

1960

# Weber Basin Water Conservancy District v. Lois A. Hislop et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED

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WEBER BASIN WATER  
CONSERVANCY DISTRICT,

*Plaintiff and Respondent,*

vs.

LOIS A. HISLOP, et al.,

*Defendant and Appellant.*

Clerk Supreme Court, Utah

Case No.  
9317

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BRIEF OF APPELLANT

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# IN THE SUPREME COURT of the STATE OF UTAH

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WEBER BASIN WATER  
CONSERVANCY DISTRICT,

*Plaintiff and Respondent,*

vs.

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*Defendant and Appellant.*

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## BRIEF OF APPELLANT

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### STATEMENT OF FACTS

As part of its over-all water development program, the Weber Basin Water Conservancy District determined it necessary that the Pineview Reservoir should be enlarged so as to accommodate additional storage water. In the course of the enlargement, it became necessary for it to condemn certain lands in the Ogden Valley area. These lands included certain lands owned by the defendant, Lois A. Hislop. She duly an-

swered the complaint in the matter, setting forth her damages for certain lands taken from her and, by way of a counterclaim, affirmatively alleged that a certain real property business establishment, known as "Jack's Shack," which was located on the main arterial highway between Ogden and Huntsville, had suffered a diminution in value because the enlargement of the reservoir necessitated the re-routing of traffic through and passed the Town of Huntsville in lieu of the route which the traffic formerly traveled in passing her business establishment.

Mrs. Hislop took the position that, although no part of the real property constituting her business establishment had actually been taken or directly touched by the condemnation proceedings or the enlargement of the reservoir, she nonetheless sustained a damage to her property which is peculiar to her and greater than the inconvenience suffered by the rest of the community in and around the Town of Huntsville, and which is just as direct and actual as the damage which she received when her farm and pasture lands were condemned in formal proceedings.

A sketch of the area involved, showing the former highway route and the re-location highway route, is set forth on Page 20 to assist the court in viewing the physical changes brought about by the enlargement of the reservoir as the changes affected this appellant.

The parties to the action entered into a stipulation setting forth the facts as the same were involved in appellant's counterclaim (R. 6), and each moved the court for summary judgment in its favor. The stipulated facts are as follows:

"1. That the issue of whether or not defendant is entitled to compensation for damages to her property caused by the re-location of Highway No. 39 into the Town of Huntsville, Utah, be submitted to the court for determination by summary judgment upon oral argument, written brief and the agreed facts as set out more particularly in Paragraph 2 of the stipulation.

2. The defendant, prior to the enlargement of the Pineview Reservoir, operated a tavern which was situated adjacent to the main highway which enters the Town of Huntsville at a point on said highway approximately one block north of where the highway enters the incorporated city limits, as is indicated by an "X" mark in red pencil on the map attached hereto, and by reference made a part of this stipulation. The original road is indicated on said map by a brown pencil line and the new location of the road by a red pencil line. Access to the highway from defendant's property was unrestricted and convenient, the property being situated adjacent to the highway with no obstructions. The flow of traffic over the highway was a factor in the successful operation of defendant's business, as said highway was the route traveled by persons desiring to communicate between Ogden and the Town of Huntsville, or residential or recreational areas adjacent to the Town of Huntsville.

The enlargement of the Pineview Reservoir by plaintiff necessitated the flooding of the roadbed leading into the Town of Huntsville at its present level and, at the request of the plaintiff and pursuant to an agreement between the plaintiff and the State of Utah, the road was re-located so as to by-pass most of the residential and commercial portions of the Town of Huntsville. The new road joins the original highway at a point approximately one mile east of defendant's business establishment. The location of the new highway adds a distance of approximately two and one-half

miles to the distance traveled between defendant's property and the City of Ogden, and the traffic moving from the Ogden vicinity to the Huntsville area and to the recreation areas adjacent to the Town of Huntsville is diverted away from the defendant's place of business.

3. That the issue of the amount of compensation, if any, to be awarded defendant be deferred until the defendant's right to such compensation is established."

From a ruling of the lower court granting respondent summary judgment on the counterclaim, appellant takes this appeal.

## STATEMENT OF POINTS

I. A RE-ROUTING OF HIGHWAY TRAFFIC OCCASIONED SOLELY BY REASON OF THE ENLARGEMENT OF A RESERVOIR WHICH SUBMERGES AN EXISTING HIGHWAY IS NOT TRAFFIC REGULATION UNDER THE POLICE POWER.

II. THE CONSTITUTION AND STATUTES OF THE STATE OF UTAH RECOGNIZE THE RIGHT TO RECOVER DAMAGES TO PROPERTY NOT DIRECTLY TAKEN IN EMINENT DOMAIN SITUATIONS.

## ARGUMENT

### I.

A RE-ROUTING OF HIGHWAY TRAFFIC OCCASIONED SOLELY BY REASON OF THE ENLARGEMENT OF A RESERVOIR WHICH SUBMERGES AN



## EXISTING HIGHWAY IS NOT TRAFFIC REGULATION UNDER THE POLICE POWER.

Appellant maintained a very profitable beer establishment on Highway 39 running between Ogden and Huntsville. The establishment was located at the junction of several highways, and its success was due to the volume of traffic which passed by its door. As a result of re-locating the highway so that it by-passed the establishment and the greater part of the Town of Huntsville, only limited amounts of traffic find it convenient to take the present route which must be followed in order to reach appellant's establishment. Obviously, such a condition has seriously affected the volume of business and, likewise, has greatly reduced the value of the properties owned by Mrs. Hislop.

It is a well-established principle of law that access rights to and from a highway are a valuable property right:

“The overwhelming weight of authority recognizes, as a statement of general principle, that the right of access to and from a public highway is one of the incidents of ownership or occupancy of land abutting thereon, of which the owner cannot be deprived without compensation, whether the fee to the way is in the public or the abutter.” 73 A.L.R. 2d 691.

This principle has been uniformly recognized irrespective of whether access has been wholly cut off or whether the access has been partially removed. However, it is also generally recognized, and many cases support the proposition, that a state in the exercise of the police power in regulating traffic for the benefit of its citizens may re-route traffic even though, in so doing, it diverts traffic completely beyond a business establish-

ment of this type. If such were the instant situation, appellant would not have appealed this decision.

This case is clearly distinguishable from cases dealing with the right of a state to change the location of a highway because the road in question was not re-located as a result of a state policy or decision to suit the convenience of the traveling public. Instead, it was moved as a direct result of the enlargement of the Pineview Reservoir and at the specific request of the plaintiff and the United States Bureau of Reclamation, which acted as the agent for the plaintiff in the construction of the enlarged reservoir. This is made amply clear by the language of the contract entered into between the United States Bureau of Reclamation and the State Road Commission of Utah on June 30, 1955, which provides, in part, as follows:

“2. WHEREAS, the United States intends to enlarge Pineview Dam and Reservoir on the Ogden River in Ogden Canyon as a part of the Weber Basin Project *which will necessitate the relocation and reconstruction of portions of State Highways 39 and 162 and certain portions of County Roads between the towns of Eden and Huntsville, Utah, and*

“3. WHEREAS, the Highway Department will relocate and reconstruct those portions of State Highways 39 and 162 and the County roads affected by the enlargement of Pineview Reservoir, *provided that the cost thereof is assumed by the United States as a part of the Weber Basin Project.*”

Further, respondent's own complaint in these proceedings states:

“III. The enlarged Pineview Dam and Reservoir and appurtenances are part of the Weber Basin Project and will be constructed in Weber County, Utah. The con-

struction of the said enlarged Pineview Dam and Reservoir and appurtenances *will necessitate the relocation of certain highways and roads* and will require the taking of additional lands.” (Italics added).

From the foregoing admissions, it is quite clear that the highway was not re-located to suit the conveniences of the State of Utah or any other governmental agency having police power to regulate traffic. On the contrary, the situation is a mere disguised proceeding under the right of eminent domain without any intention on respondent’s part to pay compensating damages.

The situation is aptly stated in the recent case of *Ackerman vs. Port of Seattle*, cited in 329 P. 2d 210 (1958) and 348 P. 2d 644 (1960), where the problem involved the flight of low-flying aircraft from an airport over the properties owned by adjoining owners. The land owners contended that the use of the airspace over their properties, even though there was no actual physical trespass upon the land itself, constituted a taking for which the Port of Seattle should pay damages. In deciding that the damage was compensable and that it was not a mere exercise of the police power, the Supreme Court of the State of Washington made the following cogent observations:

“ . . . the courts constantly emphasize the concepts of (1) “regulation” under the police power, and (2) “constitutional taking or damaging” under the eminent domain power. When restrictions upon the ownership of private property fall into the category of “proper exercise of the police power,” they, validly, may be imposed without payment of compensation. The difficulty arises in deciding whether a restriction is an

exercise of the police power or an exercise of the eminent domain power . . . but, when private property rights are taken from the individual and are conferred upon the public for public use, eminent domain principles are applicable.”

For the purpose of illustrating that one governmental unit cannot absolve itself from liability to pay damages in eminent domain by reason of contracting for its own purposes with another governmental agency, which latter agency in the exercise of its police power might be exempt from liability, the following quotation from *California vs. Chevalier, et al.* (331 P. 2d 237 at P. 244-245) is quite apt:

“As to the sufficiency of the pleadings, our attention has been directed to the Freeway Agreement between the state and city for the acquisition of defendants’ property (Exhibit 9), the statutory provisions in the State and Highway Code for cooperation between city and state in relocating, closing and opening city streets in state highway construction, and judicial recognition of joint action in carrying out certain policies of the state. *Watson vs. Greely*, 67 Cal. App. 328, 227 P. 664. Cooperation between city and state no matter how well recognized and approved would not justify a fraudulent declaration of an alleged public need and purpose that did not exist, or an act in eminent domain that was not bona fide.”

In commenting upon the protection granted to private property under the Fifth Amendment to the U.S. Constitution, together with the mandate upon the states made in the Fourteenth Amendment, the court inserted a quotation of Mr. Justice Holmes:

“When this seemingly absolute protection is found to be qualified by the police power, the natural tendency

of human nature is to extend the qualification more and more until at last private property disappears. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”

Quoting from a Texas case, in the same decision:

“Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. *If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right.*”

This court should not permit respondent to claim immunity from liability in the instant situation merely by citing cases involving the proper exercise of highway re-routing under the police power. The situation here involved is quite different, and it is submitted that to permit respondent to cause the damage here incurred without paying compensation will open the door to every conceivable situation whereby agencies having the power of eminent domain will damage or destroy valuable property rights at will without giving any regard to the effect caused upon valuable property rights created by the citizens of this state created through hard work and toil.

## II.

THE CONSTITUTION AND STATUTES OF THE  
STATE OF UTAH RECOGNIZE THE RIGHT TO

## RECOVER DAMAGES TO PROPERTY NOT DIRECTLY TAKEN IN EMINENT DOMAIN SITUATIONS.

Although this court has recently proclaimed in several decisions that the sovereign immunity of the State of Utah holds it apart from suit and recovery for damages in instances of this and similar types of cases, holding that our statutory and constitutional provisions are not self-executing, it is rather fortunate that the respondent in this case can be reached through a direct suit. In fact, this writer is seriously concerned about the effect of the sovereign immunity doctrine extended to the State of Utah in situations involving taking or damaging of private property. The common law, which has so jealously guarded real property rights, has sustained a great loss to its effectiveness under the doctrine of sovereign immunity as applied to situations of this type, particularly in view of the highly accelerated program of construction of reservoirs, highways and similar public works in recent years.

Appellant submits that this case is governed by the constitution and the statutes of the State of Utah, which provide:

Constitution of the State of Utah, Article I, Sec. 22:

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

Section 78-34-10(3), Utah Code Annotated, 1953.

“If the property, though no part thereof is taken, will be damaged by the construction of the proposed improvement, the amount of such damages.”

The foregoing constitutional and statutory provisions clearly recognize that damages must be ascertained and assessed in the event private property is damaged, even though the



construction requires the taking of no part of the actual property. This appeal squarely brings the court face to face with a factual situation which falls outside the police power regulations and also involves a defendant which cannot claim the benefit of sovereign immunity. As such, it is submitted that the court's decision in this case may well establish a significant landmark in Utah jurisprudence setting forth the course of either traveling the road of state socialism or the recognition of private property rights.

In the foregoing Washington case of *Ackerman vs. Port of Seattle*, commenting upon a provision of the Illinois constitution similar to our constitutional provision and the statute of the State of Washington, the following statement was made:

“under this constitutional provision, a recovery may be had in all cases where private property has sustained a substantial damage by the making and using an improvement that is public in its character; that it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate, but, if the construction and operation of the . . . improvement is the cause of the damage, though consequential, the party may recover.”

The principle upon which damage to property similar to the damage in the instant case is predicated is that of interference with ingress and egress to one's property and its easement rights in the highway. These rights are numerous, and are subject only to the pre-emptive right of the state or municipality in the valid exercise of its police power. Even then, in some situations, eminent domain proceedings must be resorted to. *Dooly Block vs. Salt Lake Rapid Transit Co.*, 9 Utah 31, 33 P. 229; 33 Pac. 229.

A footnote case in 18 Am. Jur., Eminent Domain, Sec. 225, Page 859, contains the following statement:

*"A village and a railroad company which, in order to abolish a grade crossing, construct a subway, vacating the surface crossing, thereby diverting travel from the space between the crossing and the entrance to the subway and depreciating the value of the abutting business property, are liable for the injuries thereby caused the owner."* *Schimmelman vs. Lake Shore and M.S.R. Co.*, 83 Ohio St. 356, 94 N.E. 840.

In analyzing the cases carefully, there appears to be a rather sharp distinction between the results of the decisions where suit was commenced against a defendant who was someone having eminent domain power *other than a state or municipality*—such as the Weber Basin Water Conservancy District. The police power of local and state governmental units, with power to alter road systems for the public good, is almost always present in most cases. But in situations where the municipality or the state furnished merely a means of procedure, and where the prime movant was some agency with a special benefit to be gained for itself or its stockholders or members, such as the Schimmelman case, a marked departure is found in the cases.

Such a situation is the one before this court, where the plaintiff in fact—rather than the State of Utah—was responsible for moving the road and for defendant's resulting damages.

Holdings similar to the Schimmelman case, involving suits which were brought directly against the responsible party, are found in the following cases from Colorado and Nebraska.



The facts are so nearly analogous that the cases have been briefed for the court's benefit.

*Mason City and Ft. D. R. Co. vs. Kennedy* (Nebraska), 113 C.C.A. 412, 192 Fed. 538:

Catherine Kennedy recovered a judgment against the railroad company for damages to her real property in Omaha, Nebraska, caused by the vacation and closing of parts of some streets and alleys. As the parts closed were several hundred feet distant from her property, her means of ingress and egress were merely impaired, not destroyed. The railroad company complained that the trial court refused to hold and to charge the jury that there could be no recovery for a damage not differing in kind from that sustained by the general public.

The Eighth Circuit Court in affirming the judgment applied the Nebraska constitutional provision on eminent domain (which is the same as Utah's covering both "taking" and "damaging") as construed by the state court and held that:

"... the property owner may recover for all special damages in excess of that to the community at large, that such damage may arise from a closing of public highways not contiguous to but distant from his property, and that the measure thereof is the difference between the values before and after the act complained of."

*Denver Union Terminal Ry Co. vs. Glodt* (Colorado), 67 Colo. 115, 186 P. 904.

Action to recover damages for the depreciation of the rental value and market value of Glodt's property caused by the closing and vacation of parts of certain streets and the building of a viaduct approach. The Glodt property did not abut the parts closed.

*Headnote:*

“Where the closing of a street west of the square in which plaintiff’s lots were located cut off all access from plaintiff’s property to streets leading to the business section of the town in the direction plaintiffs had been accustomed to use, which was the most convenient way of reaching such business section, and the closing of other streets resulted in leaving only an inadequate and dangerous way for egress on a street occupied by a viaduct, plaintiffs sustained such special damages as entitled them to compensation from defendant terminal company, for the closing of such streets.”

Although there has never been a reservoir case involving a factual situation where suit was brought against an agency other than the state or a municipality involving a re-routing of a highway, it has been recognized in the cases of *Weber vs. Salt Lake City*, 40 Utah 221, 120 P. 503, and *State Road Commission vs. Fourth District Court*, 94 Utah 384, 78 P. 2d 502, that the change in grade of an adjoining highway or the building of a viaduct in an adjoining street both constituted such interference with ingress and egress rights of the adjoining properties to the highway as to give rise to a claim for compensable damages.

Considering that the Weber Basin Water Conservancy District is enlarging the Pineview Reservoir so as to provide a benefit for the public-at-large in the form of storage and distribution of waters for irrigation and culinary usage, and that the re-routing of the highway was necessitated by reason of the benefit conferred upon the public-at-large, it is submitted that there is absolutely no practical or legal difference between the taking of portions of appellant’s lands for flooding and

the reduction in value of her other properties which were not taken—but which were seriously damaged by reason of the re-location of the highway as a part of the project. In one instance the lands themselves were trespassed upon by the stored waters and in the other instance the highway leading to her business establishment was inundated, thereby inflicting the loss complained of. Any legal approach to the situation which would permit recovery in one instance where an actual physical trespass occurred, but which would deny recovery in the other instance where the physical trespass was not directly on the property itself—but nevertheless a severance of the property from the highway traffic and which resulted in a much less accessible approach to the traveled highway—would seem illogical and entirely inconsistent with the demands of modern society and the need for the law to adapt itself to changing conditions. Were this result caused by a necessary public highway program, we could claim no damage, but the highway was moved solely to accommodate plaintiff's reservoir enlargement purposes.

In the very recent Utah case of *Southern Pacific Company vs. Arthur, et al.*, handed down on May 25, 1960, cited in 352 P. 2d 693, .....Utah 2d....., Justice Wade, speaking for the court, recognized an identical right to that urged by the appellant in this case. There the Southern Pacific Company destroyed forage and natural access to stream or spring waters on one side of a mountain in western Box Elder County, making it dangerous for sheep and lambs to cross a valley. The court held that even though there had been no actual taking of lands by the railroad which acquired certain sand and gravel deposits in the valley by condemnation, the range owners were entitled

to compensation for diminution of value of their land by injury done by the Southern Pacific Company to the natural crossing and lambing grounds.

The court quoted with approval the same reasoning cited by appellant in this case:

“Sec. 78-34-10, U.C.A., 1953, providing the manner in which damages must be assessed in condemnation proceedings, reads:

“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.

“(5) As far as practicable compensation must be assessed for each source of damages separately.”

“The only crossing available to the sheep from the east side to the west side of respondents’ land and vice versa was through Little Valley, which extends from the west lake shore due east to the head of Maple Canyon.”

“ . . . sheep can no longer cross Little Valley back and forth naturally while in search of food and water. The condition in which it is left is also very dangerous to the lives of sheep and lambs which when frightened are likely to plunge over the rim of the lands they have been grazing and get killed. Besides the danger to lives, which the pits have created, they have destroyed forage and natural access to stream or spring water on the west side of Promontory Mountain in the late winter or spring when the snow has melted on the east side of the mountain and it is dry.

The evidence revealed:

" . . . that the damages were of a special kind to the grazing use to which the range lands owned by respondents were fitted and therefore *even though there had been no actual taking of any lands they were entitled to just compensation under the provisions of paragraph 3 above*, for diminution of value of their lands by the substantial injury done to the only available natural crossing and lambing grounds."

The foregoing pronouncement on the effect of Section 78-3-1-10, coupled with the mandate of our constitutional provision, was correctly applied in the *Southern Pacific Company vs. Arthur* case. It is equally applicable to the case at bar, if not more so.

## CONCLUSION

Appellant submits that the lower court erred in granting summary judgment in favor of respondent under the facts of this case. Rather, the summary judgment granted should be vacated and set aside and summary judgment should be granted in favor of appellant and the case remanded to the lower court for proceedings calculated to determine the amount of damages sustained to appellant's properties.

Respectfully submitted,

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