipping this material to Brigham City (Tr. 71).)

This argument overlooks a fact that becomes apparent upon reading the record as a whole. That fact is that gravel deposits seem to fall into two rather distinct categories (Tr. 142). The first are those deposits in established developed gravel pits close to centers of "market." Gravel situated thusly can demand a price of upwards of 95c per ton (Tr. 71) or, on a converted price, \$1.37½ per cubic yard. The second are those deposits which lie in their undeveloped state, situated in

remote places far from "market" centers and which achieve commercial importance because of their availability for a particular project which has come into existence in the vicinity (Tr. 133, 139, 140, 141, 142, 65). Gravel deposits so situated have demanded anywhere from 1½c to 8c per cubic yard, as illustrated above, albeit that at the completion of the project the pit that has been opened by the contractor may be dormant for commercial purposes for a period thereafter (Tr. 62). An immediate present market and demand for gravel in the latter category nevertheless exists, however brief, when a project comes into existence; and a fair price range for such gravel has been established in the market therefor.

It is clear, of course, that the gravel deposits with which we are here concerned, fall within the second category above indicated. This is, of course, what was intended by Mr. Gibbons when he testified in reply to appellant's cross examination that he would pay 5c a cubic yard if he had the contract to construct the project for appellant; that is, by reason of the nature of the gravel deposit in the instant case, the fair value thereof as an undeveloped deposit available, accessible and adaptable to use in a project which has "come into being" in the immediate vicinity is 5c per cubic yard. This also, it is submitted, is the fair intendment of the testimony of the other three witnesses called by respondents who fixed a market value upon respondents' properties.

Appellant contends, however, that in fixing the value

of respondents' gravel, we must ignore the "market" or demand created by the project in existence in the vicinity, since this is the very project for which respondents' deposits are sought in these condemnation proceedings. It may be admitted that this is the rule in some jurisdictions of this country. The rule, however, to which the courts of this state are now committed is that any fact in existence on the date as of which compensation is to be determined* which would influence the value of the property to be taken, *including* the existence of the public project involved, may be properly considered in ascertaining that value. This Court in the very recent case of *Weber Basin Conservancy District v. Ward, et al.*, Utah 2d, 347 P. 2d 862, 863 (Utah 1959) in replying to the contention that the value of the property taken is to be ascertained without regard to the fact that the condemnor has entered the market, stated as follows:

"The plaintiff urges the view adopted by some courts that the value of the property for condemnation purposes should be determined without consideration for the fact that the condemnor has entered the market and plans improvements. The argument supporting such rule appears to be that the condemnee should not be allowed an advantage from the fact that the condemnor is improving the area and the latter be required to pay a higher price and thus in effect suffer a penalty because of its own improvements.

*Summons in each case was served approximately 10 days prior to actual occupancy, which latter date was adopted by the court, upon the stipulation of counsel, as the date as of which compensation was to be determined (Tr. 27).

The contrary view is that eminent domain statutes are designed only to give the condemnor the power to purchase property whether the condemnee desires to sell or not, but are not purposed to give the condemnor any superior bargaining position as to price. We are in accord with what appears to be the better view, adopted by the trial court, that the condemnee is entitled to the fair market value of his property at the time of the service of summons in the condemnation proceedings as provided by statute; and that *all* factors bearing upon such value that any prudent purchaser would take into account *at that time* should be given consideration . . ." (Emphasis supplied.)

The wisdom of this rule is demonstrated vividly when view in the light of the circumstances of the instant case. It is conceded that it is not the policy of the law to require a condemnor to pay "hold up" prices for properties "needed" for the public project involved; yet, neither is it the policy of the law to sacrifice the rights of the individual to the extent that the landowner must sell less than the "going rate" simply because the purchaser is the condemnor. Rather it is the policy of the law to place both condemnor and landowner in the position of the hypothetical willing buyer and willing seller, neither acting under compulsion.

The evidence is clear and overwhelming that the value of respondents' gravel deposit in an undeveloped state, situated as it is, in a remote area, but available, adaptable, accessible and desirable for use in an existing project (Tr. 302, 305) in the vicinity was 5c per cubic

yard. The conclusion is inescapable in viewing their testimony as a whole that each of the contractors called by respondents below would have paid that amount as a fair market price if any one of them were engaged in the construction of a similar project in the area. The jury has determined that the price that one who would willingly pay one who would willingly sell was 3c per cubic yard.

By what manner of logic can we now say that appellant should not be required to pay the same price that any other person would be required to pay for respondents' property under the same circumstances? It is fundamental that appellant is entitled to no more advantageous consideration, nor no less, than any other person merely because it is the condemnor. The fact that the legislature has conferred upon appellant the power of eminent domain does not relieve it of the obligation to pay that amount which another, not so favorably endowed by statute, would be willing to pay if engaged in the construction of a similar project in the same vicinity. This, then, must be the test of market value in this or any other land damage case: That amount which a willing buyer would pay and for which a willing seller would sell respondents' gravel under the circumstances as they existed in October of 1957 and June of 1958. If by definition, under the circumstances of this case, a "willing buyer" is one engaged in the construction of a project in the neighborhood, appellant should not be heard to complain, since it is placed in the same position as any other "willing buyer" on

those dates, and under those circumstances, no more — no less.

It is submitted, therefore, that the value placed on respondents' materials by respondents' witnesses is neither a future nor speculative one, but based upon a fair price that a purchaser would be willing to pay under all the circumstances existing as of the valuation dates referred to.

(b) THERE WAS NO ABUSE OF DISCRETION BY THE COURT BELOW IN ADMITTING EVIDENCE OF OTHER SALES.

Appellant urges that prejudicial error was committed by the trial court in allowing testimony and evidence of other sales to be presented to the jury by Mr. Gibbons and Mr. Ford. Mr. Gibbons testified regarding purchases made by his company as reflected upon Exhibit 2 (Tr. 58, 59) and indicated that these were purchases made from third parties or supplied by the owner during the period covered (Tr. 61). The Exhibit itself reflects, *inter alia*, the owner, the location and name of the project involved and the year of removal. Gibbons' testimony indicates that in each instance, the purchase was made for the specific project and no subsequent purchase made after completion from the particular source involved (Tr. 61, 62).

Mr. Ford testified regarding a specific purchase made at Soda Springs, Idaho, in September of the year 1954 (Tr. 98), from an area that, as in the instant

case, was remotely situated (Tr. 100) and in which, as in the instant case, the gravel deposit lie in an undeveloped state requiring a pit to be opened by the purchaser (Tr. 98, 99).

As to where the Court is to draw the line in view of the peculiar nature and situation of the commodity taken in this case involves practical considerations, weighing in the balance the possible degree of dissimilarity and confusion of issues as against the assistance this evidence furnishes the jury in arriving at a fair value to be paid. As stated in 5 Nichols on Eminent Domain, (3rd Ed.), 275 §21.3:

“The question whether such evidence shall be admitted does not depend upon any fundamental principle of the law of evidence, but is a purely practical one, depending upon whether there is a net gain or loss to the orderly and expeditious administration of justice in land damage cases by the use of such evidence.”

It is significant that appellant’s counsel sought below to restrict such evidence only to sales occurring precisely at the “promontory area” (Tr. 57). Such a view under the circumstances of this case would be unreal and unduly harsh and unfair on respondents. As stated in 5 Nichols, id., §21.3, and quoted with approval in *State v. Peek*, 1 Utah 2d. 263, 265 P. 2d 630, 637:

“It is evident that there may be considerable difference in the size, shape, situation and immediate surroundings of two estates, and perhaps in other respects, and yet the price which one

brought may be of substantial assistance in determining the value of the other."

Again at 5 Nichols, id. 280-281, §21.31:

"Similarity does not mean identical, but having a resemblance. Obviously, no two properties can be exactly alike, and no general rule can be laid down regarding the degree of similarity that must exist to make such evidence admissible. It must necessarily vary with the circumstances of each particular case. Whether the properties are sufficiently similar to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the sound discretion of the trial court, which will not be interfered with unless abused. *The exact limits, either of similarity or difference, or of nearness or remoteness in point of time, is difficult, if not impossible, to prescribe by any arbitrary rule, but must to a large extent depend on the location and the character of the property and the circumstances of the case. It is to be considered with reference to the light thrown on the issue, and not as a mere method of raising a legal puzzle.*" (Emphasis supplied.)

Our Supreme Court in *State v. Peek, supra*, has stated:

"However, to be admissible there must be a similarity between the two properties, even though they do not have to be identical in size or shape or possible uses, but there must be sufficient similarity in these respects and in proximity in time of sale and the location of the properties *to satisfy the trial judge that such evidence will be helpful to the jury in determining the value of the property in question.* This is a preliminary question for the trial judge to de-

termine before such evidence is admissable, and his determination should be followed by the appellate court in the absence of an abuse of discretion.” (Emphasis supplied.)

It is submitted that under the circumstances of this case the assistance given to the jury in fixing the value of respondents’ gravel by the evidence adduced of other sales was inestimable and that the admission of the same was in the sound exercise of the trial court’s discretion.

(c) ADMISSION OF CERTAIN INFORMATION CONTAINED IN NOTES ON PLAINTIFF’S EXHIBIT 2 WAS NOT PREJUDICIAL AND ANY ERROR IN CONNECTION THEREWITH HAS BEEN WAIVED.

In connection with Exhibit 2, appellant assigns the fact that said Exhibit contains two “Notes” at the bottom thereof as an additional reason for the alleged objectionable nature of the Exhibit (See pages 21, 22 of Appellant’s brief).

It is significant to note that appellant’s counsel below objected to the Exhibit as a whole and for the express reason that it referred to sales of gravel not “located on Promontory.” (Tr. 57) At no time did he direct the attention of the court to the particular portion of the Exhibit which appellant now complains of; and it is submitted that he may not now raise this particular objection for the first time on appeal.

Moreover, in view of the compelling and overwhelming competent evidence establishing value which the jury had before it, any error of the court in failing to strike from Exhibit 2 the two “Notes” referred to, if error

there be, was harmless. It is submitted that it cannot be seriously contended that there was a reasonable likelihood of a different result below, had the "Notes" been stricken.

It has long been the rule in this jurisdiction that where there is abundant competent evidence to establish the fact sought to be proved, admission of improper evidence does not constitute prejudicial error. Rule 61, U.R.C.P.; *Baird v. Denver & R.G.W.R. Co.*, 49 Utah 58, 162 Pac. 79, 83.

(d) THE PROPER MEASURE OF VALUATION IS THE FAIR MARKET VALUE OF THE RESPONDENTS' GRAVEL DEPOSITS SEPARATELY EVALUATED.

Inasmuch as the valuation fixed below was upon the basis of a fixed price per unit of the gravel deposits here involved, and not the fair market value of the land in which these gravel deposits were situate, respondents feel it is incumbent upon them to very briefly indicate to the court that the measure adopted was the proper measure.

Although appellant has not raised any issue in this connection, but indeed furnished testimony as to valuation also on a fixed price per unit (2/10c per cubic yard), in light of the recent decision of this court in the case of *State of Utah v. Noble*, 6 Utah 2d 40, 305 P.2d 495, it is felt that it should be demonstrated to the court that the instant case falls within a well recognized exception to the general principles laid down in the Noble case.

In the Noble case this court was of the opinion that

the evidence in the record as to valuation was based upon a computation of the amount of gravel and rock multiplied by the net profit that could be derived from the marketing thereof. This court there held that such evidence was not competent because although the quality, quantity, and extent of the gravel deposit situate upon the land sought to be condemned was an element to be considered in assessing the market value of the land, it was not the yardstick thereof. In the instant case, unlike the Noble case, the mineral deposit itself was actually the subject of the condemnation rather than the lands in which the minerals are situate. The measure of value to be applied must of necessity, therefore, be a different one. It was, therefore, proper in the instant case to separately evaluate the gravel deposit.

4 Nichols Eminent Domain, id., 244, § 13.22 states the general rule announced in the Noble case as follows:

“However, while the profits, price or value of the minerals, taken separately, may not be considered, yet the value, extent and quality of such minerals as exist upon the land may be considered.”

Nichols goes on to state that there is a well recognized exception to this general rule (246, § 13.22 [1]):

“The second exception to the general rule is applied where the mineral deposit itself is the subject of the condemnation. In such case the deposit is treated as so much merchandise rather than land. The rule applicable to personal property is invoked and the condemnor is liable for

the market value of the mineral deposit as separately evaluated."

The same rule was applied in the New Mexico case, *The Board of County Commissioners v. Good*, 44 N.M. 495, 105 P. 2d 470, in which condemnation proceedings were instituted seeking to condemn certain lands belonging to Good for the purpose of securing rock, sand, gravel and caliche for use upon a public highway. The trial court submitted to the jury the acreage value of the land taken, whereas Good claimed that he was entitled to show the market value of the minerals taken as separately evaluated. The Supreme Court of New Mexico held that this action of the trial court was error and reversed the case with instructions stating as follows:

"Appellant had the right to have the jury hear the evidence and determine the actual market value of the caliche rock taken from his land without reference to the value of the land itself ***.

"It may be doubted whether appellant offered to produce very satisfactory proof as to such market value, as distinguished from the value of the land itself, but that would be a question for the jury. It would go to the weight and not to the admissibility of the evidence."

The rule is similarly stated in the annotation contained at 156 A.L.R. 1419, wherein it is stated:

"Certain limitations of this general rule follow directly from the statement of the rule itself. Where the condemnation proceeding is concerned with a use of the land which leaves the mineral deposits untouched or where, on the other hand, only the minerals are taken and the land remains

in the owner's possession, the general rule will apparently become inapplicable."

It is, therefore, submitted, without dispute by appellant, that inasmuch as appellant sought here not to condemn the land itself, but rather a right of way for the purpose of extracting respondents' gravel deposit, that the trial court below applied the proper measure of value in this case, that is, the gravel deposit separately evaluated.

POINT II.

THE TRIAL COURT PROPERLY SUBMITTED TO THE JURY THE QUESTION OF DAMAGES TO RESPONDENTS' REMAINING LANDS AND THE VERDICTS RETURNED THEREON ARE SUPPORTED BY SUFFICIENT AND COMPETENT EVIDENCE.

(a) THE TESTIMONY CLEARLY SHOWS THAT THERE WAS NO POSSIBILITY OF REPLACING THE LANDS WHICH WERE DESTROYED BY APPELLANT IN EXCAVATING THE GREAT PIT FROM THE FLOOR OF THE LITTLE VALLEY CANYON; AND APPELLANT OBJECTED TO RESPONDENTS' QUESTIONS DESIGNED TO POINT UP CLEARLY THE UNAVAILABILITY OF OTHER LANDS.

The only question presented by appellant under this subdivision of its brief is whether "respondents failed to produce competent evidence that other similar lands were unavailable."

Appellant urges the court to recognize that the Chournos lands condemned by appellant which are involved in the severance award case (lower court No. 8191)

were, at the time of suit, isolated by distances up to six miles from his other grazing lands on Promontory by property of others. The facts are otherwise. In its brief, appellant refers to "the 40-acre tract taken for gravel in the Chournos case." In this particular case, there was a total of 200 acres of land area involved in appellant's taking, 160 acres of which land are in Section 13, which is south of Little Valley, and with which parcel we were not directly concerned in the severance award problems. The other 40-acre tract was located in Little Valley and was part of an 80-acre tract owned by respondents. The sand and gravel condemned and taken by appellant here was from the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 6, T. 6 N., R. 5 W., SLM. The facts are and the evidence clearly showed that Chournos also owned, at all times herein, the immediate contiguous parcel, the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of the same section (Ex. 1), making up the 80-acre tract.

An examination of Exhibit 1 shows the ownership of the lands within the entire area involved (Tr. 14, 16, 17, 18, 19). That map shows that the 80-acre tract (N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 6, above township) is contiguous along its entire south boundary for one-half mile to public domain which extends due south for one and one-quarter miles and that this public domain area extends also into the west half of this Section 7 which is directly south of the said Section 6. The testimony also shows without contradiction that Mr. Chournos is the only person qualified and permitted to graze these public lands (Tr. 176-77, 186). The said map exhibit also shows that the above 80-acre tract corners upon lands owned by respondent

Chournos along the south tier of forties in the adjacent section 5. And this is contiguous to approximately 5,000 acres of Chournos-owned lands located in the upper part of Little Valley and in the eastern and southern part of the Promontory Mountain. Every part of this acreage is contiguous to Chournos-owned lands. If no rights exist in Chournos (and such a concession was never made) to trail across the Adams lands located in the Section 5 directly east of the above said Section 6 (and the evidence is otherwise, Tr. 177, Ex. 1), it is clearly shown upon this map that a wide open and unobstructed way is available to Chournos to reach all of these lands from his said 80-acre tract in the said Section 6 by going across the public domain to the south for any distance up to a mile and a half and then easterly into several thousand acres of his patented lands.

As the said Exhibit map indicates, it is necessary for Mr. Chournos in moving from the the above 5,000 acre area of his lands to cross only two corners of sections of lands owned by Mrs. Arthur and Mrs. Hunter in reaching his additional 15,000 acres of lands located upon this one Promontory Mountain Unit of his range. It must readily be admitted that the 40 acres from which the sand and gravel were removed in Little Valley is not contiguous to every other parcel of the Chournos holdings on Promontory. Respondents never contended such to be the case, and such need not be the situation in order to support a severance award. This element is treated in another division of this brief.

The testimony and evidence in this case was plainly that Little Valley served as the trail-way, the only road, the frequently used and natural livestock passageway between the lands on the east and those on the west side of the mountain (Tr. 157, 158, 159, 161, 162, 198, 212, 225, 227), as well as the biggest, best and more excellent lambing range on the mountain (Tr. 148, 154, 159, 160), the route to the only live water in this area where these sheep can drink in the dry fall and spring of the year whenever snow is not available to meet this livestock need (Tr. 157, 158, 162, 215). It provided the easy, natural and convenient way for sheep to retreat to the safe winter range when caught in the higher elevations by too deep snows (Tr. 156, 157, 226, 227, 228). It was the safe and indispensable link for livestock operations; holding the east side and the west side ranges together as one unified parcel of grazing lands (Ex. 1, Tr. 161, 162, 178, 211).

The evidence is abundant and convincing to the effect that all of the above uses and purposes to which Little Valley had been put and which it had served before the gaping hole was excavated, from wall to wall of the canyon and for two miles in length, were destroyed for all time by the appellant's sand and gravel removal (Tr. 162-4, 171, Ex. 5, 6, 7). Not only was that area and its uses and relationships to the remaining lands of these respondents destroyed but a new element, never before present, was injected into this range area; a very serious and unnatural hazard was created and left by the appellant in this once very safe and usable piece of range (Tr. 64-6). This hazard is in the extremely high, unstable and per-

pendicular walls left around the 335-acre pit (Tr. 205, Ex. 5, 6, 7, 166). While this dangerous hazard may be eliminated by sloping down these high and steep banks, the cost thereof will approximate \$28,000.00, and even with this done, the range will remain forever without vegetation and will remain destroyed so far as any of the above uses and purposes are concerned (Tr. 168, 171, 207, 208). And the elimination of this hazard which never existed before would not alleviate the severance damage which appellant created (Tr. 161-66, 170-1).

The physical situation as it exists with this high rocky mountain ridge dividing the east side and the west side lands, with no other roads and no other usable passes to supply the means for livestock to move between the two, precludes the possibility, from the physical standpoint of securing other lands to supply the uses and purposes in connection with the continued use of the remaining lands, which the lands appellant destroyed once served. Ex. 1, 5, 6, 7, Tr. 154, 155, 161, 164, 171, 178, 211, 326, 333). It is submitted that, in this situation, where the identical location of the land destroyed by the condonor is the only location which a tract of land could occupy to meet the requirements of the remaining lands of the defendant, the rule requiring proof that similar lands are unavailable is satisfied, or is not applicable.

Any other land which might possibly serve the uses and purposes which the land appellant destroyed had served would have to contain water for livestock to meet the needs of the water which the lake shore had furnished

for livestock use to enable them to reach the available forage from this water hole. The evidence showed that there was no other water hole in this entire area to service these particular forage lands. Lands removed by any substantial distance from this area, without regard to how much water they might possibly contain, could not service this once important segment of range. Under this situation, the answer to the question whether substitute range is available to satisfy all of the uses and relationships which the lands destroyed once served is already obvious.

Sand and gravel from other lands or land areas might be available to replace that which was removed, and soil might conceivably be hauled in to fill up this huge pit in Little Valley to provide the needed fertile top-soil to support plant growth again. This is the only method by which other lands might be used to substitute for the lands destroyed. But this is unworthy of consideration not only because the cost of this replacement would be immeasurably beyond any amounts with which we are involved here, but years would be required to accomplish this impractical restoration of the ruined lands.

The considerable land area of the respondents had constituted one single, efficient and harmoniously functioning winter grazing and sheep lambing range before the connecting lands which served to combine the east and the west side of the mountain were destroyed by appellant. But, by this destruction of Little Valley, for all practical purposes, these land areas are physically and

permanently divided and separated one from the other so far as the livestock operations are concerned. The lands had been put to this use and to no other for many years. The fact that the two land areas on either side of the mountain could be held together only by land parcels in the location of those which appellant destroyed would seem to clearly furnish all the proof required that substitute lands could not be available in this situation.

Appellant neither requested an instruction to be given by the court to the jury relating to the availability or the unavailability of other lands, nor did it take any exception to the failure of the court to instruct the jury on this point.

At one point in the trial where respondent endeavored to summarize the showing that there was no other available land which might be secured to replace the parcels destroyed in Little Valley the appellant interfered with and objected to that testimony (Tr. 174). He, therefore, may not be heard to complain that such factual information was not further developed. This court has recently ruled on this point in *Weber Basin Water Conservancy District v. Braegger*, (No. 8835) as follows:

“The claim that the court’s instructions as to severance damages was inadequate in its failure to include a proviso that defendants were disentitled to such damages unless there was evidence showing non-availability of comparable land in the area, is answered by plaintiff’s successful objection to the introduction of such evidence, placing

plaintiff in no position to complain that the instruction was not given."

(b) THE DAMAGES AWARDED BELOW FOR THE DEPRECIATION IN THE VALUE OF THE RESPONDENTS' REMAINING LANDS WERE PROPER UNDER THE CONSTITUTION AND STATUTES OF THE STATE OF UTAH.

Appellant attacks the award below of damages for the depreciation in value of the respondents' remaining lands upon the theory that such damages resulted from appellant's operations upon lands not owned by respondents and further, upon the theory that, in any event, such damages were not proper severance damages under the statutes and decisions of this State.

The fallacy of this contention will be made apparent by demonstrating that the awards made below for damages to respondents' remaining lands are properly sustainable whether viewed as so-called "consequential damages" or as "severance damages."

Before proceeding to so demonstrate, however, a definition of terms, for the sake of clarity, appears to be in order. In every condemnation proceeding wherein damages to lands other than those taken are involved, two situations may conceivably arise: (1) That situation where part of a tract of land is physically appropriated, and (2) That situation where from public works on lands of others damages accrue to a tract of land no part of which is taken. 4 Nichols on Eminent Domain, (3rd Ed.), §14.1. For the sake of convenience, those damages accruing in situation (1) will be referred to in this brief as

“severance damages” and those damages accruing in situation (2) will be referred to in this brief as “consequential damages.” See 2 Nichols, id., § 6.4432.

There is an important distinction between “severance damages” and “consequential damages,” as those terms are used herein, which must be constantly borne in mind, because, as will be demonstrated hereafter, the concept of “severance damages” is much more liberal than the concept of “consequential damages.” In the case of “consequential damages,” the owner, in order to recover, must show that the consequential injury to his lands is peculiar to his lands and not of a type suffered by the public as a whole. 4 Nichols, id., §14.1; *Stockdale v. Denver & Rio Grande Western Railway Co.*, 28 Utah 201, 77 Pac. 849. Whereas, in the case of “severance damages,” the owner is not required to show the injury to be peculiar to his land, on the theory that the “just compensation” guaranteed by the constitution refers to the injury or loss to the whole tract caused by taking from it that part that is the subject of the condemnation. 4 Nichols, id., § 14.21.

(i) The Award Below for Damages to Respondents’ Remaining Lands Can Be Properly Sustained as Proper “Consequential Damages” As That Term Is Used Herein.

Bearing in mind the distinction above noted between “consequential damages” and “severance damages,” it will now be demonstrated that under our Constitution, statutes, and decisions, “consequential damages” may be awarded in this State and were properly awarded under the circumstances of the instant case.

It must at the outset be observed that “consequential damages” may not be awarded under the rule prevailing in many of the jurisdictions of this country, most notable of which is the Federal rule prohibiting such an award. 4 Nichols, id., 288 § 14.1[1]. This fact must be borne in mind in examining many of the authorities cited by appellant. The divergence of judicial opinion on this subject results directly from the variance in the phraseology of the various constitutional and statutory provisions relating to the subject. 4 Nichols, id., § 14.1[1]. For example, the Fifth Amendment to the Constitution of the United States provides that:

“. . . nor shall private property be *taken* for public use without just compensation.” (Emphasis supplied.)

There is no mention of “damage” to private property for public use in the Fifth Amendment. This explains the rule now obtaining in the Federal Courts; and this is the rule that appellant urges likewise obtains in the State of Utah. Keeping clearly in view appellant’s argument that damages may not be awarded in the State of Utah as a result of public works performed upon lands of another, let us examine our Constitutional and Statutory provisions relating to the subject.

Article I, Section 22 of the Constitution of the State of Utah is identical to that contained in the Federal Constitution except for one very important distinction. It provides as follows:

“Private property shall not be taken *or damaged* for public use without just compensation.” (Emphasis supplied.)

Section 78-34-10(3) U.C.A., 1953, makes the distinction even more apparent:

“Compensation and damages — how assessed — The court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

* * *

(3) If the property, *though no part thereof is taken*, will be damaged by the construction of the proposed improvement, the amount of such damages.” (Emphasis supplied.)

The decisions of our Supreme Court clearly indicate that under our Constitution and Statutes, damages may be awarded as a result of activities conducted upon lands other than those belonging to the owner seeking the award. *Kimball v. Salt Lake City*, 32 Utah 253, 90 Pac. 395; *Hempstead v. Salt Lake City*, 32 Utah 261, 90 Pac. 397; *Cook v. Salt Lake City*, 48 Utah 58, 157 Pac. 653, 645; *Robinett v. Price*, 74 Utah 512, 280 Pac. 736; *State v. District Court Fourth Judicial District*, 94 Utah 384, 78 P.2d, 502, 508; *Stockdale v. Denver & Rio Grande Western Railway Co.*, *supra*; *State v. Ward*, 112 Utah 452, 189 P. 2d 113, 117.

In discussing the significance of the phraseology contained in Article I, Section 22 of the Utah Constitution as broadening the scope of damages that may be awarded in eminent domain proceedings in the State of Utah, the Supreme Court stated in the case of *State v. District Court Fourth Judicial District*, *supra*, as follows:

“Much argument might be devoted to the question whether there is involved in this case a ‘taking’ or a ‘damaging’ of property. Almost countless decisions of courts might be cited on either side of the question. *We believe, however, that in incorporating in the constitution a provision requiring just compensation for property damaged for public use, it was intended to put an end to such controversy and to protect the damaged property owner equally with the property owner whose land was physically entered upon.* (Emphasis supplied.)

The view announced immediately above is consistent with one of the very earliest pronouncements upon this subject in this State contained in the case of *Stockdale v. Denver & Rio Grande Western Railway Co.*, *supra*, wherein the Supreme Court upheld an injunction against defendant railway company prohibiting it from the running of cars and engines upon lands adjacent to those of the plaintiff, with the proviso that if the defendant company proceeds in eminent domain, the injunction would be dissolved. The Court there stated:

“Many of the earlier cases adopted the more restrictive construction, and held that, to bring a case within the foregoing provision of the Constitution (of the United States), there must be an actual physical appropriation of private property sought to be converted to a public use; but . . . the great weight of the more recent judicial authority, which we believe to be supported by the better reason, and which is more in accord with our ideas of equity and natural justice, holds that any substantial interference with private property which destroys or materially lessens its value, or

by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed is, in fact and in law, a taking in the constitutional sense to the extent of the damages suffered, even though the title and possession of the owner remain undisturbed.

* * *

Under the provisions of the Constitution of this State herein before referred to (Article I, Section 22), a party whose property is about to be specially damaged in any substantial degree for public use has the same rights and is given the same remedies for the protection of his property from the threatened injury as would be accorded him if his property were actually taken and appropriated for such use. That such is the spirit and intent of the foregoing provision of the Constitution is evident from the tone and character of the extended discussions on this question in the constitutional convention at the time the provision was adopted and became a part of the organic law of the State.” (Emphasis supplied.)

That section of our Code quoted above (Section 78-34-10 (3), U.C.A. 1953), has long been a part of our statutory law. See, R. S., 1898, § 3598. Our Supreme Court in the case of *State v. Ward, supra*, had occasion to briefly make reference to the quoted portion of that Statute in the following words:

“If there is no taking of part of the property but only a damaging as contemplated by Paragraph (3) then . . .”

The question for analysis is not, therefore, as appellant suggests, whether or not the damages awarded below

were awarded as a result of the activities conducted by appellant on lands other than those belonging to the respondents, since it is obvious from the foregoing authorities that such damages may be in a proper case recoverable. Rather the question for analysis is, under what circumstances may such damages be properly awarded or, stated another way, when are such damages of a type that are peculiar or special to the property allegedly damaged and not of a type suffered by the landowner in common with the public as a whole.

The case of *State v. District Court Fourth Judicial District, supra*, clearly indicates, and respondents concede, that not all damages attributable to activity conducted upon adjacent lands are compensable. Only such damages as reach the "actionable degree" may be considered. It was there stated:

"We believe that the line of demarcation should be drawn at the point of **actionable damage**. The Constitution clearly does not require compensation for damages not recognized as actionable, at common law, but for a damage of property 'to the actionable degree.' The Constitution makers intended the landowner to have just compensation equally with the landowner whose property was physically taken."

As to what is meant by "actionable damages" in the law of eminent domain is more precisely illustrated by the earlier case of *Twenty-Second Corporation, etc. v. Oregon Shortline R. Co.*, 36 Utah 238, 103 Pac. 243, 248, wherein damages were sought under our Constitutional provision, quoted above, for annoyance and interference

with the carrying on of orderly undisturbed church services. Plaintiff there complained of noises, blowing of whistles and ringing of bells in connection with the operation of defendant railroad on adjoining land. The Court held that damages of this type are not compensable, because the interference complained of was not one peculiar to the plaintiff, but rather shared by all the residents along the railroad track in common with the plaintiff. The Court, however, made the following important observations:

“It will be observed that in this case no question is raised with respect to *interruptions of ingress and egress to and from the property alleged to be damaged.*”

* * *

“... The clause in the Constitution (of Illinois which is identical to that of Utah) is limited to damages arising from some physical disturbance or interference with *some property right*, as distinguished from mere annoyance.

* * *

“... In order to bring the case within the damage clause of the Constitution there must be some physical interference with the property itself *or with some easement that constitutes an appurtenance thereto.*”

* * *

“... A critical examination of the cases cited ... will disclose that in nearly all, if not all of them, *some easement or appurtenance to the property in question was physically interfered with.* ... ” (Emphasis supplied.)

Let us apply the foregoing concepts to the facts of the instant case. The record shows without dispute that for many years sheep have been trailed east and west across the Little Valley pit area, which area has afforded the only natural and expeditious pass for trailing sheep from the east side of the mountain to the western slope. This area was shown to constitute a natural, protective lambing ground in addition to and as an adjunct of the trailing operations. In short, it has been a necessary connecting link between respondents' lands situated as they are. It must, without serious contention, be clearly determined to be a valuable appurtenance to respondents' remaining grazing lands. This appurtenance has not only been physically entered upon, but has been physically cut away leaving in its stead a yawning, man-made hole, damaging respondents to a substantial degree in their use and enjoyment of their remaining lands because of the nature of the use to which those lands had been, in fact, put. It is at once clear that such a substantial interference does not constitute that type that adjoining landowners (assuming such landowners to have existed) having no peculiar interest in the use of the Little Valley area, would have shared in common with respondents. On the contrary, as a result of the use to which respondents put their lands, and as a further result of the vital and integral part that the Little Valley area played in connection with that use, such damages, it is submitted, must, of necessity, be of a type special and peculiar to respondents' use of their lands and not of a kind shared in common with the public generally.

It follows, therefore, that appellant's argument to the effect that the award appealed from cannot be sustained because based *in part* upon appellant's operations on lands of another, must of necessity fail, when, as demonstrated above, such an award would have been proper though based *entirely* upon such operations on lands of another.

(ii) The Award Below for Damages to Respondents' Remaining Lands Can Be Sustained as Proper "Severance Damages" As That Term Is Used Herein.

If we may assume, for purposes of argument only, that the damages sustained by respondents to their remaining lands by reason of the destruction of the trailing easement across the Little Valley pit area, were not of a type peculiar or special to such remaining lands but were of a type shared with the general public in common, nevertheless, it will now be demonstrated that the award below, though based upon the operations of appellant upon the whole pit area and not just upon that portion of the pit area belonging to the respondents, is properly sustainable as "severance damages" as that term has been used herein. It should be remembered, as pointed out earlier in this brief, that "severance damages" embrace a more liberal concept than "consequential damages" in that "severance damages" may be awarded, though such damages are of a type that are not peculiar to the landowner but shared in common with the general public.

"Severance damages," unlike "consequential damages," as those terms have been defined herein, are properly awarded in all the jurisdictions of this country in-

cluding that of the Federal Government, because, as pointed out above, land has actually been *taken* from a landowner. See Section 78-34-10 (2), UCA, 1953. It appears, however, to be the general rule that ordinarily the depreciation in value of the remaining lands is limited to only such as is attributable to the use of the land taken from the owner of the remainder area. There appears, however, in reason and justice, to have developed a clear-cut exception to this general rule. That exception may be stated as follows: That where the damages caused to an owner's remaining area by reason of the severance therefrom of part of such tract are inseparable from the damages caused to the remainder area by the use of lands acquired from others, then the owner is entitled to his full damage, though it be based in part upon the use of his lands theretofore severed and the use of other lands. 4 Nichols, *id.*, 315, §14.21[1], in speaking of the general rule states as follows:

“This rule has been criticized upon the ground that it is difficult, if not impossible, to separate one element from the other, and that under the circumstances the owner of the remainder area is entitled to all damage caused by the use of an entire project. A railroad, for instance, is an entire thing. It is impossible for any human intelligence to separate the loss or injury which its operation causes, apportioning so much to one portion and so much to another.”

One of the earlier cases to announce this exception is the case of *Chicago K & N Railway Company v. Van Cleave*, 52 Kan. 665, 33 Pac. 472, wherein the railroad

contended that the landowner should recover damages only for the injuries sustained by him because of the use of the railroad of that part of its proposed right of way that was actually taken from his land, and that nothing could be recovered because of cuts and embankments or of the construction and operation of the road on property belonging to others. The Court, in disposing of this contention, stated as follows:

“The right to condemn the land is based upon the necessity existing or at least supposed to exist that the company should have it for use in connection with its road. We think the cuts, embankments tracks, ditches and right of way are to be considered as one entire thing in determining the plaintiff’s damages. Usually the appropriation of a narrow strip along one of the boundary lines of a tract of land results in comparatively little damage to the land not taken, but it is not always so, and where any portion of the plaintiff’s land is condemned, we are unable to conceive any rule by which the plaintiff’s damages could or should be measured at either more or less than the *whole* damage which he actually sustains by reason of the appropriation of his land, *and* the construction of the road.” (Emphasis supplied.)

And again in the case of *Blesch v. Railway Company*, 43 Wis. 183, 2 N.W. 113, it was stated as follows:

“The counsel for the company argued that the plaintiff should recover such damages only as resulted from the six-inch roadbed encroachment upon his premises . . . If by this it is meant that the plaintiff should recover only the fractional part of the damages which the construction and operation of the road worked to his premises, a

bare statement of the proposition is sufficient to show its unsoundness. A railroad is an entire thing, and it is impossible for any human intelligence to separate the loss or injury which its operation causes, apportioning so much to one portion and so much to another.”

In the case of *Haggard v. The Algona School District*, 113 Iowa 486, 85 N.W. 777, wherein a half lot was severed from plaintiff's property for use together with other property in the construction of a school site, it was stated:

“Who can say in this case, for instance, how much the inconvenience due to the proximity of the school building on the balance of this block would be increased by the fact that the half lot in question was included in the schoolhouse site? . . . if the legislature has provided that a more liberal measure of compensation shall be adopted—one which gives to the man whose property is taken compensation for damages which he actually suffers, although one whose land is not taken must suffer the same injury without compensation—then the corporation which seeks to take the land must submit. . . . We see no reason, therefore, why the inconvenience due to the proximity of the schoolhouse, as affecting the market value of appellee's residence property, should not have been taken into account.”

In the case of *Andrews v. Cox*, 129 Conn. 475, 29 A. 2d 587, a small triangular portion of the plaintiff's property was taken for use in the construction of a raised highway, the embankment for which started on the land taken. The Court stated as follows:

“It would be very difficult to separate the

effect upon the value of the plaintiff's remaining land of so much of the embankment as was on the land taken from the effect upon that value of the embankment as a whole. * * * The element of cause and effect is present in any award for depreciation in the value of the remaining land due to the use of the land taken for the making of the improvement; damages of that kind are given because they are caused by the use of the land taken; and where the making of the improvement requires as an integral and inseparable part the use of the land taken, though the improvement as a whole extends to adjoining land, that use is a contributing cause of the effect produced by the entire improvement * * * Where the use of the land taken constitutes an integral and inseparable part of the single use to which the land taken and other adjoining land is put, the effect of the whole improvement is properly to be considered in estimating the depreciation in value of the remaining land."

Recently the Supreme Court of the State of Minnesota adopted the exception announced above and modified the law of that State as theretofore announced in the case of *Adams v. Chicago B. & N. R. Co.*, 39 Minn. 286, 39 N.W. 629, when in the case of *City of Crookston v. Erickson*, 69 N.W. 2d 909, 914 (Minn. 1955), it held that a landowner may be entitled to recover damages for the depreciation of his remaining land caused by the erection of a sewage disposal plant in part upon lands severed from the owner's tract and in part upon lands belonging to others. The court stated in the Erickson case:

- "We therefore modify the rule of the Adams case to the extent that where a part of an owner's land is taken for a public improvement such as

this, and the part taken constitutes an integral and inseparable part of a single use to which the land taken and other adjoining land is put, the owner is entitled to recover the full damage to his remaining property due to such public improvement even though portions of the public improvement are located on land taken from surrounding owners.”

In the case of *Campbell v. United States*, 266 U.S. 368, 69 L.Ed. 328 (1924), which case is cited in appellant’s brief, the district court had found separately the damages sustained by the owner to his remaining lands as the result of the use to which the land taken from him had been put and separately the amount of damages sustained as a result of the whole improvement. The Supreme Court held that the landowner was entitled only to the former amount, and in so doing, made reference to the *Blesch*, *Van Cleve*, and *Haggard* cases, cited above. The court noted, however, as follows:

“In each of these cases, it was impossible separately to ascertain the damages caused to the remainder of the owner’s tract by the taking and proposed use of a part of it. *In this case such damages were separately found, and plaintiff does not complain in respect of the amount of that element.*” (Emphasis supplied.)

In light of the exception announced to the general rule by the foregoing authorities, it is proper that we examine the Utah Statute dealing specifically with “severance damages.” Section 78-34-10 (2), U.C.A., 1953 provides that there must be assessed:

“(2) If the property sought to be condemned constitutes only a part of a larger parcel the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned *and* the construction of the improvement in the manner proposed by the plaintiff.” (Emphasis supplied.)

It is significant, we submit, that our Statute does not limit a landowner solely to the damages to his remaining lands resulting from the severance alone. It states clearly that such damages shall be awarded as may be sustained by reason of (1) “its severance from the portion sought to be condemned,” *and* (2) “the construction of the improvement in the manner proposed by the plaintiff.” Viewed in the light least favorable to the respondents, it is submitted that the legislators by enacting such a statute have clearly ingrained into the law of this State the exception to the general rule above announced. Viewing the Statute in the light most favorable to the respondents, it may be suggested that damages may be thereunder awarded to the remaining lands as a result of the entire project without regard to whether that part thereof which is conducted upon lands severed is an integral and inseparable part of the whole.

Be that as it may, however, it is submitted that the facts in the record, in any event, clearly fall within the exception to the general rule above noted. The pit excavated by appellant represents one entire project. It seems an obvious fact that respondents’ lands taken constituted an inseparable part of the whole pit. Who can say, with any degree of reason, how much of the damage to re-

spondents' remaining lands was caused by the removal of the millions of cubic yards of gravel from their lands alone and how much of that damage was caused by the removal of the millions of cubic yards of gravel from other lands, apportioning so much to one and so much to another. It is submitted that it is clear from the record that it would be absolutely impossible "for any human intelligence" to accurately determine how much of the diminution of respondents' remaining lands was attributable solely to the excavation done on their lands. It is submitted that such damages cannot be separated and that respondents' lands taken formed an inseparable and integral part of the entire pit.

It is, therefore submitted that the damage to respondents' remaining lands may be properly awarded from the excavation of the entire pit area, although part of that area be upon lands belonging to others upon either the theory of "consequential damages," as that term is used herein, and/or under the more liberal concept of "severance damages," as that term is used in this brief.

(c) THE DAMAGES AWARDED BELOW TO RESPONDENTS' REMAINING LANDS WERE FOR THE DEPRECIATION IN THE VALUE OF THOSE LANDS AND NOT LOSSES TO THE BUSINESS CONDUCTED THEREON.

This Court is urged by appellant to over-turn the judgment below for the reason that the so-called severance damages awarded below were, in effect, damages resulting to the sheep operations of the respondents and that, therefore, the same, being a damage to the

business of respondents, is not properly recoverable in eminent domain proceedings, if at all. Appellant relies in making this contention upon certain testimony adduced from respondent Chournos and quoted on Page 35 of appellant's brief. Although respondents do not quarrel with the law as announced by the decisions cited by appellant, it is submitted that appellant has misinterpreted and misconstrued the purpose and the nature of the testimony offered and has misapplied the law to the facts of this case.

The testimony clearly shows that the measure of damages claimed for the remaining lands of the respondents and testified to by the respondent Chournos and witness Keller was the *diminution in the market value of the land as a result of the proposed improvement*, to wit: the excavation (Tr. 171, 183-185, 232). The measure of damages utilized was not, as one might suspect from reading appellant's brief and the abstracts of the decisions contained therein, loss of profits, destruction of livestock, or loss of good will.

It was both proper and necessary for respondents to show below the use to which respondents' remaining lands were plainly adapted and the use to which such lands had, in fact, been put, and to further show that the Little Valley area in which the huge excavation pit was dug by appellant formed an integral part of that use. It was the use of respondents' remaining lands and the use to which those lands were plainly adapted that gave them value. The use to which the land is

adapted and has been put is always a relevant inquiry insofar as it affects the market value of the land.

4 Nichols, id., 38, §12.2 [3], et seq. states as follows:

“Generally speaking, the true rule seems to be to permit proof of all the varied elements of value; that is, all the facts which the owner would properly and naturally press upon the attention of a buyer with whom he is negotiating a sale and all the facts which would naturally influence a person of ordinary prudence desiring the purchase. In this estimation, the owner is entitled to have consideration given to all the capabilities of the property, *to the business or use, if any, to which it has been devoted*, and to any and every use to which it may reasonably be adapted or applied. And this rule includes the adaptation of value of the property for any legitimate purpose or *business*, even though it has never been so used and even though the owner has no present intention to devote it to such use.” (Emphasis supplied.)

And at 263, §13.3 [1]:

“Where the character of the property is such, however, that, independently of the labor, skill or knowledge of its owner, it lends itself peculiarly to a particular use, *a business based upon such use*, and then the profits therefrom may be considered in ascertaining the market value of the land. Also, where such business contributes all or the principal part of the value of the land, it has been held that consideration may be given to such business.” (Emphasis supplied.)

Moreover, certain portions of respondents' remaining lands, particularly those of respondent Chournos,

were disconnected from the parcel actually taken (Tr. 144-147). The law appears to be rather clear that where severance damage is claimed for remaining lands that are parcels separated from the parcel condemned and severed, that severance damages may not ordinarily be awarded unless it be shown that the several parcels constituted one economic unit. 4 Nichols, id., 426, 428, §14.3, discusses this proposition as follows:

“It is well settled that when the whole or a part of a particular tract of land is taken for the public use, the owner of such land is not entitled to compensation for injury to other separate and independent parcels belonging to him which results from the taking.

* * *

“If, as a matter of fact, however, the contiguous parcels constitute one tract, *so far as actual* use by the owner is concerned, it has been held that the contiguous parcel may be considered as a remainder area and the damages ascertained upon that basis. Thus, if several parcels together constitute one farm, operated as a unit, the damages must be considered to the entire farm.” (Emphasis supplied.)

The question then arises as to when are two tracts of land contiguous as that term is used in the quotation above. 4 Nichols, id., 432, et seq., §14.31 [1] answers this question as follows:

“Actual contiguity between two separate parcels is ordinarily essential to merit consideration as a unified tract. Actual physical separation by an intervening space between two parcels

belonging to the same owner is ordinarily ground for holding that the parcels are to be treated as independent of each other, but it is not necessarily a conclusive test. *If the land is actually occupied or in use, the unity of the use is the chief criterion.* When two parcels are physically distinct, there must be such a connection or relation of adaptation, convenience and actual and permanent use *as to make the enjoyment of one reasonably necessary to the enjoyment of the other in the most advantageous manner in the business for which it is used, to constitute a single parcel within the meaning of the rule.*" (Emphasis supplied.)

The Court's attention is directed to the case of *Grand River Dam Authority v. Thompson*, 118 F.2d, 242 (10th Cir. 1941), wherein the question was raised as to whether or not it was a question for the Court or for the jury to determine whether two certain tracts of land constituted one unit or separate independent tracts. The Court, in its treatment of this question, discussed the so-called unit rule (expressed in the quotation above) at some length and with exhaustive citation, indicating clearly that it is overwhelmingly the general rule of this country. It is apparent that the application of the unit rule in determining severance damages, by its very definition, would be all but impossible without a consideration of the use to which the land itself is put and this is true whether the use to which the land be put be that of a farm operation, as is the usual case, or a livestock operation as in the instant case. Cf. *Provo River Water Users Association v. Carlson*, 103 Utah 93, 133 P.2d 777. It is submitted

that unity of use being the criterion, no reasonable logical distinction may be made on the basis of the nature of the particular use to which the land is put. This is illustrated clearly in the case of *City of Tulsa v. Horwitz*, 131 Okla. 63, 267 P. 852, 854, wherein the doctrine was applied by reason of the use of two parcels in a unified pipe supply business, wherein the court stated:

“The evidence shows that the two lots were separated by a 20-foot alley but that they were suitable for and intended to be and had been used in the pipe supply business, were bought at the same time and intended to be used for that purpose, and had always been used together, so that the taking of a part of Lot 1 necessarily affected the value of Lot 2 to some extent.”

A very recent pronouncement by our Supreme Court in the case of *Weber Basin Water Conservancy District v. Ward, et al*, 347 P.2d 862, 864 (Utah, 1959) clearly indicates that Utah is among those jurisdictions committed to the unit rule and that further in its application, the nature and extent of the business conducted upon the land is a vital and necessary consideration for the court and jury. In that case, the respondents operated a dairy farm and claimed and were awarded substantial damages as a result of the severance of the land condemned. The court held that it was error for the trial court to prohibit examination as to the profitable operation of respondents' dairy, the *business* conducted upon the land in question, and in so doing, stated as follows:

“The objections of the defense counsel and the rulings of the court prevented effective inquiry into the *important and material fact*: Whether the dairy farm was in fact a well-balanced economic unit as the defendant claimed.” (Emphasis supplied.)

It is submitted, therefore, that appellant has failed to draw the necessary distinction between measure of damages, on the one hand, and use, adaptability to use, and unity of use of the lands involved by reference to the business conducted thereon, on the other. The evidence clearly showed that the proper measure of damages was the diminution in the value of the land and the court's instruction to the jury clearly encompassed this measure (Tr. 350, 351). There can be, therefore, no error based upon the presentation of the evidence attacked by appellant, for such evidence under the circumstances of this case, with regard to the issue of severance damages, was not only proper but necessary.

(d) THE DAMAGES AWARDED TO RESPONDENTS' REMAINING LANDS WERE NOT THE RESULT OF ADDING VALUES FOR THE DIFFERENT USES OF THE LANDS TAKEN.

Appellant, as an additional reason for reversal, contends that the award below was arrived at by adding the values of the different uses for the land taken. A fair appraisal of the argument presented by appellant in this connection indicates that appellant contends that respondents may not recover for the value of the sand and gravel taken and also, in addition thereto, the value of the strip of respondents' respective lands upon

which the pit was excavated and from which the gravel deposit was extracted. It is submitted that this argument also misconceives the nature of the evidence and the award below. The award below was, of course, in two parts. The first was for the value of the sand and gravel taken on a unit basis at a fixed price per unit, which the jury determined to be three cents per cubic yard of gravel. A determination on that basis was necessary because appellant did not seek to take the land itself but rather sought a right of way upon the land for the purpose of excavating therefrom the gravel and fill material. As pointed out earlier in this brief, there was thus presented for the trial court below an exception to the general rule that the profits, price, or value of minerals, taken separately, may not be considered in determining the value of the land condemned. Cf. *State of Utah v. Noble, supra*.

In addition to the value of the gravel deposit taken by appellant the respondents also claimed severance and/or consequential damages to their remaining lands. Appellant apparently fails to take cognizance of the fact that these damages are based upon the diminution in the value of the remaining lands of respondents by reason of the severance of a portion thereof by appellant and as a result of the construction of the improvement here involved, to wit: The excavation of the pit area from which the sand and gravel were extracted. This amount is not, as appellant claims, additional compensation for the lands taken, but is clearly an award for the damages sustained to the remaining lands belonging to respondents.

Respondents again do not quarrel with the law as announced by the authorities cited in appellant's brief. However, the respondents invite the court's attention to the fact that each citation deals with the proposition of double compensation for the land *actually taken* and do not deal at all with the question of severance and/or consequential damages to remaining lands. The law as announced by these various authorities have no application whatsoever to the question of severance or consequential damages to other lands and a *fortiori* no application to the issues sought to be raised in this appeal.

It is possible, of course, that an award of double damages might conceivably result in a particular type of case. For example, in the instant case, had appellant seen fit to condemn the lands belonging to respondents in the Little Valley area, rather than the fill material contained therein, and the Court below had awarded an enhanced value of these lands by reason of such lands forming an integral part of all of respondents' lands, rather than an award of its actual value considered separate and apart from respondents' lands, and then, in addition, also awarded severance damages to the remaining lands, there might conceivably be a case made out for double damages. To further illustrate, if the respondents' lands had been actually condemned and without considering all of the lands owned by respondents of which the lands taken formed a part, the lands taken were of a value of \$20.00 per acre, but that such value was enhanced, by reason of it constituting

on integral part of these other lands, to \$30.00 an acre, and then severance damages were awarded in addition to the enhanced value, double damages would probably result. See 4 Nichols, id., 331 §14.23 [1].

However, as pointed out above, this was most definitely not the case below. The value of the rock and fill material was separately evaluated, and under no posture of the evidence adduced below could it conceivably be said that that value was fixed in consideration of the use of such rock and fill material in connection with the balance of the lands owned by the respondents.

Appellant cites the case of *Morton Butler Timber Co. v. United States*, 91 F. 2d 884, in his argument upon this point, wherein the owner attempted to recover not only for the value of the timber taken from his land, but also for the stumpage value of the timber. It is submitted that a more appropriate and applicable example would be one wherein the landowner owned a home site surrounded by forest land and where the condemning authority condemned a right of way only upon the forest land to denude it and take away the timber growing thereon. Could it then be said, by any stretch of the imagination, that payment by the condemning authority for the resulting diminution in value of the owner's home site by reason of the loss of shade, cover, protection, and general beauty previously afforded to the home site area by the forest need not be made since the landowner has already been compensated for that loss when he received payment for the timber at

its fair market value per board foot? One need not be a real estate expert to realize that the value of the home site has been greatly diminished by the taking of the trees. On the contrary, there is a clear and distinct damage resulting to the owner's remaining land that should be properly paid in addition to the value of the timber taken. So it is in the instant case.

It is submitted, therefore, that appellant's argument seeks by some verbal legerdemain to twist the situation as reflected in the record into something which is clearly not justified by the evidence.

(e) THERE IS COMPETENT EVIDENCE OF RECORD UPON WHICH THE JURY PROPERLY BASED THEIR FINDING OF DAMAGES TO RESPONDENTS' REMAINING LANDS.

The record clearly reflects that the respondent Chournos and the witness Boyd Keller, who together represented a combined total of at least sixty years' experience in the sheep and livestock business conducted upon the very area in question (Tr. 154, 221), testified that, in their respective opinions, the diminution in the value of respondents' remaining lands as a result of the excavation of the pit by appellant was at least a 20% depreciation, in the opinion of Chournos, and a 25% depreciation, in the opinion of Keller (Tr. 171, 183-185, 232). The record further reflects that the rental received from the Hunter-Arthur lands was \$7,000.00 annually (Tr. 170). Without any consideration being given the 90,000 acres of the Chournos lands which are located elsewhere, the record and exhibits show that the

Promontory Mountain lands of respondent Chournos are identical to those of respondents Hunter and Arthur in quality, location and use, and that as a matter of fact, Chournos, Hunter and Arthur own undivided interests in several of the same parcels, which fact required the establishment of herd lines (Tr. 199, 200). It was clearly presented to the jury that a 20-year capitalization of the annual return on a tract of leased land is proper and acceptable to arrive at the value thereof (Tr. 232). It is submitted, therefore, that although no specific market values of respondents' remaining lands were given, either before or after the excavation of the pit area, under the testimony given, such values would be simply the result of a mathematical computation involving the multiplication of the rental value times 20 to arrive at the market value before the excavation of the pit and, using the opinion given by witness Keller as to the amount of depreciation, simply depreciating that value 25% to arrive at the value after the excavation of the pit — the difference representing the damages claimed. Appellant apparently now seeks a new trial on the basis that the mathematical computation above referred to was performed and only the end results thereof, namely, the amount of damages, rather than the "before" and "after" values of the land, given to the jury.

5 Nichols id., 346, §23.3, in discussing this very issue states as follows:

"Once it is conceded that the witness may state the before and after values it is a mere

matter of form whether the simple mathematical computation of arriving at the damage by subtracting the value after from the value before the taking is to be made by the witness or by the jury. It is accordingly held in many jurisdictions that a duly qualified expert may testify directly as to the amount of the damage * * *. In some of the states in which such testimony is not considered strictly competent, its admission is not necessarily a cause for setting aside a verdict otherwise unobjectionable. *The modern tendency is to discard arbitrary rules of evidence which have no substantial principle behind them, but which continually involve the court and counsel in quibbles over the form in which interrogatories shall be put. It has been said that opinion evidence may be allowed of the diminution in value without a statement of the before and after values.*" (Emphasis supplied.)

"The fact that the computations of the values of the remaining property "before" and "after" utilize the capitalization of the rental return of the property involved does not render such testimony incompetent. When appellant refers to the use of rental value as "artificial" and "deceptive," it is overlooking a rather basic and common-sense device in the fixing of land valuations. As stated in 5 Nichols id., 215, §19.2:

"However, as a safe working rule, if property is rented for the use to which it is best adapted, the actual rent reserved, capitalized at the rate which local custom adopts for the purpose, forms one of the best tests of value, and accordingly evidence of the rent actually received at a time reasonably near the punctum temporis of the taking should be admitted." (Emphasis supplied.)

This has long been the law of this jurisdiction. In the case of *Ogden L. & I. Ry. Co. v. Jones*, 51 Utah 62, 168 Pac. 548, 550, the railroad company alleged error upon the part of the lower court in allowing the landowner's counsel to elicit on cross-examination the rent paid for the land in question in the year 1914. The crucial date for the fixing of value was August 6, 1915. [It should be noted that the rental value testified to in the instant case was fixed on the precise date of the occupancy of these lands by appellant (Tr. 170.)] It was stated by our Supreme Court as follows:

“The general holding of the courts is to the effect however that for the purpose of proving value of the premises in question it is proper to show the rental value of the premises and what rents were paid therefor at and for a reasonable time before the action was commenced.”

There was placed before the jury below competent and uncontradicted evidence of: 1. the rental value of the lands involved; 2. the acceptable rate that local custom has adopted for the capitalization of rental value to arrive at market value; and 3. the percentage of diminution in that value as a result of the improvement. There was also placed before the jury the proper measure of damages stated in the court's instructions (Tr. 350, 351). From this, the jury could and did properly draw its conclusion as to the amount of damage sustained. Appellant by seeking a new trial, and the additional expensive and prolonged litigation that a new trial entails, in order to establish the “before” and “after” values of the land involved when these values

are merely mathematical conclusions easily drawn from the factual testimony in the record, seeks, it is submitted, to sacrifice the ends of fair and practicable justice for the sake of a mere formal technicality.

POINT III.

BASED ON THE COMPETENT EVIDENCE OF RECORD, IT CANNOT BE SAID THAT THE VERDICT BELOW WAS EXCESSIVE AND THE RESULT OF PASSION AND PREJUDICE.

Respondents will not burden the court with a prolonged recital of the competent evidence presented below respecting valuation and damage. That evidence has been detailed at some length earlier in this brief.

Suffice it to say that the testimony given, by way of direct opinion, comparable sales, and analysis of the nature and adaptibility of the property here involved, by seven well-qualified, experienced witnesses clearly supports a verdict fixing valuation at 3c per cubic yard for the material taken. The overwhelming strength of this testimony is more apparent when view in the light of appellant's testimony offered to contradict: one comparable sale made to the condemnor itself;* and opinion testimony offered by only one witness of limited experience and employed by the very contractor to whom appellant furnished the material condemned.

The testimony offered by respondents to support

*In most jurisdictions, evidence of sales to the condemnor is not admissible. Anno. 118 A.L.R. 893; cf. *Weber County v. Ritchie*, 98 Utah 272, 96 P. 2d 744.

the damages resulting from the taking was, as indicated earlier herein competent and proper and the result of a lifetime of experience in livestock operation, upon the very ground in question. Moreover, this testimony was completely uncontradicted! The valuation fixed and the damages awarded were within the limits fixed by all witnesses called by respondents, with the exception of respondent Chournos himself whose testimony as to damage was \$28,000.00, whereas Keller's was \$35,000.00 (Pages 19, 21 of this brief).

In light of the evidence adduced below, which would clearly support verdicts in excess of those returned by the jury, it is submitted that the following rule pronounced by this court in the early case of *Braegger v. O.S.L.R.R. Co.*, 24 Utah 391, 397, 68 Pac. 140, is dispositive of appellant's contention:

"The appellant complains that the verdict appears to be excessive, and given under the influence of passion or prejudice and is not justified by the evidence. The answer to this is that under our Constitution the amount of the verdict is a matter entirely within the province of the trial court and jury, the same being a question of fact. If there is *any* evidence to support the verdict, this court has no power to pass upon it, or to set the verdict aside as being excessive." (Emphasis supplied.)

POINT IV.

THE TRIAL COURT ERRED IN PERMITTING THE PAYMENT OF THE JUDGMENT ENTERED BELOW IN CASE NO. 8192 TO BE HELD IN ABEYANCE PENDING

THE DETERMINATION OF THE CHALLENGE BY THE UNITED STATES TO THE VALIDITY OF RESPONDENTS' MINING CLAIMS.

The Respondents, Milton A. Oman, Virginia S. Oman, Samuel N. Chournos, Janice R. Chournos, Nick Chournos, and Dorothy K. Chournos, hereinafter referred to as respondents, have filed a cross appeal in this action, appealing from the order made and entered by the court below on November 2, 1959, in Case No. 8192, whereunder appellant was permitted to deposit with the clerk of the court below its payment of the judgment entered in said case to be held pending an administrative determination of a challenge to the validity of respondents' sand and gravel placer mining claims made by the United States Government and presently pending before the United States Department of the Interior.

The gravel deposit extracted by appellant in Case No. 8192 was from certain government lands upon which said respondents had located certain sand and gravel placer mining claims. The jury below found that the value of the 1,222,899 cubic yards of gravel and fill material extracted from these claims was 3c per cubic yard, or a total of \$36,686.97 (Tr. 362).

It is the position of respondents that regardless of the ultimate determination made by the United States Department of Interior, or such Federal Court as may thereafter assume jurisdiction of the contest filed by the Government, that as between respondents and appellant in the instant case, the former are to be con-

sidered the owners of the gravel deposits extracted and entitled to compensation therefor.

It may be conceded, for the sake of argument only, that ultimately it may be determined at another time and in other proceedings that *as against the United States Government*, respondents possessed no rights in the placer claims from which the gravel here involved was extracted. Such a result, however, can in no way affect the obligation of appellant in the instant case.

Appellant, both in its complaint and at the trial below, acknowledged respondents to be the locators of "2 placer mining claims named Sand No. 2 and Sand No. 3" (Par. 3 Complaint; Tr. 18) upon the area in question and from which the gravel was extracted.

Appellant went upon the land and extracted the amount of gravel aforesaid under the order of immediate occupancy granted by the trial court in accordance with Paragraph 2 of the prayer of appellant's complaint. It is significant that no order was sought as against the United States, if indeed such an order could be made; nor was the party in whom appellant now contends has better title than respondents, namely, the United States, ever made a party to nor did the Government intervene in this action at any stage of the proceedings.

By Paragraph 4 of the prayer of its complaint, appellant agreed to pay the value assessed in these proceedings to "the person or persons who may be adjudged entitled thereto." Certainly, appellant cannot

now contend that the adjudication to which it then had refernce was one that was to be made by another tribunal in another proceeding.

As stated above, appellant stipulated that respondents were the mining claimants to the land in question and were conceded to be the "locators" of said claims in plaintiff's complaint; and testimony was adduced by appellant itself showing this to be the fact (Tr. 216). No evidence was offered by appellant to contest this fact nor to contest the validity of respondents' claims, for appellant clearly did not assert any interest in itself or any other person in such land by way of relocation or otherwise, nor did appellant offer any proof that respondents' rights had been terminated by the Government at the time of appellant's entry, for indeed that question is still pending.

Under the posture of the evidence in the record, together with the pleadings on file, it is submitted that it must be presumed in the absence of a showing to the contrary that for the purposes of this action, such claims were valid claims and that respondents were the owners thereof.

The law is clear that a mining claim located upon public lands belonging to the United States is property to its fullest extent, which may be taxed, mortgaged, transferred, sold and inherited. *U. S. vs. Etcheverry*, 230 F. 2d 193 (10th Cir. 1956); 30 USCA 26, 30 USCA 35.

The general rule is stated at 36 Am. Jur., Mines and Minerals, 353, §105:

“By virtue of the Federal Statute (30 USCA 26) a valid location, whether lode or placer, segregates the land embraced from the public domain and operates as a grant by the United States of the right of present and exclusive possession for such period as the locator may comply with the Federal laws and the local regulations not inconsistent therewith. It is apparent that this right is as effective, for practical mining purposes, as the fee passed by the patent, for it inhibits any further exploration of the premises and authorizes the locator to maintain his possession as against all other persons, including the government. It is clear that the locator's rights are not in any way dependent upon continuous occupation of his claim, for it is settled by an abundance of authority that actual possession is no more necessary for the protection of the rights herein considered than for any other rights granted by the United States.”

In the case *U. S. v. Ethcheverry, supra*, wherein the rights of a mining claimant's lessee to graze the surface of the land as against the United States were discussed, the court, although holding that general grazing rights are not included within the possessory rights of a mining claim, clearly indicated those rights that were so included:

“We are satisfied that under the statute the mere location of a mining claim gives to the locator only the right to explore for and mine minerals, and to purchase the land if there has been a compliance with the provisions of the statute. As against third parties, the locator or his assigns have exclusive right to use the surface of this land, but as against the United States, his right is conditional and inchoate.

The land is no longer a part of the public domain so far as the minerals are concerned, and it is not open to relocation until the rights of a former locator have terminated.” (Emphasis supplied.)

The only attempt made by appellant that could be construed as an attack upon the validity of respondents' claims was a certain attempted cross-examination of respondent Chournos during which the following colloquy took place (Tr. 215-217):

“Q. Now these mining claims that—you and your wife, is it, Mr. Chournos? And one of your family? Three of you at least — I guess there are four of you?

A. Three families. Me and my wife, my son and his wife, and Milton Oman and his wife.

Q. You were parties in locating those mining claims, were you not?

A. Yes.

Q. That was about when? July, 1955? Is that pretty close?

A. I think it was the spring of '55, or winter of '55. Some time in there, when we filed them.

Q. And after you located them you didn't do any work on them, did you?

MR. OMAN: I object to that as being totally immaterial. He alleges in his complaint we're the owners of the claims, we answer we are, and there is no issue as to that.

MR. O'CONNOR: It goes just to the value.

MR. OMAN: It doesn't go to the value. It doesn't

make any difference whether any work was done on them or not.

THE COURT: I'm inclined to sustain that, as far as this particular phase of the proceedings is concerned, Mr. O'Connor. I'll let you examine him at length any time you want to, before the Court only, on that subject.

MR. O'CONNOR: All right. I'm not going to the title. I'm going to the question of his idea of the value. If he did any work on them or not for three or four years.

THE COURT: What difference does it make whether he works on it or not? He located the claim.

MR. O'CONNOR: It goes to the value.

THE COURT: Well, as far as this lawsuit is concerned, the jury has got to consider that these people own the claims.

Even assuming, for the sake of argument only, that had appellant been allowed to pursue this examination and in so doing sought to question the ownership of respondents, rather than the value fixed upon the material, and assuming further that, for the purpose of argument only, appellant might have shown failure to perform the necessary assessment work prior to appellant's entry, nevertheless, the law is well settled that, in the absence of a valid relocation, failure to perform assessment work does not ipso facto terminate the claimants' rights. *Ickes v. Virginia-Colorado Development Corp.*, 295 US 639, 55 S. Ct. 888, 79 L.Ed., 1627.

It is submitted, therefore, that for the purpose of

the instant action, under the law, the evidence and the pleadings, the ownership of the right to extract minerals from the area in question reposed in the respondents and none other, and that upon affirmance of the judgment below, respondents are entitled to immediate payment therefor.

CONCLUSION

It is therefore submitted that the evidence presented below to the court and jury is sufficient and competent to support the verdicts returned and that the verdicts of the jury and the judgments entered thereon should be affirmed. It is further submitted that the order of the court below of November 2, 1959 in Case No. 8192, permitting appellant to make payment of the judgment entered therein to the clerk of the court to be held pending determination of the challenge of the United States to the validity of the respondents' placer mining claims should be vacated and set aside.

Respectfully submitted,

OMAN & SAPERSTEIN

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Respondents, and Cross Appellants.*