1983

Robert W. Adkins v. The Division of State Lands of The State of Utah : Respondent's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

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ROBERT W. ADKINS,

Plaintiff-Appellant,

vs. Case No. 19170

DIVISION OF STATE LANDS
OF THE STATE OF UTAH,

Defendant-Respondent.

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RESPONDENT'S BRIEF

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APPEAL FROM A JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
HONORABLE PHILIP R. FISHLER, JUDGE

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IN THE SUPREME COURT OF THE STATE OF UTAH

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vs.	:	Case No. 19170
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RESPONDENT'S BRIEF

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NATURE OF THE CASE

Plaintiff-Appellant initiated this action seeking a declaratory judgment that an oil, gas and hydrocarbon lease erroneously entered into with the Division of State Lands and Forestry is valid and binding, despite the fact the land involved in the lease has at all relevant times to this matter been withdrawn from oil, gas and hydrocarbon exploration and development by order of the State Land Board.

DISPOSITION IN THE LOWER COURT

After hearing cross motions for summary judgment, the court issued a Memorandum Decision in which the court held that Plaintiff-Appellant had failed to comply with the jurisdictional requirements for judicial review in this case, §65-1-9(2) and §63-30-1 et seq., U.C.A. (1953), as amended. Appellant's motion for summary judgment was denied, Respondent's motion for summary judgment was granted, and the action was dismissed with prejudice.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment of the trial court in all respects.

INTRODUCTION

The trial court dismissed Appellant's lawsuit on jurisdictional grounds as will be discussed in detail, infra, and, therefore, did not reach the merits of his claims. By way of brief introduction in order to place this appeal in perspective, it is important to note that this lawsuit has come about because an oil, gas and hydrocarbon lease was issued to the Appellant by the Respondent, Division of State Lands and Forestry, when it should never have been issued at all. The land which was leased had been previously withdrawn from oil and gas leasing by the State

Land Board and was, therefore, unavailable to be leased to anyone. The mistake in issuing this lease occurred because even though the land had been withdrawn from oil and gas leasing, the withdrawals were not indicated properly on the plat maps which identify state-owned lands and which are located in the offices of the Division of State Lands and Forestry. The Division is charged with the day-to-day management of approximately 3.6 million acres of land, most of which lie in scattered, isolated sections of land throughout the State. (R. 78-81) Although it is not known for sure why the withdrawals of these lands were not indicated properly on the Division's plat maps, it is believed the oversight occurred when the Division changed its state-wide plat mapping system in 1980. (R. 78-80) Thus, even apart from the jurisdictional issues in this matter, if it were to be decided a mineral lease must be issued contrary to the State Land Board's determination that this land should be withdrawn from oil and gas leasing, such a decision would have devastating implications on the day-to-day administration of state-owned lands because it would, in effect, require the Division to act according to a standard of perfection in carrying out its land management responsibilities.

STATEMENT OF FACTS

In March 1980 Appellant, Mr. Robert W. Adkins, applied for an oil, gas and hydrocarbon lease from Respondent, Utah Division of State Lands and Forestry, (hereinafter the "Division"), for property in San Juan County, Utah, described as follows:

> Lots 3, 4, 5 and 6, and the South half of the Northwest quarter and the South half in Section 2, of Township 27 South, Range 20 East, Salt Lake Base and Meridian, containing 509.18 acres.
>
> Also, the North half of the Southeast quarter of Section 8, Township 27 South, Range 21 East, Salt Lake Base and Meridian, containing 80 acres.

Appellant made application to lease this land under the so-called "first applicant" procedure set forth in §65-1-45 U.C.A. (1953), as amended; the property in question had not been posted by the Division as available for leasing pursuant to the competitive bidding procedures provided in subsection (2) of §65-1-45. *

On March 24, 1980, Appellant and the Division entered into State Mineral Lease No. 37794, which purported to lease

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* The 1983 Legislature amended §65-1-45 and, as amended, the "first applicant" procedure is set forth in subsection (1) of §65-1-45 and the competitive bidding procedures are set forth in subsection (2).

to Appellant the oil, gas and hydrocarbon rights to the property in question. (R. 5) However, subsequently the Division discovered that the property lying in Lots 3, 4, 5, 6 and the South half of the Northwest quarter and the South half in Section 2 of Township 27 South, Range 20 East, Salt Lake Base and Meridian, containing 509.18 acres, (hereinafter "the 509.18 acre tract") had previously been withdrawn from oil and gas leasing by the State Land Board (hereinafter, "the Board") and, hence, was unavailable for oil and gas leasing. (R. 63, 64) According to the Minutes of the Board's June 14, 1966, hearing, the Board withdrew this 509.18 acre tract from oil and gas leasing because of its proximity to the potash lands of the Cane Creek Anticline which had been statutorily withdrawn from oil and gas leasing by the Utah Legislature in 1961, Section 65-1-99 U.C.A (1953), as amended. (R. 64) All of the land discussed herein (both the land which was legislatively withdrawn and the land contained in the Plaintiff's lease which was withdrawn by the State Land Board) is now and has been at all relevant times hereto part of a producing potash unit. (R. 65, 66)

Upon discovering that the lease which had been issued to Appellant included this withdrawn land, the Division, by letter dated March 25, 1981, notified him that his mineral

lease would have to be terminated as to the 509.18 acre tract, and that all of the monies paid to the Division by Appellant for rental of this tract would be refunded to him. (R. 67) Appellant appealed this action to the State Land Board but at the hearing on this matter on August 12, 1981, the Board rejected his claims and unanimously upheld the Division's action to delete the withdrawn portion of the property in question from his lease because the withdrawal had not been lifted and also because the lands were not posted for competitive bid, as required by Section 65-1-45 and the State of Utah Rules and Regulations Governing the Issuance of Mineral Leases. (R. 68)

Following this hearing the Division discovered that the remaining 80 acres contained in Appellant's lease, the North half of the Southeast quarter of Section 8, Township 27 South, Range 21 East, Salt Lake Base and Meridian, (hereinafter "the 80 acre tract"), had also been previously withdrawn by the State Land Board from oil and gas leasing by a separate withdrawal order of the Board on June 8, 1967. (R. 69, 70) The Division then immediately notified Appellant by letter that because the remaining 80 acre tract had been previously withdrawn from oil and gas leasing, the lease would have to be cancelled. In this letter the Division also indicated it would refund the original filing fee and

all of the remaining rentals paid by him for this property. (R. 75) Appellant appealed the cancellation of this remaining 80 acre tract to the State Land Board. At the Board's hearing on November 10, 1981, at the State Land Board hearing on this appeal, the Board unanimously upheld the cancellation of the Appellant's lease, again on the grounds that the property had been previously withdrawn from oil and gas leasing and also because the property had not been posted for competitive bid, as required by Section 65-1-45 and the State of Utah Rules and Regulations Governing the Issuance of Mineral Leases. (R. 71)

In order to explain more clearly the background of this case, the Division identified on a map of this area the portion of the land which was leased to Appellant, the portion of the land which was withdrawn from oil and gas leasing by the Board by its actions of June 14, 1966, and June 8, 1967, and the portion of the land which was statutorily withdrawn from oil and gas leasing by the Utah Legislature in 1961. (R. 72) None of the land which was leased to Appellant was that which was legislatively withdrawn from oil and gas leasing but the legislatively withdrawn land has been identified on the map to show its proximity to the land withdrawn by the State Land Board. For the Court's convenience, the same map that was included

in the record for the trial court (R. 72) has been attached hereto as Appendix "A."

In January 1982 the Division refunded all of the monies paid by Appellant under his lease. On February 13, 1982, Appellant sent the uncashed check back to the State Treasurer and notified the Division that an action would be initiated in the District Court to "test the cancellation of the Lease No. 37794." (R. 73)

Thereafter, the Division notified Appellant by letter that the State refund check to him was being cancelled and that he would be credited with that amount for any other mineral lease held by him or, upon written request, returned to him in cash. (R. 74)

In March 1982 Appellant sent a check for the 1982 rental payment for the cancelled lease. The Division promptly returned his check and reaffirmed by letter that State Mineral Lease No. 37794 was cancelled. (R. 75)

The trial court granted summary judgment on two grounds, first that Appellant had failed to comply with the statutory jurisdictional requirements of §65-1-9(2) U.C.A. (1953), as amended, which provides that in order to appeal for judicial review of a decision of the State Land Board in a case such as this, a claimant must file a written protest with respect thereto with the Board within ninety

days after the final decision of the Board relating to such matter. In this case the Board issued its final decision with respect to the cancellation of the mineral lease as to the 509.18 acre tract on August 12, 1981. (R. 68) With respect to the cancellation of the rest of Appellant's lease after it was discovered the remaining 80 acres were also subject to a withdrawal order, the State Land Board issued its final decision on November 10, 1981. (R. 71) The only written protest filed by Appellant to either of these Board actions was his letter dated February 13, 1982. (R. 73) As the trial court noted in its Memorandum Decision, this letter was dated 185 days after the August 12, 1981, decision and 96 days after the November 10, 1981, decision. (R. 95, 96)

The second ground on which summary judgment was granted against Appellant was that Appellant had failed to comply with the relevant and applicable requirements of the Utah Governmental Immunity Act, §63-30-1 et seq., U.C.A. (1953), as amended, (specifically, §§63-30-12, 15 and 19), which pertain to actions involving property and which must be satisfied for there to be a waiver of immunity. Appellant concedes he made no attempt to comply with these jurisdictional requirements. (R. 102 and Appellant's Brief, pp. 3 and 4)

ARGUMENT

POINT I

PLAINTIFF FAILED TO COMPLY WITH THE JURISDICTIONAL REQUIREMENTS OF §65-1-9(2) U.C.A. (1953), AS AMENDED, AND IS, THEREFORE, BARRED FROM MAINTAINING THIS ACTION.

The trial court held that Appellant failed to comply with the jurisdictional requirements for judicial review as provided in §65-1-9(2) U.C.A. (1953), as amended. Section 65-1-9(2) provides:

> No claimant for lands under control of the board can appeal for judicial review of a decision of the board involving any sale, lease, or disposition of state lands, or any action relating thereto, unless such claimant files a written protest with respect thereto with the board within ninety days after the final decision of the board relating to such matter; or, with respect to decisions rendered prior to the effective date of this act, within ninety days after such effective date. This provision shall not relate to disputes between the board and any party as to the ownership or title to any lands. [Emphasis added.]

The language of this statute could hardly be more clear. In order for Appellant to appeal for judicial review of the decisions of the State Land Board, he had to file a written protest with respect to the decisions within ninety days. In this case there were two final decisions of the State Land Board: one pertaining to the 509.18 acre tract and one pertaining to the 80 acre tract. The facts of this case show clearly that Appellant failed to file a

written protest timely with respect to either of these decisions.

With regard to the 509.18 acre tract, upon discovering the tract was subject to a withdrawal order and, therefore, not available for oil and gas leasing, the Division of State Lands and Forestry, by letter dated March 25, 1981, notified Appellant the 509.18 acre tract would have to be deleted from the mineral lease. Appellant requested State Land Board review of this Division action but at the hearing on this appeal on August 12, 1981, the Board unanimously decided the 509.18 acre tract should be deleted from the lease and Appellant's advance rental payment for that tract should be refunded to him. This Board action was the only Board action taken regarding the 509.18 acre tract, and it was clearly a final decision of the Board. Pursuant to §65-1-9(2), Appellant had ninety days to file a written protest to this final decision; however, the facts demonstrate that the only communication from Appellant which could be construed as a written protest of the Board's decision was his February 13, 1982, letter, which came a full 185 days after the Board's August 12, 1981, decision.

With regard to the 80 acre tract, upon discovering that the 80 acre tract was also subject to a withdrawal

and, therefore, not available for oil and gas leasing, an employee of the Division of State Lands and Forestry, by letter dated August 12, 1981, notified Appellant of the error and of his intention to recommend to the Director that the remaining 80 acres of the lease be cancelled and all of the balance of the payments previously tendered by Appellant be refunded to him. On August 17, 1981, the Director cancelled the lease. Evidently this action was not communicated to Appellant because on October 29, 1981, he wrote to the Division asking if the Director had cancelled the 80 acre tract. Also in that letter, Appellant requested, pursuant to Section 65-1-9, U.C.A. (1953), as amended, and the Rules and Regulations of the Division of State Lands, a "hearing before the land board regarding the purported deletion of the 80 acres from my lease." (R. 25) This letter made no mention of the Board's action regarding the 509.18 acre tract. At the Board's November 10, 1981, hearing, the Board unanimously upheld the cancellation of Appellant's lease. As with the 509.18 acre tract, the only written communication which could be construed as a written protest to this final decision of the Board was Appellant's February 13, 1982, letter, which, even if it were to be assumed that the letter was "filed" with the Board on the same day it was written, came 96 days after the November 10,

1981, final decision of the State Land Board.

Notwithstanding the plain meaning of §65-1-9(2), Appellant argues §65-1-9(2) should be read in conjunction with §§65-1-1 and 2.1, U.C.A. (1953), as amended, to the conclusion that in this case the State Land Board should never have even been involved to review the Division's action.

Appellant's argument goes something like this: as originally organized the State Land Board was the only state agency involved in state lands management, and it handled the day-to-day management as well as the policy-making responsibilities with respect thereto. Then in 1967 when the §§65-1-1 and 2.1 were enacted, the Legislature created a division of state lands to handle the day-to-day operations and the board of state lands to be responsible for all policy-making functions, powers, duties, rights and responsibilities. Rather than legislatively decide which provisions of Title 65 involve policy-making functions and which do not, the Legislature stated in §65-1-1:

> [e]xcept as otherwise provided in this act, whenever reference is made in Title 65, or in any other provision of law, to the state land board it shall be construed as referring to the board of state lands where such reference pertains to policy-making

> functions, powers, duties, rights and responsibilities; but in all other instances such reference shall be construed as referring tot he division of state lands.

Thus, the Legislature left it to the Board of State Lands to decide what functions involve policy-making and what do not.

Appellant's argument continues, because §65-1-9(2) consistently refers to "the board," and a decision of "the board," in light of §§65-1-1 and 2.1 every time the words "the board" appear the words "the division" must be substituted instead, to the conclusion there really is no appeal of a Division action to the Board, the Board is a non-entity so far as review of Division action is concerned, and it is only the Division that acts and then reviews itself. Thus, Appellant's protest of the Divition action to cancel his lease interests is the only protest that is required by §65-1-9(2). Respondent submits this interpretation of these statutory provisions is not only strained and irrational, it is unsupported by law, unworkeable on a day-to-day basis, and contrary to Appellant's own view of the relative roles as evidenced by his actions in this

case.*

First, Appellant's argument requires this Court to ignore the very plain language of §65-1-9(2) that it is the Board that is to make final decisions for lands under its control and timely written protest must be given thereto before a claimant can appeal for judicial review.

Second, assuming Appellant is contending that it is the Division that takes and action such as the one in this case and it is the Division Director who reviews that action,

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* Appellant states on pp. 7 and 8 of his brief that §§65-1-1 and 2.1 provide that it is the Executive Director of the Department of Natural Resources who actually makes final decisions with respect to matters other than those determining policy for the Division of State Lands. Although Respondent is somewhat unclear as to whether Appellant is really suggesting the Executive Director of the Department of Natural Resources has the role of reviewing day-to-day land management decisions, such interpretation is wholly unsupported by the enabling legislation pertaining to the Executive Director of the Department of Natural Resources. §63-34-1 et seq., U.C.A. (1953), as amended, which provides for the Department of Natural Resources which coordinates ten different state boards and seven different state agencies; and these statutes make abundantly clear the Executive Director's essential role is "the administration and supervision of the department of natural resouces" to effect "coordination and co-operation among the boards and divisions of it...." Section 63-34-5 U.C.A. (1983 Interim Supplement, Part 2, pp. 888 and 889). Although the statute requires the Executive Director to do "such other duties as the Legislature shall assign to him," it is preposterous to suggest the Executive Director has been legislatively assigned the specific additional duty to review all of the hundreds of lease actions the Division may take throughout any given year.

such a contention ignores the statutory scheme of Title 65, which makes the Division and the Director one and the same. Pursuant to §65-1-3.1, the Director of the Division is the executive and administrative head of the Division. Moreover, what Appellant is asserting is that a Division staff employee could make an official Division decision which could be protested and appealed to the Division Director. Title 65 does not provide for such an intra-agency review process. Thus, what Appellant is asserting is that it is the Division Director who would make a final decision on a Division cancellation of a state oil and gas lease, and this is nothing more than to say there is no administrative review at all of such an action.

Third, if the plain language of §65-1-9(2) were to be ignored, and the Court were to consider whether the cancellation involves a policy-making function such that it was appropriate for the Board to review the Division cancellation of Appellant's lease pursuant to §65-1-9(2), it seems reasonable to assume that virtually every action by the Division to cancel a lease necessarily involves some policy-making function, power, duty, right or responsibility. Certainly that is how the Board has interpreted its responsibilities because it is the Board and not the Division that reviews such matters in every

case.

Fourth, because the Board has itself determined the hearing of all appeals of Division lease actions to be a legitimate exercise of its responsibilities, as this Court held in Colman v. Utah State Land Board, 17 Utah 2d 14, 19, 403 P.2d 781, 784 (1965), this determination must be treated as prima facie correct and not regarded otherwise so long as the function conforms with the general objections the agency is charged to carry out and there is a rational basis for it in the provisions of the law.

Fifth, even if it were somehow to be concluded that Board review of Division lease actions was not in every case appealable to the Board, but for only those matters which involve a policy consideration, certainly under the facts of this case review of the cancellation of Appellant's lease involves a policy consideration. In this matter the Board had previously withdrawn two tracts from oil and gas leasing and there could hardly be a clearer example of a land management policy decision than a decision to withdraw lands from leasing. It only stands to reason that consideration of whether a lease for those withdrawn should be permitted in direct contradiction to those withdrawals is, therefore, also a policy decision.

Sixth, Appellant's argument that the Director's actions

terminating the lease should be the "final decisions" as contemplated in §65-1-9(2) is unworkable on a day to day level. Instead of having an orderly process of Division action and Board review of that action, a claimant for lands administered by the Division and the Board would have to guess to whom he should request review and hope he guesses correctly.

Finally, the Appellant's argument is utterly inconsistent with his own view of the relative roles of the Division and the Board, as evidenced by his own actions in this case. In both instances when the Division notified him of its intent to terminate the respective tracts of land Appellant requested review by the Board of that Division action. Indeed, Mr. Adkins' letter dated October 29, 1981, pertaining to the deletion of the 80 acre tract states: "[p]ursuant to Section 65-1-9, Utah Code Annotated 1953, as amended, and the Rules and Regulations of the Division of State Lands, I hereby request a hearing before the land board regarding the purported deletion of the 80 acres from my lease." (R. 25)

As a final note, the Appellant complains that the plain reading of §65-1-9(2) requires a claimant upset with a Division action to request a hearing before the Board, obtain a ruling from the Board and then, if still unhappy

with the Board ruling, file a timely written protest with the Board in order to appeal for judicial review. He says this does not make sense because this procedure would only accomplish "a second appeal to the Board of State Lands or to the Director of Natural Resources." However, this is simply a mistatement of the ordinary process for review and of what happened in this case. The procedure that was followed in this case was (1) an action by the Division, (2) a request by the claimant for Board review of that action, (3) Board review of that action. Where the process broke down for the Appellant was his failure to comply with §65-1-9(2), as he was obliged to do. It is not for Appellant to second guess the wisdom of §65-1-9(2) but it certainly is his obligation to comply with it. And in view of the fact the plain wording of that provision requires a claimant to comply and in this case he simply did not, he has waived his right to obtain judicial review of his claims.

POINT II

PLAINTIFF FAILED TO COMPLY WITH THE JURISDICTIONAL REQUIREMENTS OF THE UTAH GOVERNMENTAL IMMUNITY ACT, SECTION §63-30-1 ET SEQ., (1953), AS AMENDED.

The trial court held also that Appellant failed to comply with the relevant and applicable requirements of the Utah Governmental Immunity Act, 63-30-1 et seq., U.C.A. (1953), as amended, which pertain to actions involving

property and which must be satisfied for there to be a waiver of governmental immunity.

At the outset of Point II it is important to state what Respondent is not contending. Respondent is not contending that this is the sort of action for the State is immune from suit under the Governmental Immunity Act. To the contrary, Respondent has consistently asserted that this is an action involving property, for which, pursuant to §63-30-6 U.C.A. (1953), as amended, immunity has been waived so long as the other requirements of the Governmental Immunity Act have been met. With this in mind, Respondent submits the trial court correctly held that Appellant failed to comply with relevant and applicable requirements of the Governmental Immunity Act, and, therefore, cannot now maintain this action.

The Utah Governmental Immunity Act is an act which provides exceptions, limitations and conditions on the immunity which is generally accorded to governmental entities, including the Respondent in this action. Section 63-3-3 U.C.A (1981 Supp.) provides:

> Except as may be otherwise provided in this act, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private

facilities.

The Act specifically waives certain kinds of actions from immunity, including actions such as the one before the Court involving property, Section 63-30-6 U.C.A. (1953), as amended. Section 63-30-6 provides:

> Immunity from suit of all governmental entities is waived for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon, or secure any adjudication touching any mortgage or other lien said entity may have or claim on the property involved.

For those actions in which immunity has been waived (except actions involving contractual obligations) the Act provides several requirements to be met by claimants in order for them to be able to bring actions against governmental entities. The requirements of the Act which are relevant to the case at bench include Section 63-30-12 U.C.A. (1981 Supp.) which requires a notice of claim to be filed with the Attorney General and the Agency concerned within one year after the cause of action arises. Section 63-30-12 provides:

> A claim against the state is barred unless notice of claim is filed with the attorney general and the agency concerned within one year after the cause of action arises.

Section 63-30-15 provides that a suit against the State may be filed only if and after such claim is denied. In this

case Appellant did not file a notice of claim with either the Attorney General or the Division of State Lands and Forestry.

Appellant also failed to file an undertaking pursuant to Section 63-30-19 U.C.A. (1953), as amended, which provides as follows:

> At the time of filing the action the plaintiff shall file an undertaking in a sum fixed by the court, but in no case less than the sum of $300, conditioned upon payment by the plaintiff of taxable costs incurred by the governmental entity in the action if the plaintiff fails to prosecute the action or fails to recover judgment.

Although Section 63-30-6 waives immunity as to actions involving property, there is no question Appellant must comply with the notice and undertaking requirements of Sections 63-30-12 and 19 in order to bring an action against a State agency. Ash v. State, Utah, 572 P.2d 1374 (1977). Accord, Walton v. State Road Commission, Utah, 558 P.2d 609, 611 (1976), in which this Court held

> ... this case is determinable on the sole ground of failure to file a claim required by Title 63-30-12, U.C.A. 1953, which bars a claim under the Government Immunity Act unless written notice is filed with the Utah Attorney General and the agency concerned within one year after the cause of action arises.

In the instant case Appellant's cause of action is barred because he did not comply with these jurisdictional notice requirements and the undertaking requirements.

On appeal Appellant argues that Standiford v. Salt Lake City Corporation, Utah, 605 P.2d 1236 (1980), Johnson v. Salt Lake City Corporation, Utah, 629 P.2d 432 (1981), and Thomas v. Clearfield City, Utah, 642 P.2d 737 (1982), support his contention that the facts of this case Respondent cannot claim immunity from suit. But these cases simply do not apply because Respondent has not asserted that the State is immune from suit because the action involves the exercise of a governmental function. To the contrary, §63-30-6 clearly waives immunity; but despite this waiver of immunity, based on the Act itself and the cases cited above, Appellant was still obliged to comply with the legislatively mandated notice, claim and undertaking requirements. In view of the fact Appellant failed to so comply, he is barred from maintaining this action.

Appellant's final argument pertaining to the Governmental Immunity Act is that this case really involves an action arising out of a contractual obligation as provided in §63-30-5 and is, therefore, not conditioned upon compliance with the notice, claim and undertaking requirements of the Act. The trial court in its Memorandum Decision rejected this contention on the ground "such interpretation of the state-granted leases does not comport with the general intent and history of the dealings of the

parties." Although, as Appellant asserts, it is generally held that a lease is more of a contract than a conveyance of an estate, the general rule is just the opposite when it involves a mineral or oil and gas lease. See, generally, 38 AmJur.2d Gas and Oil §69 (1968). Because of this property interest, an oil and gas lease is distinguished from a lease that creates an ordinary landlord-tenant relationship. E.g., Vanzandt v. Heilman, 54 N.M. 97, 214 P.2d 864 (1950). Thus, cases such as Medical-Dental Building Co. of Los Angeles v. Horton and Converse, 21 Cal.2d 411, 132 P.2d 457 (1942), which was cited by Appellant, have no application to mineral leases.

POINT III

THE STATE OIL AND GAS LEASE ISSUED TO APPELLANT WAS PROPERLY TERMINATED BECAUSE THE LANDS IN THE LEASE HAD BEEN WITHDRAWN FROM OIL AND GAS LEASING BY ORDER OF THE STATE LAND BOARD AND WERE, THEREFORE, UNAVAILABLE TO BE LEASED TO ANYONE.

Because the trial court decided Appellant did not comply with the jurisdictional requirements of §65-1-9(2) and §63-30-1 et seq., the court did not reach his other claims regarding the termination of the lease. And, assuming this Court affirms the trial court on the jurisdictional issues, obviously these claims do not need to be reviewed on appeal. However, in the event this Court reverses the trial court on the jurisdictional issues,

Respondent submits Appellant is still not entitled to the oil and gas lease because the oil and gas interest was withdrawn from leasing by the State Land Board and was, therefore, unavailable to be leased to anyone.

As mentioned in the Introduction to this brief, this lawsuit resulted because a state oil, gas and hydrocarbon lease was issued when it should not have been. In the event the Court reaches the merits of Appellant's claims, it is critical to keep in mind what Appellant is really asking is that due to inadvertence or oversight on the part of the state agency, a mineral lease must be issued to a private individual when the policy-making board charged with the management of that publicly-owned land had previously determined the public interest would be best served by withdrawing the subject land from that kind of mineral entry. Such a result would be disastrous to Respondent in this case which is charged with the responsibility of managing 3.6 million acres of land within this state. To hold this agency to a standard of perfection in its administrative functions regarding mineral leases would gravely impair its ability to perform its management responsibilities.

In Point III of his brief, Appellant contends he should be entitled to lease the 509.18 acre tract of land on the

theory that as of June 14, 1966, when the State Land Board withdrew that tract from oil and gas leasing, the Board lacked the authority to withdraw lands from any type of mineral leasing. This contention is simply without merit. Although it is true that as of June 1966 there was no statutory provision expressly authorizing the Board to make such withdrawals, the Board certainly had discretion to withdraw land from certain kinds of mineral entry if it determined that development of the two separate mineral interests would conflict with one another. This power is necessarily implicit in the Board's statutory land management responsibilities, and the Board's authority to order withdrawals as this Court expressly acknowledged in dicta in Archer v. State Land Board, 15 Utah 2d 321, 322, 392 P.2d 622, 623 (1964).

In addition, Section 65-1-95 U.C.A., as it provided at the time the Board made this withdrawal (it has since been repealed), authorized the Board to "make and enforce rules and regulations not inconsistent with the provisions of this act for carrying the same into effect." Although the Board did not have a specific rule or regulation describing its withdrawal capability, even apart from the fact the Board ordered these withdrawals, it is evident the Board has consistently interpreted its discretion as including such

authority because Rule 12(d) of its Rules and Regulations Governing the Issuance of Mineral Leases (revised to include amendments to October 13, 1966) referred to "minerals on State lands which have been withdrawn from mineral leasing" [emphasis added]. (R. 76, 77)

Finally, as this Court held in Whitmore v. Candland, 47 Utah 77, 88, 181 P. 528, 532 (1915), "[t]he whole matter of making disposition of the State's land was placed in the hands and under the control of the State Land Board." And in the matter of making disposition of state lands, the Board has discretion in making management decisions, Grant v. State Land Board, 26 Utah 2d 100, 485 P.2d 1035 (1971). In ordering the 1966 withdrawal, it is obvious from the Board's action of ordering the withdrawal of the 509.18 acre tract from oil and gas leasing that the Board viewed withdrawal as a legitimate exercise of its discretionary management responsiblities. Although Archer v. State Land Board, supra, clearly recognizes the authority of the Board to withdraw lands from mineral leases under appropriate circumstances, should there be any question remaining that this authority was necessarily implicit in the Board's land management capabilities, the fact the Board itself considered this to be a legitimate exercise of its responsibilities must be treated as prima facie correct and not

regarded otherwise so long as the function conforms with the general objectives it is charged to carry out and there is a rational basis for it in the provisions of the law, Colman v. Utah State Land Board, 17 Utah 2d 14, 19, 403 P.2d 781, 784 (1965), wherein the Court held:

> Where such uncertainty exists the interpretation and application of statutes adopted by the administrative agency is usually looked upon with some indulgence. It is both just and practical that the Board should be allowed considerable latitute of discretion in deciding what policies will best carry out the responsibilities imposed upon it. Due to the considerrations just stated, and because of its experience and presumed expert knowledge in its field, an administrative interpretation and application of a statute ... is generally regarded as prima facie correct and not to be overturned so long as it is in conformity with the general objectives the agency is charged with carrying out, and there is a rational basis for it in the provisions of the law.

Finally, in Grant v. State Land Board, supra, 26 Utah 2d at 103, 485 P.2d at 1037, this Court considered the nature of the State Land Board's land management responsibilities, holding that "[t]he general purpose of the law in giving the Land Board responsibility for administering the public lands is to encourage their settlement and development so that they and their resources can be widely used, managed and conserved." There can be no question the Board's withdrawal of the 509.18 acre tract was consistent with proper land management objectives because it added additional protection to the potash development in the

Cane Creek area which the Legislature had previously sought to protect and promote, and, therefore, the 1966 decision to withdraw the 509.18 tract was a permissible and desirable exercise of land management discretion.

Appellant cites Hirsh v. Ogden Furniture and Carpet Co., 51 Utah 558, 172 P. 318 (1918), in support of his argument that the Board's withdrawal of the 509.18 tract was invalid in absence of an express statutory grant of power to withdraw lands from leasing prior to 1967 when the Legislature amended §65-1-45 to provide the specific authority to withdraw state lands from leasing. In Hirsh the Court considered whether a notice of filing a remittitur had to be given a party under a statute that was silent as to notice but which was subsequently amended to require notice. The Court held there was nothing in the statute requiring such notice and the subsequent amendment indicated the legislative intent that such notice was not required prior to the amendment. Hirsh is relied on by Appellant for the general rule that an addition in a statute should be regarded as a departure from the previous law.

Hirsh does not apply to the instant case for at least two reasons: first, unlike Hirsh, this case concerns whether in the absence of an express statutory authorization, an authority to take a certain kind of action could

be implied from the broad statutory grant of authority providing for policy discretion. Hirsh concerned an analysis of whether a precedural requirement should be implied when apparently there was no statute from which a requirement could be implied. In this case the Board was charged with broad land management discretion by statute, and the Board construed withdrawal as a reasonable, rational and, in this case, necessary exercise of the existing statutory grant of land management discretion to promote potash development. Under Colman v. Utah State Land Board, supra, that interpretation must be treated as prima facie correct. Second, and perhaps even more important, unlike in Hirsh, in this case the Utah Supreme Court has already acknowledged in dicta the Board's power to withdraw land from leasing for good cause shown as a reasonable exercise of that discretion. Archer v. State Land Board, supra. Obviously, in Hirsh there was no such judicial recognition of the existence of a notice requirement.

Therefore, unlike in Hirsh, no reason exists in this case to support the view that the Legislature, by amending §65-1-45 in 1967 expressly to include the power to withdraw land from certain kinds of mineral entry, meant to change the law to provide for a new tool for responsible land

management. To the contrary, based on the broad statutory grant of discretion in Title 65 and the case law discussed herein, there can be no question that by amending §65-1-45 in 1967 the Legislature intended only to codify and clarify the already existing authority to withdraw lands under appropriate circumstances.

POINT IV

EVEN ASSUMING, ARGUENDO, THE 509.18 ACRE TRACT WAS AVAILABLE FOR LEASING BECAUSE THE WITHDRAWAL WAS INVALID, APPELLANT IS STILL NOT ENTITLED TO LEASE THE 509.18 ACRE TRACT BECAUSE THE LEASE WAS NOT ACQUIRED THROUGH THE COMPETITIVE BIDDING PROCEDURES REQUIRED BY §65-1-45 U.C.A. (1953), AS AMENDED.

Appellant contends that with respect to the 509.18 acre tract which had been withdrawn from oil and gas leasing by order of the State Land Board in 1966 (R. 64), he should be entitled to lease the tract because (a) the 1966 withdrawal was void because the Board did not have the authority to order the withdrawal (as discussed in Point III) and (b) under §65-1-45 U.C.A. as that statute provided in 1966, he was entitled to lease the interest because he was the first applicant for the interest. It should be noted in order for Appellant to prevail on the claim this Court would have to hold that the 1966 withdrawal was unlawful and void and that Appellant could lease the land merely by making application and thereby avoid the competitive leasing requirement of §65-1-45. Point III addresses the withdrawal issue; this

Point IV addresses Appellant's contention he is entitled to lease the 509.18 acre tract under the "first applicant" procedure of §65-1-45.

At the outset it should also be noted that Appellant's argument in Points III and IV pertain only to the 509.18 acre tract. Appellant has conceded that as to the 80 acre tract the Board's 1967 withdrawal was proper. (R. 137-139, 141)

With respect to the 509.18 acre tract, the State Land Board, at its August 12, 1981, hearing to review the Division's action to delete this tract from Appellant's oil and gas lease, ruled the Division had acted properly to delete the tract from the lease on the <u>two</u> grounds that the tract was subject to the withdrawal <u>and</u> because the lands had not "been posted for simultaneous filing." (R. 68) The Board's reference to "simultaneous filing" relates to one of the only two ways one can obtain a state mineral lease: as a "first applicant" or as a result of being the highest bidder pursuant to the competitive leasing procedure, as provided in §65-1-45.

As a threshold matter, the parties dispute what law applies to this question. Appellant argues that §65-1-45 as it provided in 1966 applies. This provision stated as follows:

> Except as otherwise provided by law, applications

to lease shall be considered in the order filed; provided, that when simultaneous applications are filed the land board shall let the land to the applicant who will pay the highest rental therefor; and provided further, that applications to lease land already under lease, shall not be received before the day following the expiration of said lease, and all such applications received on such day shall be considered simultaneous.

In all cases where lands become available for leasing by the state because they are newly acquired or because a previous mineral lease is cancelled or otherwise terminated by the board, such land shall be offered for mineral lease by the following procedure.... [Competitive bidding procedures set forth.]

Respondent asserts, however, the law that controls is the law as it read when Appellant filed his application to lease this land. The law as it read in March 1980 when Appellant made his application provided as follows:

Except as otherwise provided herein applications to lease state lands for mineral purposes shall be considered in the order in which they are filed. The division of state lands shall have the authority to withdraw state lands from leasing, but unless state lands are withdrawn and except as otherwise provided herein, the division shall lease the land to the first qualified applicant who has filed an application in accordance with rules and regulations promulgated by the board of state lands.

In all cases where lands become available for leasing by the division because they are newly acquired, or because an existing mineral lease is canceled, relinquished, surrendered, or for any reason terminates, except where the division determines it is not in the best interest of the state to offer the land for lease, the division shall offer the land for subsequent mineral leasing by the following procedure only....[Competitive bidding procedures set forth.] *

*

Since 1980 §65-1-45 has been amended twice: once in 1981, see U.C.A. Second Replacement Volume 7A 1981 Pocket Supplement; and once in 1983, see U.C.A. 1983 Interim Supplement, Part 2, pp. 960, 961.

However, even assuming, arguendo, the older version of §65-1-45 applies, Appellant is still not entitled to lease the land as a first applicant. Under the older version of §65-1-45, the Appellant could not lease the land as a first applicant because the land had become available for leasing "because a previous mineral lease [had been] cancelled or otherwise terminated by the board." In this matter, there was a previous mineral lease on the 509.18 acre tract that had been cancelled by the Board on February 14, 1966, for nonpayment of rental. The only evidence in the record regarding this previous lease appears in the Minutes of the State Land Board's June 14, 1966, hearing in which the Board withdrew the 509.18 acre tract from oil and gas leasing. (R. 63, 64) The Minutes, in pertinent part, state:

> Oil and gas lease ML 6790, MLA 5436, was issued on March 18, 1955, on All Sec. 2, T. 27 S., R. 20 E., SLM, containing 698.64 acres. This land is on the southwest flank of the Cane Creek Anticline.
>
> ML 6790 was cancelled on February 14, 1966, for nonpayment of rental for the portion of its term from January 1, 1966 [sic] until April 1, 1966.

Obviously, assuming the oil and gas interest was even available for leasing, in view of the fact the previous mineral lease was cancelled by the Board, under either version of §65-1-45 the only way the oil and gas could be leased was through the simultaneous bidding procedures.

Nevertheless, without any evidentiary support, whatsoever, Appellant claims the Minutes of the Board hearing, which are a public record, are simply wrong. Appellant's arguments are nothing more than speculation and mere conjecture. In view of the fact there is no evidence contrary to the Minutes of the June 14, 1966, Board hearing as to the reason for the cancellation of the previous mineral lease, this evidence must be regarded as correct. See Wendling v. Cundall, Utah, 568 P.2d 888 (1977).

Appellant argues that the date of the cancellation of the previous mineral lease does not square with the date the primary term of the mineral lease would have ended. But Respondent submits that this does not by itself raise any fact sufficient to raise a question as to the accuracy of the Minutes of the Board's hearing.

POINT V

RESPONDENT CANNOT BE ESTOPPED FROM ASSERTING THE LEASE TO APPELLANT IS INVALID.

Appellant claims that Respondent should be estopped from asserting the lease to him was invalid, and he assigns two reasons for that position: first, he claims the Division did not notify him that the Board upheld the Division's recommendation of cancellation on the ground the simultaneous leasing procedures were not followed as well as

because of the prior withdrawals. Second, he suggests the Division should be estopped because it "misled" him "into believing that certain lands were available for leasing [and] that he was qualified to lease them." (Appellant's brief, p. 17.)

The Utah Supreme Court held in First Equity Corporation of Florida v. Utah State University, Utah, 544 P.2d 887 (1975), that estoppel cannot be asserted against a governmental entity when that entity has acted in excess of its statutory power, such as the Division did in this case when it mistakenly issued the lease to Appellant when the lands were unavailable for leasing. Accord, Utah State University v. Sutro and Co., Utah, 646 P.2d 715, 718 (1982), wherein the Court stated:

> We have no doubt about the soundness of the rule that estoppel generally is not assertable against the government or governmental institutions. There are good and sufficient reasons for that rule, including the safeguarding the interests of the public.

In this case Appellant would have this Court estop Respondent from trying to undo the mistake it made in issuing the mineral lease despite the existence of the withdrawals on the subject land. And not only that, Appellant wants this Court to estop Respondent from alleging that even if the land had been available for leasing, because the land had been subject to a previous mineral

lease that had been cancelled, §65-1-45 requires that the Division could only lease the land under the simultaneous filing procedures. Estoppel is not appropriate in this case because cancellation of Appellant's lease for these reasons is necessary to safeguard the interests of the public. The withdrawals from oil and gas leasing by the Board were to safeguard what it had determined to be the public interest in fostering the potash development of those lands, and the Division cannot, either intentionally or by mistake, undo that revocation or otherwise act in such a way to nullify that Board action. And with respect to §65-1-45, the statute clearly requires when a previous lease is cancelled, as the undisputed evidence in this case shows, the Division must lease the land only by the competitive bidding procedure. This Court construed the legislative intent embodied in the competitive bidding procedure of §65-1-45 in Colman v. Utah State Land Board, 17 Utah 2d 14, 403 P.2d 781 (1965), in which the Court held that this procedure safeguards the interest of the public:

> The statutes we have referred to should be considered together and in connection with the entire act and harmonized insofar as possible with the carrying out of the responsibilities the Land Board is charged with of managing the public lands of the State in the most prudent and profitable manner possible. Viewed in conformity with that objective, it appears to be intended that when mineral leasing rights are "first available for leasing" they should be put on the open market and an opportunity for competitive bidding be

> given. This safeguards the interests of the State by getting the best price a qualified bidder will pay, and also protects the interest of all persons who might be interested by allowing them a fair opportunity to bid.
>
> 17 Utah 2d at 18.

An exception to the general rule that estoppel generally is not assertable against a governmental entity arises if a party can show that manifest injustice would result if estoppel could not be asserted against the governmental entity, Utah State University v. Sutro and Co., Celebrity Club, Inc. v. Utah Liquor Control, Utah, 602 P.2d 689 (1979), but the facts of this case do not warrant invoking this exception. All of the monies paid by Appellant have either been refunded to him, offered to be refunded to him, or offered to be credited to any other account Appellant has with the Division. Further, Appellant had not begun drilling operations under the lease nor had he even explored for oil and gas before the Division terminated the lease. (R. 68) Appellant complains he was somehow disadvantaged because the Division, in informing him of the Board's final decision, did not list the fact that the land had not been put up for competitive bid as one of the reasons the Board upheld the Division's cancellation. But this contention overlooks the fact the record clearly shows that the competitive bidding issue was one of the two grounds on which the Board based its decision in both Board

hearings pertaining to Appellant's lease (R. 68, 71), Appellant had requested both of these hearings, and the Minutes of these hearings show this issue as a factor in the Board's decision. Appellant has failed to demonstrate that estoppel is appropriate in this case.

CONCLUSION

The trial court properly ruled Appellant failed to comply with the requirements for judicial review, §65-1-9(2) U.C.A. (1953), as amended, under the clear and undisputed facts of this case, and with the requirements for waiver of governmental immunity, §63-30-1 et seq., U.C.A. (1953), as amended. Notwithstanding Appellant's erroneous, cumbersome and impractical construction of the relevant and applicable statutes, the plain fact is Appellant simply failed to do what these statutes require him to do to maintain this action.

Because Appellant did not satisfy the applicable jurisdictional requirements, the trial court did not reach the other claims raised by Appellant. Obviously, assuming this Court affirms the trial court, these claims do not need to be reviewed on appeal. However, even if these claims are reviewed, the land involved in this lawsuit is subject to two previous withdrawals which are valid and binding, and the land simply is not available to be leased to anyone, not

even the Appellant. If this land ever becomes available for leasing by the Division, it will only do so at such time as those withdrawals are revoked and the land is put up for competitive bid.

It is respectfully submitted that the Order Granting Summary Judgment entered by the trial court herein should be affirmed in all respects.

DATED this 30th day of September, 1983.

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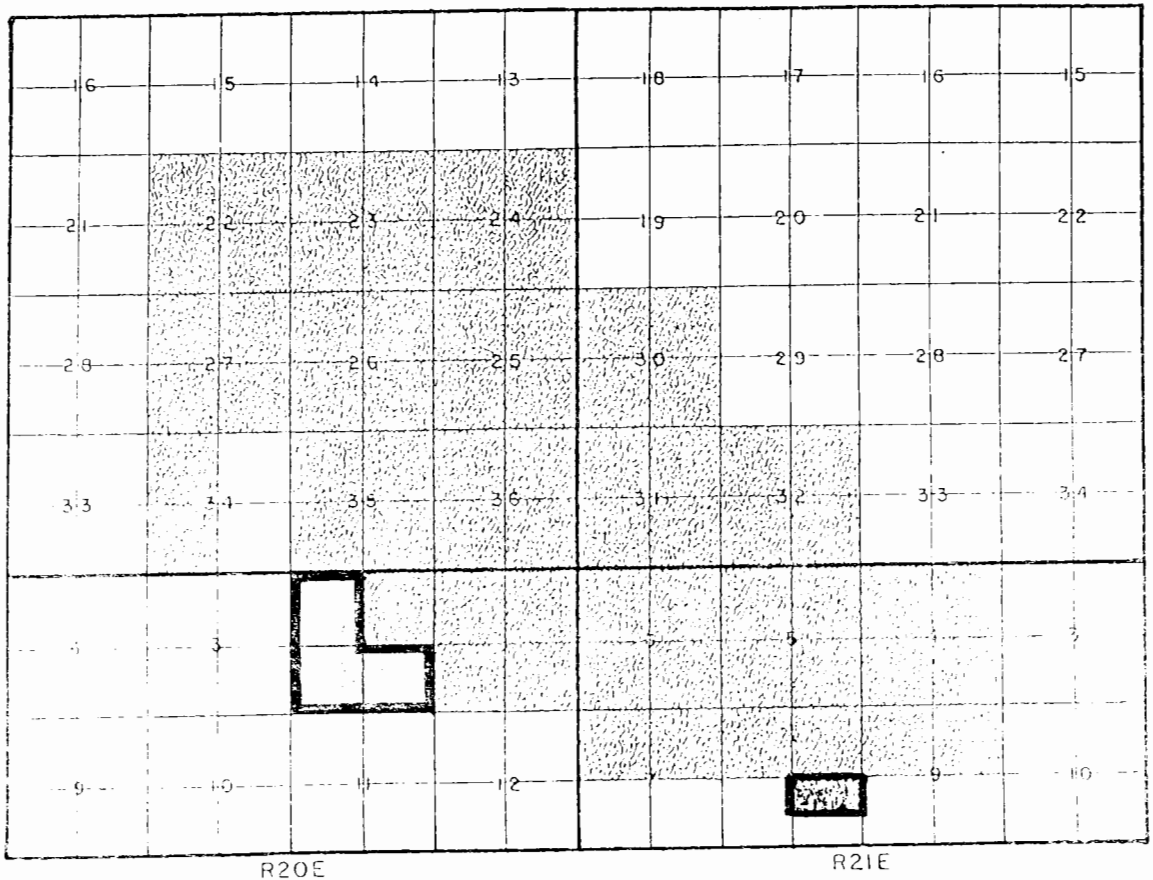
CERTIFICATE OF MAILING

This is to certify that two copies of the foregoing Brief of Respondent were mailed first class, postage prepaid, to Bryce E. Roe of Roe and Fowler, Attorneys for Appellant, 340 East Fourth South, Salt Lake City, Utah 84111, this 30th day of September, 1983.

STATE LAND OIL/GAS WITHDRAWLS IN CRITICAL POTASH REGION



Prepared by John T. Blake, DSLF