

1992

# Kennecott Corporation v. Salt Lake County and The Utah State Tax Commission of Utah : Brief of Petitioner

Utah Supreme Court

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David E. Yocum; Salt Lake County Attorney; Karl Hendrickson; Deputy Salt Lake County Attorney; Bill Thomas Peters; Special Deputy County Attorney; Paul Van Dam; Utah State Attorney General; Rick Carlton; Assistant Attorney General; Attorneys for Respondents.

James B. Lee; Kent W. Winterholler; Parsons, Behle & Latimer; Attorneys for Kennecott Corp..

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UTAH SUPREME COURT  
BRIEF

## BRIEF

159

DOCKET NO. 920144

KENNECOTT CORPORATION

Petitioner,

VS.

SALT LAKE COUNTY and THE STATE  
TAX COMMISSION OF UTAH

## Respondents.

Docket No. 920144  
85801C

PRIORITY CATEGORY 15

## BRIEF OF PETITIONER

JAMES B. LEE (1919)  
KENT W. WINTERHOLLER (3525)  
MAXWELL A. MILLER (2264)  
of and for  
PARSONS BEHLE & LATIMER  
Attorneys for Petitioner  
Kennecott Corporation  
201 South Main Street  
Suite 1800  
P.O. Box 11898  
Salt Lake City, Utah 84147

R. PAUL VAN DAM  
Attorney General  
RICK CARLTON  
Assistant Attorney General  
Tax & Business Regulation  
Division  
Attorneys for Respondent  
State Tax Commission of Utah  
136 South State, Suite 1100  
Salt Lake City, Utah 84111

**FILED**

JUN 17 1992

CLERK SUPREME COURT  
UTAH

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BEFORE THE SUPREME COURT OF THE STATE OF UTAH

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Petitioner,

vs.

SALT LAKE COUNTY and THE STATE  
TAX COMMISSION OF UTAH

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85801C

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ON APPEAL FROM THE UTAH STATE TAX COMMISSION

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BRIEF OF PETITIONER

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DAVID E. YOCOM  
Salt Lake County Attorney  
KARL HENDRICKSON  
Deputy Salt Lake County Attorney  
BILL THOMAS PETERS  
Special Deputy Salt Lake County  
Attorney  
Attorneys for Respondent  
Salt Lake County  
#9 Exchange Place, Suite 400  
Salt Lake City, Utah 84111

R. PAUL VAN DAM  
Attorney General  
RICK CARLTON  
Assistant Attorney General  
Tax & Business Regulation  
Division  
Attorneys for Respondent  
State Tax Commission of Utah  
136 South State, Suite 1100  
Salt Lake City, Utah 84111

JAMES B. LEE (1919)  
KENT W. WINTERHOLLER (3525)  
MAXWELL A. MILLER (2264)  
of and for  
PARSONS BEHLE & LATIMER  
Attorneys for Petitioner  
Kennecott Corporation  
201 South Main Street  
Suite 1800  
P.O. Box 11898  
Salt Lake City, Utah 84147

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### JURISDICTION OF THE COURT

This Court has jurisdiction of this Petition for Review pursuant to Article VIII, Section 3 of the Utah Constitution, Utah Code Ann. §§ 78-2-2(3)(e)(ii) and 63-46b-16 and Rule 14 of the Utah Rules of Appellate Procedure.

### ISSUES PRESENTED FOR REVIEW AND STANDARD OF APPELLATE REVIEW

#### **ISSUE 1**

A. Issue: Is there sufficient evidence in the record to sustain the Utah State Tax Commission's (the "Commission's" or the "Tax Commission's") Finding of Fact that Kennecott Corporation's ("Kennecott's") state-assessed property was assessed as of January 1, 1988 using the capitalized net revenue method?

B. Standard of Review: The standard of appellate review applicable to this issue is that there must be substantial evidence in the record, considered as a whole, to support this Finding of Fact by the Commission. First Nat'l Bank v. County Bd. of Equalization, 799 P.2d 1163 (Utah 1990).

#### **ISSUE 2**

A. Issue: Did the Commission erroneously conclude that the appraisal methods used to value Kennecott's state-assessed real property and those used by Salt Lake County (the "County") to value county-assessed commercial and industrial real property were not the same?

B. Standard of Review: The standard of appellate review applicable to this issue is that there must be substantial evidence in the record, considered as a whole, to support this Conclusion of Law by the Commission. First Nat'l Bank v. County Bd. of Equalization, supra.

### ISSUE 3

A. Issue: Did the Commission err in failing to apply the 20% reduction enunciated in Utah Code Ann. § 59-2-304(1) (1987) to Kennecott's state-assessed real property as of January 1, 1988 under Amax Magnesium Corp. v. Utah State Tax Comm'n, 796 P.2d 1256 (Utah 1990)?

B. Standard of Review: The standard of appellate review applicable to this issue is a correction of error standard. The Commission's decision should be upheld only if it is not erroneous. Savage Industries, Inc. v. Utah State Tax Comm'n, 811 P.2d 664 (Utah 1991).

### ISSUE 4

A. Issue: As an alternative to Issue 3 above, did the Commission err in failing to grant Kennecott's state-assessed property the 14% reduction in value which the Commission granted to the railroads as of January 1, 1988?

B. Standard of Review: The standard of appellate review applicable to this issue is a correction of error

standard. The Commission's decision should be upheld only if it is not erroneous. Savage Industries, Inc. v. Utah State Tax Comm'n, supra.

#### CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE<sup>1</sup>

1. Art. XIII, Sec. 2(1), Utah Constitution:

All tangible property in the state, not exempt under the laws of the United States, or under this Constitution, shall be taxed at a uniform and equal rate in proportion to its value, to be ascertained as provided by law.

2. Art. XIII, Sec. 3(1), Utah Constitution:

The Legislature shall provide by law a uniform and equal rate of assessment on all tangible property in the state, according to its value in money, . . . . The Legislature shall prescribe by law such provisions as shall secure a just valuation for taxation of such property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its tangible property, . . . .

3. Art. I, Sec. 24, Utah Constitution:

All laws of a general nature shall have uniform operation.

4. Utah Code Ann. § 59-2-201(1) (1987):

By May 1 the following property shall be assessed by the commission at 100% of fair market value, as valued on January

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<sup>1</sup> A verbatim presentation of the constitutional provisions, statutes and rules are included in the Addendum at page B-1.

1, in accordance with this chapter:  
. . . .

5. Utah Code Ann. § 59-2-201(2) (1987):

The method for determining the fair market value of productive mining property is the capitalized net revenue method or any other valuation method the commission believes, or the taxpayer demonstrates to the commission's satisfaction, to be reasonably determinative of the fair market value of the mining property. . . . In no event may the fair market value of the mining property be less than the fair market value of the land, improvements, and tangible personal property upon or appurtenant to the mining property.

6. Utah Code Ann. § 59-2-304 (1987):

(1) If the county assessor uses the comparable sales or cost appraisal method in valuing taxable property for assessment purposes, the assessor is required to recognize that various fees, services, closing costs, and other expenses related to the transaction lessen the actual amount that may be received in the transaction. The county assessor shall, therefore, take 80% of the value based on comparable sales or cost appraisal of the property for purposes of assessment under Subsection 59-2-103(1).

**STATEMENT OF THE CASE**

I. Nature of the Case.

This is a petition for review by Kennecott from an order of the Utah State Tax Commission issued on March 3, 1992 in which the Commission refused to reduce the value of Kennecott's

centrally-assessed property, holding that Kennecott's property had been assessed according to the capitalized net revenue method in 1988 and that Kennecott's assessment at 100% of its fair market value pursuant to that method was proper, fair, reasonable, and required by the constitution and laws of the State of Utah.

## II. Course of Proceedings Below.

On April 29, 1988, Kennecott received from the Property Tax Division of the Commission (the "Division") its Notice of Assessment assigning the assessed value of Kennecott's mining properties and associated facilities as of January 1, 1988. Kennecott filed a timely Request for Agency Action with the Commission protesting this assessment. Thereafter, Kennecott filed an Amended Request for Agency Action.

In its Amended Request for Agency Action, Kennecott sought a reduction in the assessed value of its real property by twenty percent (20%), asserting that the Division's failure to grant this reduction to Kennecott's state-assessed real property, while having this 20% reduction extended to county-assessed commercial and industrial real property, and other state-assessed real property, i.e., railroad property, violated Kennecott's rights under Article XIII, §§ 2,3 and 4 of the Utah Constitution as well as Kennecott's rights to equal protection of the law as guaranteed by the Utah and United States Constitutions.

Kennecott also asserted that this failure deprived Kennecott of its property without due process of law, in violation of the Utah and United States Constitutions.

Additionally, Kennecott asserted that, as of January 1, 1988, the Commission had reduced the value of railroad real and personal property from 100% of that property's fair market value without reducing the value of Kennecott's real and personal property, and that this action constituted unlawful discrimination in violation of these same Utah and federal constitutional provisions.

On May 10, 1990 the Commission held a formal hearing respecting Kennecott's Amended Request for Agency Action. After the Utah Supreme Court's decision in Amax, issued July 18, 1990, the Commission issued an Order on October 28, 1991 directing the parties to submit written briefs addressing the affect of the Amax decision on Kennecott's Amended Request. On March 3, 1992, the Commission issued its Findings of Fact, Conclusions of Law and Final Decision ("Final Decision"), a copy of which is included in the Addendum at page A-1, denying Kennecott any reduction in its assessed value as of January 1, 1988.

### III. Decision of the Commission.

In its Final Decision, the Commission ruled that (1) Kennecott's state-assessed property was assigned an assessed

value as of January 1, 1988, using the capitalized net revenue method; (2) Kennecott did not show that the appraisal methods used to value Kennecott's state-assessed real property and those used by the County to value locally-assessed commercial and industrial real property were the same; (3) the Commission denied Kennecott's request to apply the 20% reduction set out in Utah Code Ann. § 59-2-304(1) (1987) (the "20% Statute") to Kennecott's state-assessed real property as of January 1, 1988 under the Amax decision; and (4) the Commission refused to grant to Kennecott's state-assessed property the 14% reduction in value which was granted by the Commission to the railroads as of January 1, 1988.

#### IV. Statement of Facts.

Prior to the hearing, Kennecott, the Division and the County signed two stipulations which were received into evidence at the hearing. See Transcript at 5; Record at 203-07.<sup>2</sup> The parties stipulated as follows:

(1) As of January 1, 1988, all of Kennecott's real property, improvements and personal property subject to

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<sup>2</sup> The record on appeal consists of the record compiled and numbered by the Commission (the "Record"), the reporter's transcript of the hearing (the "Transcript"), and the depositions of Brent Eyre ("Eyre Deposition") and Larry Butterfield ("Butterfield Deposition"). The Eyre and Butterfield Depositions were, by stipulation, accepted into evidence and used in lieu of testimony. Transcript at 4; Eyre Deposition at 4-5; Butterfield Deposition at 3-5.

assessment by the Division was assessed at \$617,771,073. Record at 205.

(2) The Division did not apply Utah Code Ann. § 59-2-304 (1987) to Kennecott's property as of January 1, 1988 and did not discount or reduce Kennecott's assessment of \$617,771,073 by 20% or any other percentage. Record at 205.

(3) As of January 1, 1988, the Division reduced the fair market value of all Union Pacific Railroad, Denver and Rio Grande Railroad and Southern Pacific Railroad property in Utah by 14%. This reduction was applied to all the railroads' state-assessed taxable property, which included both real and personal property. Record at 205.

(4) Kennecott, which did not receive a 14% reduction in the value of its state-assessed property for 1988, and the railroads, which received a 14% reduction in the value of their state-assessed property, were both property owners whose property was assessed by the Division pursuant to the provisions of Utah Code Ann. § 59-2-201 (1987). Record at 206.

(5) The County agreed that it would not contest the valuation of Kennecott's property in 1988 by the Division except to the extent Kennecott sought a reduction in that valuation as a result of Union Pacific Railroad Co. v. State Tax



Commission, 716 F. Supp. 543 (D. Utah 1988), or related theories. Record at 204.

The methods employed by the Division to value Kennecott's property as of January 1, 1988 consisted of (1) a comparable sales, or market value, method for Kennecott's land; (2) replacement cost new less depreciation method (RCNLD), or cost method, for Kennecott's buildings and other real property improvements, and; (3) historical cost less depreciation for personal property. This was characterized in the hearing as the "summation" method of valuing Kennecott's property. Transcript at 51.

#### SUMMARY OF ARGUMENT

- I. KENNECOTT IS ENTITLED TO THE BENEFIT OF THE 20% STATUTE BECAUSE, AS IN AMAX, KENNECOTT'S PROPERTY WAS VALUED USING THE SAME METHODS USED BY COUNTY ASSESSORS, WHO APPLIED THE 20% STATUTE.

In Amax Magnesium Corporation v. Utah State Tax Commission, 796 P.2d 1256 (Utah 1990)<sup>3</sup>, the Court held that since the Tax Commission used the same methods to value Amax's property that Tooele County used to value county-assessed property, it would unconstitutionally violate the uniform and equal requirements of Article XIII, §§ 2 and 3 and the equal protection

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<sup>3</sup> A copy of the Amax decision is included in the Addendum at page D-1.

requirement of Article I, § 24 of the Utah Constitution not to apply the 20% Statute<sup>4</sup> to Amax's property. The Commission refused to apply the Amax decision and analysis to Kennecott's property because it ruled that Kennecott's property was valued using the capitalized net revenue method instead of the same methods employed by county assessors.

Despite the Commission's decision, the evidence at the hearing established the following: (1) the capitalized net revenue method was not used to arrive at the assessed value of Kennecott's centrally assessed property in 1988; and (2) the appraisal methods used to value Kennecott's centrally assessed property and those used by the County to value county-assessed commercial and industrial property were identical; (3) Kennecott's property was valued at its full fair market value; and (4) all comparable County-assessed property, regardless of appraisal methodology, was valued at full fair market value and then reduced by application of the 20% Statute by County assessors.

Therefore, under Amax, Kennecott is entitled to the benefit of the 20% Statute in 1988. The Commission's refusal to apply the 20% statute ignores Amax and violates the uniform and

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<sup>4</sup> The statute at issue in Amax was Utah Code Ann. section 59-5-4.5 (1973 & Supp. 1986). In 1987, the 20% Statute was recodified at Utah Code Ann. section 59-2-304(1).

equal requirements of the Utah Constitution and the equal protection requirements of the Utah and United States Constitutions.

**II. ALTERNATIVELY, THE TAX COMMISSION ERRED IN FAILING TO GRANT KENNECOTT THE 14% REDUCTION IN VALUE WHICH WAS GRANTED TO THE RAILROADS BY THE TAX COMMISSION AS OF JANUARY 1, 1988.**

In Union Pacific v. Utah State Tax Commission, 716 F. Supp. 543 (D. Utah 1988)<sup>5</sup> the court held that the 20% Statute discriminated against the railroads for arbitrary reasons which violated the federal Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act"). Therefore, the railroads, which like Kennecott are state-assessed property, were granted a 14% reduction by the Commission in the assessed value of their real and personal property for 1988.

The Commission refused to apply a similar 14% reduction to Kennecott's property because it claimed (1) that the methods used to value railroad property are dissimilar from those used by the counties to value commercial and industrial property and by the Division to value Kennecott's property, and (2) that the federal 4-R Act does not apply to mining property.

Despite the Commission's holding, Kennecott is entitled to equal treatment with the railroads under the equal protection and uniformity guarantees of the federal and Utah constitutions.

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<sup>5</sup> A copy of the Union Pacific decision is included in the Addendum at page E-1.

Utah's equal protection requirements prohibit arbitrary classifications which discriminate against similarly situated taxpayers. Federal requirements prohibit the intentional systematic undervaluation of property which is comparable to the taxpayer's property. Allowing railroad property to be taxed at 86% of its value, while requiring Kennecott's property to be taxed at 100% of its value violates both federal and state equal protection requirements as well as Utah's uniformity requirement.

#### ARGUMENT

**I. KENNECOTT IS ENTITLED TO THE BENEFIT OF THE 20% STATUTE BECAUSE, AS IN AMAX, KENNECOTT'S PROPERTY WAS VALUED USING THE SAME METHODS USED BY COUNTY ASSESSORS, WHO APPLIED THE 20% STATUTE.**

**A. The Utah Supreme Court ruled that the Tax Commission's failure to apply the 20% Statute to Amax was unconstitutional because Amax's property was valued using the same methods used to value county-assessed property.**

In Amax, the Utah Supreme Court held that Amax Magnesium Corporation ("Amax"), which owned state-assessed property in Tooele County, was entitled to the same 20% discount in the valuation of its taxable property that was extended to county-assessed property because Amax had shown that its property had been assessed using valuation methods similar to those used by county assessors. Amax was in the business of extracting magnesium from the brine waters of the Great Salt Lake and its plant

was state-assessed as property appurtenant to a mining operation, pursuant to Utah Code Ann. § 59-5-3 (1974).<sup>6</sup> Id. at 1258. Amax claimed that it should receive the benefit of the 20% Statute because the assessment of its property at 100% of its value, while county-assessed property was assessed at only 80% of its value violated the equality and uniformity requirements of Utah Constitution Article XIII, §§ 2 and 3 and the equal protection requirement of Article I, § 24. The Utah Supreme Court agreed with both arguments.

1. Equality and Uniformity.

The Court acknowledged that in Rio Algom v. San Juan County, 681 P.2d 184 (Utah 1984)<sup>7</sup> it had upheld the 20% Statute against a facial constitutional challenge, but it distinguished Rio Algom because the Rio Algom plaintiffs had not shown that their properties were assessed at fair market value or that they bore a disproportionate share of the property taxes in the county. Amax, 796 P.2d at 1259.

Amax, on the other hand, did not challenge the facial validity of the 20% Statute; rather it established that the statute, as applied to Amax, violated the constitutional requirements

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<sup>6</sup> Amax's primary argument was that its plant was not appurtenant to a mining operation and should have been county-assessed property. The Court, however, ruled against that argument. See, id. at 1258-59.

<sup>7</sup> A copy of the Rio Algom decision is included in the Addendum at page F-1.

of equality and uniformity because its property was valued using similar valuation methods as those used by county assessors. Id. at 1260.

The Court stated that the purposes of the 20% Statute were (1) to prevent overvaluation by recognizing transactional costs which lessen the amounts received by a seller, and (2) to equalize the tax burden between state and county assessments. Id. at 1260. Since Amax showed that its property was valued using the same cost and market methods used to value county-assessed property, the Court stated that it:

strains reason to assert that if assessors using the cost and market appraisal methods overvalue county properties, the same overvaluation would not occur with state properties appraised by the same methods.

Id. The Court continued:

Assuming that the legislature was correct in determining that the market value appraisal method overvalues property by 20 percent, it would be unconstitutional to apply [the 20% Statute] to county-assessed properties and not to state assessed properties.

Id. Consequently, the Court held that the assessment of Amax's property at 100% of its value violated Article XIII's equality and uniformity requirements.

## 2. Equal Protection.

In analyzing Amax's equal protection claim, the Court relied upon the rule set forth in Blue Cross and Blue Shield v.

State, 779 P.2d 634 (Utah 1989), that in order to establish a violation of the Utah Constitution's equal protection requirement, a party must show that the law creates certain classes of persons and that the law discriminates against a class without a reasonably related legitimate government purpose. See, Amax at 1261.<sup>8</sup>

Relying on the fact that Amax's property was valued using the same methods used by county assessors, the Court stated:

If county properties assessed by the cost appraisal method receive a 20 percent reduction and state properties assessed by the same method receive no reduction, then [the 20% Statute] has created two classes of properties assessed by the cost appraisal method and arbitrarily discriminates against one class merely because it is a state-assessed property.

Id. Additionally, the Court noted that the purposes of the 20% Statute, i.e., the equalization of state and county-assessed property, were not met when the same valuation methods were used for both state and county assessments. Instead, application of the 20% Statute to county-assessed, but not state-assessed property, "aggravates the taxing disparity" between state-assessed and county-assessed property. Id. at 1261-62.

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<sup>8</sup> The Amax Court did not decide the federal constitutional issue, because "if the challenged statute cannot withstand attack under the state constitution, there is no reason to reach the federal question." Id. at 1261.

Since the Amax Court held that the application of the 20% Statute to county-assessed property but not to Amax violated Articles I and XIII of the Utah Constitution, it remanded the case to the Commission for revaluing Amax's property pursuant to the 20% Statute. Id. at 1262.

- B. As in Amax, the Tax Commission's refusal to apply the 20% Statute to Kennecott is unconstitutional because Kennecott's property was valued using the same methods used to value county-assessed property.

The Commission ruled that the Amax decision did not apply to the valuation of Kennecott's property in 1988. The Commission based this conclusion upon its factual determinations that (1) Kennecott's property had been assessed using the capitalized net revenue method, and (2) that Kennecott did not show that its property had been assessed using the same methods used to value county-assessed property.

Neither of these factual determinations, however, are supported by substantial evidence in the record taken as a whole. See First National Bank v. County Board of Equalization, 799 P.2d 1163 (Utah 1990). In fact, the record clearly shows that Kennecott was not valued using the capitalized net revenue method, but was valued using the same methods used to value county-assessed property. Therefore, according to the Amax analysis, the Commission should be required to apply the 20% Statute to its valuation of Kennecott's property for 1988.



1. The Tax Commission erroneously found that Kennecott's property was assigned its assessed value as of January 1, 1988 using the capitalized net revenue method.

In its Findings of Fact, the Commission states: "Mining properties in Utah are valued using only one method, the 'capitalized net revenue method' as set forth in Utah Code Ann. § 59-2-201, which method is more fully set forth by the Rules of the Tax Commission in Rule R884-24-7P." Findings of Fact ¶ 9. Additionally, the Commission states: "The assessment of Kennecott was not made by using either the comparable sales method or the cost appraisal method, but was made by using the capitalized net revenue method." Findings of Fact ¶ 13.

The Commission's decision should not be upheld because, although there is substantial evidence to show that Kennecott's property was not valued using the capitalized net revenue method in 1988, there is no evidence to support the Commission's finding that the capitalized net revenue method was used to assign an assessed value.

Section 4 of Article XIII of the Utah Constitution states: "All metalliferous mines or mining claims . . . shall be assessed as the legislature shall provide." Utah Code Ann. § 59-2-201(1)(e) and (f) state that all mines and mining claims, machinery used in mining, and property or surface improvements upon or appurtenant to mines or mining claims shall be assessed

by the Tax Commission at 100% of fair market value. Utah Code Ann. § 59-2-201(2) states:

The method for determining the fair market value of productive mining property is the capitalized net revenue method or any other valuation method the Commission believes, or the taxpayer demonstrates to the Commission's satisfaction, to be reasonably determinative of the fair market value of the mining property . . . In no event may the fair market value of the mining property be less than the fair market value of the land, improvements, and tangible personal property upon or appurtenant to the mining property (emphasis added).

Therefore, Utah's Constitution requires the legislature to specify the method for valuing mining property. The method the legislature has chosen is the capitalized net revenue method or any other method that the Commission believes, or the taxpayer demonstrates, to be reasonably determinative of the fair market value of the mining property.

Brent Eyre, who is responsible for the assessment of mines and railroads for the Tax Commission, testified that in 1988 the application of the capitalized net revenue method to Kennecott's property resulted in a valuation that was less than the fair market value of the property based upon standard valuation methods. Consequently, Kennecott's property was valued

using a summation of assets approach instead of the capitalized net revenue method. Transcript at 50-51.<sup>9</sup>

In arriving at the value of Kennecott's land, the Division looked at values of comparable adjacent commercial/industry property in the same area. Transcript at 29-30, 75. In valuing Kennecott's improvements to the land, the Commission relied upon the Marshall & Swift guidelines for determining replacement cost new less depreciation. Transcript at 30-31, 67. Therefore, other methods, i.e. the replacement cost new less depreciation method and the comparable sales method, were used to value Kennecott's real property, not the capitalized net revenue method.

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<sup>9</sup> Q: [By Mr. Winterholler] All right. Now when you ultimately reached a valuation, an assessed value for Kennecott, which approach was used?

A: [By Mr. Eyre] The statute states that the value for mining property will be determined by the capitalized net revenue method. The statute goes on to state that in no event will the value of mining property be less than the summation of the value of the land, improvements, and tangible property associated with the mine.

In the case of the 1988 assessment of Kennecott, Kennecott was just concluding their major modernization project, was not in full production as of yet, I believe, on the lien date. And thus, in our complying with the regulation for the capitalized net revenue method, the five-year average of Kennecott's net revenue, coupled with the massive capital expenditures that were allowed to reduce the revenue, made it so that the net revenue approach was less than the summation of the value of the land, improvements, and tangible property.

So the valuation placed on Kennecott's property was the summation of the physical assets.

2. The Commission erred in concluding that Kennecott did not show that the appraisal methods used to value Kennecott's state-assessed real property and those used by the County to value county-assessed commercial and industrial real property were the same.

In its Findings of Fact, the Commission states:

During the period in question, locally assessed commercial and industrial real property located in Salt Lake County was assessed by the County using a combination of the comparable sales method, the cost appraisal method, and the income approach.

Findings of Fact ¶ 4. Additionally, the Commission states:

The assessment of Kennecott was not made by using either the comparable sales method or the cost appraisal method, but was made by using the capitalized net revenue method.

Findings of Fact ¶ 13. Finally, the Commission states:

The petitioner [Kennecott] has not shown that the appraisal methods used by the Petitioner and those used by Salt Lake County were the same.

Conclusions of Law ¶ 15.

- (a) The County uses three standard valuation methods.

In his deposition, which by stipulation became part of the record at the hearing, Larry Butterfield, Chief Appraiser for the County, testified that the County uses three methods for valuing real property on its tax rolls: the replacement cost new

less depreciation method, the comparable sales method, and the income method. Butterfield Deposition at 22-24.<sup>10</sup>

In describing the cost method employed by the County in valuing buildings, Mr. Butterfield testified that the assessor considers the building's age, construction, composition, square footage, and condition and then refers to the widely accepted Marshall & Swift Costing Manual to determine replacement cost and depreciation. Mr. Butterfield identified this method as the

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10 Q. [By Mr. Winterholler] It is my understanding, then, that the method employed by your office in appraising industrial buildings is a replacement cost minus depreciation method?

A. [By Mr. Butterfield] That is one approach.

Q. What are the other approaches?

A. There is the market approach to value which is where the appraiser would probably try to find similar projects that have been sold and try to compare the market value from the sale [sold] property to the subject property. . . .

\* \* \*

A. Yes. We also use the income approach to value.

\* \* \*

Q. Now, is that a method which is used primarily for industrial property or commercial property or both?

A. Of the three approaches to value there is no primary method that we currently use.

Q. You may use any one?

A. We may use any one of the three.

replacement cost new less depreciation method ("RCNLD").  
Butterfield Deposition at 20-22.<sup>11</sup>

Describing the comparable sales (or the market) approach to value, Mr. Butterfield stated that the appraiser would look for similar property that had recently been sold and

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<sup>11</sup> Q. [By Mr. Winterholler] What does he do?

A. [By Mr. Butterfield] What he does is he goes out on the site, makes a determination or looks at the property, turns around and starts making notes about what the property is, the condition of the property, possibly what it's made of, what he could classify it as, and the type of construction. He probably would try to pick up the year of build on it.

And then the next step would be to measure it to come up with square footage of it. . . .

\* \* \*

Q. Let's assume he knows what the square footage is; he knows what the cubic footage is; he knows what the general condition of the building is; he knows the years in which it was built; and he has a general idea of how well it's been maintained. Where does he look after that?

A. He would go into the Marshall & Swift Manual, costing manual, and see what costs it would have, replacement costs, and then he would turn around and take the condition and age for depreciation.

Q. As I understand it, the method he employs in appraising that building is primarily a Marshall & Swift replacement cost minus depreciation method.

A. This is true.

\* \* \*

A. Yes. I really don't know how many there is, but most generally the Marshall & Swift system everybody uses, because it is quite well-known and quite valid and quite easily accepted by all appraisers.

Q. Is it my understanding, then, that the method employed by your office in appraising industrial buildings is a replacement cost minus depreciation method?

A. That is one approach.

compare them to the subject property. Butterfield Deposition at 23.<sup>12</sup>

Finally, describing the income approach, Mr. Butterfield testified that the assessor would look for similar property that had recently been leased in order to determine the economic value of the property. Butterfield Deposition at 23.<sup>13</sup>

Thus, the County's assessors use three methods to value property within the County: First, the cost method, or RCNLD, in which the appraiser examines the footage, condition and age of the building and then refers to the Marshall & Swift costing manual to determine the replacement cost of the building and

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- 12     A.     [By Mr. Butterfield] There is the market approach to value which is where the appraiser would probably try to find similar projects that had been sold and try to compare the market value from the sold property to the subject property. There is also --
- Q.     [By Mr. Winterholler] Relative to industrial property, can you tell me how many industrial properties in Salt Lake County are assessed using a market -- as I understand, is that the same thing as a comparable sales method?
- A.     Yes.
- Q.     So if I use those terms interchangeable, I'm not misleading you.
- A.     They are interchangeable.
- 13     A.     [By Mr. Butterfield] We also use the income approach to value.
- Q.     [By Mr. Winterholler] How do you get that information?
- A.     We find comparable properties that have been recently leased or rented out, and then we would use that and we would develop an economic rent. We would try to arrive at an economic rent to see what the building would rent, the subject property, would rent for.

depreciation; second, the market, or comparable sales, method in which the appraiser looks for similar properties that have recently sold and compares them with the subject property; and third, the income approach in which the appraiser tries to develop an economic rent for the subject property. These are the only methods employed by the County Assessor's Office. Butterfield Deposition at 24.<sup>14</sup>

(b) The Division used the same standard methods used by the County to assess Kennecott's property in 1988.

Brent Eyre also identified the same three standard methods which are used by the Division in valuing property, Transcript at 77, and stated that the cost approach and the income approach were employed in the valuation of mining properties in 1988. Transcript at 77-78.

In specifically discussing how Kennecott's property was valued in 1988, Phillip Despain, Manager of Ad Valorem Taxes for Kennecott, testified that the Division used the comparable sales

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14 Q. [By Mr. Winterholler] Now, is that a method which is used primarily for industrial property or commercial property or both?

A. [By Mr. Butterfield] Of the three approaches to value, there is no primary method that we currently use.

Q. You may use any one?

A. We may use any one of the three.



method to value Kennecott's land and the RCNLD method based upon the Marshall & Swift manual to value Kennecott's buildings. Transcript at 29-32.<sup>15</sup> Mr. Despain also testified that the

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- 15 Q. [By Mr. Winterholler] Mr. Despain, this land value which was assessed by the Property Tax Division, do you know the method they employed in order to arrive at that assessment?
- A. [By Mr. Despain] Yes. They used what would be called the comparable sales method.
- Q. In order to arrive at the land value?
- A. At the land value.
- Q. What about buildings and improvements by the Property Tax Division? Do you know the method employed by the Property Tax Division to arrive at that value?
- A. Yes, I do.
- Q. Tell me what that method was.
- A. They--they appraisers will come out and inspect the--each building and improvements, measure for buildings, determine what type of construction and so forth, determine square footage, and then, as a understand it, they used the recognized publication called Marshall & Swift, where they can look in this manual and find a particular type of building and get a replacement cost new less depreciation based on the square footage.
- Q. So, in other words, is the cost model you're describing from Marshall & Swift a replacement cost minus depreciation model?
- A; That's my understanding, yes.
- Q. You're familiar with the Marshall & Swift manual, are you not?
- A. Yes.
- Q. Now, with respect to improvements other than buildings, do you know how the Property Tax Division values those improvements?
- A. Yes. I do.
- Q. How do they do it?

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capitalized net revenue method was not used in 1988 to value Kennecott's property. Id.

Therefore, the evidence at the hearing was that there are three standard methods of valuing property used by both the

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- A. Well, they come out, and in their appraisal they'll see retaining walls, concrete, asphalt paving, roads, and so forth. And then they have another source that lists the construction costs, current construction costs, to build similar type facilities. For example, asphalt paving, they--it would tell them how much it costs for a--per square foot. And they measure the asphalt paving and come up with a replacement cost.
- Q. So it's your understanding that this method of valuing improvements other than buildings by the Property Tax Division is a replacement cost minus depreciation methods; is that correct?
- A. That's correct.
- Q. Is that the method that was employed when you testified about replacement costs minus depreciation for the valuation which is included on Exhibit 5--
- A. That's correct.
- Q. Now, are you familiar with the income approach to value?
- A. Yes, I am.
- Q. Does this Exhibit 5 contain an income approach to value?
- A. No. Not that I'm aware of.
- Q. Why does it not?
- A. Well, we went through the income approach, called the capitalized net income method; and the values, assessed value using that method is considerable less than the method that was used to arrive at these numbers. So it was not used.
- Q. So you're talking about--you mean that the replacement cost method valued Kennecott's property higher than the income method would have done?
- A. Yes.

County Assessors and the Division: the cost approach, the income approach and the market approach. In valuing mining property, both the Commission and the County Assessors use the RCNLD method as implemented in the Marshall & Swift costing manual. For valuing land, both the County and the Commission rely primarily on the market method, looking for sales of comparable land to the subject property. Finally, the income method primarily used for mining property is the capitalized net revenue method. This method, however, was not used for Kennecott in 1988 because the resulting value was less than the value of Kennecott's property computed by other methods.

3. Kennecott's state-assessed property was assessed at 100% of its fair market value while all county-assessed property was assessed at 80% of its fair market value.

That Kennecott's property was valued at least at 100% of its fair market value is not in dispute and is clearly established in the record. Prior to the hearing, the parties stipulated that the Division's valuation of Kennecott's property would not be contested other than to determine if Kennecott was entitled to a reduction because of the 20% Statute. See Stipulation submitted as Exhibit No. 4; Record at 203-04. At the hearing,

Brent Eyre testified that Kennecott's property was valued at 100% of fair market value. Transcript at 82-83.<sup>16</sup>

It is also indisputable that county-assessed property was only valued at 80% of its fair market value. Larry Butterfield testified that county-assessed property was assessed at 100% of fair market value before application of the 20% Statute and that, consequently, county-assessed property was assessed at only 80% of its fair market value.<sup>17</sup> This is consistent with

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<sup>16</sup> Q. [By Mr. Winterholler] Kennecott's value at \$617,771,070, which you've got next to you, is the value which was arrived at by the Property Tax Division; isn't that correct?

A. [By Mr. Eyre] That's correct.

Q. And that value is the value which the Property Tax Division considered to be 100 percent of fair market value, isn't it?

A. If that's our charge and that's what we put on the assessment, yes. We would stipulate to that fact.

<sup>17</sup> Q. [By Mr. Winterholler] What do you mean by statutory market value as opposed to fair market value?

A. [By Mr. Butterfield] In our tax files within the tax system of Salt Lake County we call -- the full fair market value is the first value. It's 100 percent. From that we have taken the 80 percent and then that's called the statutory value.

Q. Now, the statutory value as opposed to the fair market value, what value was reported to a tax payer on his tax notice?

A. The full fair market value.

Q. Is that the basis upon which that tax payer paid taxes in 1988?

A. No.

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the Court's conclusion in Amax. See 796 P.2d at 1259 ("Section 59-5-4.5 allows county assessors to assess property at 80% of its reasonable fair cash value"). Additionally, Mr. Butterfield testified that the 20% Statute was applied to all county-assessed real property regardless of the valuation method used. Butterfield Deposition at 41<sup>18</sup>; Transcript at 111-12. Therefore, Kennecott's state-assessed real property was assessed at 100% of

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Q. What's the basis upon which the tax payer paid taxes in 1988?

A. He paid on 80 percent of the full fair market value.

Q. So, in other words, if I understand you correctly, on commercial and industrial property which was locally assessed in Salt Lake County in 1988, locally assessed commercial and industrial property was valued at 80 percent of its full fair market value?

A. That is correct.

Butterfield Deposition at 29; see also, Transcript at 106-108.

18 Q. [Mr. Winterholler] Let me back up. It's true, is it not, that in arriving at the statutory value of commercial and industrial property in Salt Lake County, which is locally assessed under 59-2-304, Exhibit No. 1, that you multiply the fair market value arrived at by either comparable sales or replacement cost minus depreciation or whatever income approach is used and by 80 percent to arrive at the statutory value?

A. [Mr. Butterfield] Yes, this is true.

Q. And that's applied to all property. It doesn't matter how you achieve the value.

A. This is correct.

its value while all county-assessed real property was assessed at only 80% of its value.

4. The Tax Commission's refusal to apply to 20% Statute to Kennecott's state-assessed property violates the uniform and equal assessment and the equal protection requirements of the Utah Constitution.

Kennecott has shown that (1) its real property was valued by the Division using the same valuation methods used by the County to assess property; (2) its property was valued by the Division at 100% of fair market value; and (3) all county-assessed real property, regardless of valuation method, was valued at only 80% of fair market value.

Therefore, as in Amax, the Tax Commission's refusal to equalize Kennecott's assessment with county-assessed property violates the uniform and equal requirements of Article XIII, §§ 2 and 3 of the Utah Constitution because Kennecott bears a tax burden greater than its pro rata share of the property taxes in the County, merely because its property is state-assessed. See Amax at 1259-60.

Additionally, the Commission's Final Order violates the equal protection requirements of Article I, § 24 of the Utah Constitution because the 20% Statute arbitrarily discriminates against state-assessed property without a reasonably-related, legitimate government purpose. See id. at 1261-62.

Kennecott's appropriate relief, as stated in Amax, is as follows: "If both just value and equal proportionality cannot be obtained because some assessments are made at a fixed percentage of true value, then equality must prevail so that the fixed percentage of true value must be uniformly applied." Id. at 1260. Therefore, Kennecott is entitled to a reduction of the assessed value of its real property in 1988 by 20%.

**II. ALTERNATIVELY, THE COMMISSION ERRED IN FAILING TO GRANT KENNECOTT THE 14% REDUCTION IN VALUE WHICH WAS GRANTED BY THE COMMISSION TO THE RAILROADS AS OF JANUARY 1, 1988.**

The Commission refused to apply the 14% reduction which it granted to railroads in 1988 to Kennecott's property for two reasons: First, the Commission asserted that the methods used by the state to value railroad property are dissimilar from those used by the county to value commercial and industrial property, and by the Commission to value Kennecott's property. The Commission stated that historical cost is used for railroads, replacement cost is used by the county, and the capitalized net revenue method is used for Kennecott's property. The Commission also distinguished the stock and debt approach, distinctive to railroad valuation, from the comparable sales method which is routinely used to value commercial and industrial property.

Second, the Commission asserted that Union Pacific v. State Tax Commission, 716 F. Supp. 543 (D. Utah 1988), has no

bearing on Kennecott's claim for reduction based upon the 20% Statute because the federal 4-R Act does not apply to mining property. According to the Commission, Kennecott falls into a different classification from railroads and may not claim the same relief granted to railroad property.

- A. In Union Pacific, application of the 20% Statute was held to discriminate against state-assessed railroad property.

In Union Pacific, three railroad companies sued the Commission claiming that their 1984 and 1985 property tax assessments discriminated against them in violation of the Railroad Revitalization and Regulatory Reform Act (the "4-R Act"). See 49 USCA § 11503 (1982 & Supp. 1988). The railroads claimed discrimination in two ways: first, the valuation method employed by the Commission overvalued their property; and second, the Commission's refusal to apply the 20% Statute made them bear a higher percentage of taxes than county-assessed taxpayers. The court held that the Commission's assessment discriminated against the railroads in violation of the 4-R Act.

In analyzing the railroads' overvaluation claim, the court summarized the three standard techniques to assess railroad property: the cost approach, which is based on historical costs; the stock and debt approach, which is a form of the comparable sales method; and the income approach. See id. at 547-551. The



court considered a variety of valuation methods for railroads, each promoted by an economic expert. The court noted that true market value for purposes of ad valorem taxation is always an estimate based upon each appraiser's best judgment and that each appraiser approaches the task of valuation a little differently. See id. at 554. The court held, consequently, that there was no single correct formula for computing fair market value, and that the choice of methodology, as long as the chosen methodology has a rational footing, is not as important as the requirement that once true market value is determined, the property should not be taxed discriminatorily. Id. at 556-57, 565-66. Based on this conclusion, the court accepted the Commission's formula for computing fair market value. See id. at 563.<sup>19</sup>

In addressing the railroads' 20% Statute claim, the court held (1) the state's and county's valuations before applying the 20% Statute were the figures understood to be fair market value, id. at 565; (2) even though the methods used to value railroads were a cost method and a comparable sales method, the state did not apply the 20% Statute to the valuations, id.; (3) the Commission discriminated against the railroads by assessing them at a higher rate than other commercial and industrial

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<sup>19</sup> Not only did the court accept the Commission's formula as being rational, it recognized that it may have been preferable to the other methods presented. See 716 F. Supp. at 557.

property, id. at 566; and (4) the extent of the discrimination violated the 4-R Act which provided relief to the railroads, id.

- B. Railroad property as of January 1, 1988 was valued at 100% of its fair market value before application of a 14% discount.

The Commission overemphasized the distinctions in appraisal methodology between Kennecott's and the railroad's property. As pointed out in Union Pacific, the method used to arrive at fair market value is not as important for discrimination purposes as how property is taxed once fair market value is determined.

Brent Eyre testified that the railroads in 1988 received a 14% discount in the value of their "taxable property" even though no other state-assessed property received any discount from fair market value, and that this 14% discount was a reduction from the fair market value of the railroads' assessments. Transcript at 83-84.<sup>20</sup> Further, he understood the

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Q. [By Mr. Winterholler] Now, your division is in charge of valuing mining companies, or you are in charge of those divisions in the Property Tax Division whose responsibility it is to value mining companies, public utilities, and railroads? Is that correct?

A. [By Mr. Eyre] That's correct.

Q. And other state-assessed property, including, say, for example, oil wells or oil producing properties, is that correct?

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Division's statutory and constitutional duty was to assess all property within its charge at 100% of fair market value, and that Utah law does not permit the Division to assess any property at a different percentage of fair market value than others. See Transcript at 90-92.<sup>21</sup> Nevertheless, the Division assessed

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A. That's correct.

Q. In 1988 the only classification or the only category--I hesitate to use the word classification--but the only category of property which received a discount from 100 percent fair market value under your division were the railroads; isn't that correct?

A. In 1988?

Q. In 1988.

A. That's correct.

21 Q. [By Mr. Winterholler] Your understanding of the statutes relating to the assessment and taxation of centrally assessed property in the state and of the statutes which relate to the assessment of centrally assessed property in the state requires the State Tax Commission, the Property Tax Division, to assess all that property at 100 percent of fair market value, doesn't it?

A. [Mr. Eyre] That's correct.

Q. In fact, those statutes and rules do not permit the Tax Commission to assess some property at 80 percent, some at 90 percent, and some at 10 percent, do they?

A. That's correct.

Q. And yet, in 1988, one category of state-assessed property was assessed at less than 100 percent, wasn't it?

A. They were valued at 100 percent. The assessed value that was ultimately used to determine their tax liability was less than that, the 100 percent of fair market value, that's correct.

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railroad property at only 86% of its fair market value in 1988 while it assessed Kennecott's property at 100%.

- C. The allowance of a 14% reduction to state-assessed railroad property but not to Kennecott's state-assessed property is unconstitutional.

The plaintiffs in Union Pacific were entitled to relief according to the 4-R Act, which provided statutory relief for railroads discriminated against by state and local taxing authorities. Even though Kennecott does not qualify for relief under the 4-R Act, it is protected from discriminatory taxation by both the Utah and the United States Constitutions.

In Blue Cross and Blue Shield v. State, 779 P.2d 634, 637 (Utah 1989)<sup>22</sup> the Court stated that the uniform operation of laws requirement of the Utah Constitution in Art. I, § 24 was substantially similar to the federal equal protection clause and

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Q. And that category of state-assessed property upon which that discount was given was railroad property, wasn't it?

A. That is correct.

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Q. . . . Is it not your understanding that the statutes of this state require the State Tax Commission to assess all state-assessed property at 100 percent of its fair market value?

A. That's correct.

<sup>22</sup> A copy of the Blue Cross decision is included in the Addendum at page G-1.

that the court's analysis under the Utah Constitution provision was at least as rigorous as that required by the federal constitution.

The purpose of the uniform operation of laws requirement is to prevent the legislature from "classifying persons in such a manner that those who are similarly situated with respect to the purpose of a law are treated differently by that law, to the detriment of some of those so classified." Id. at 637, citing Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 888 (Utah 1988); see also, Amax, 796 P.2d at 1256.

In this instance, Kennecott and the railroads are similarly situated because they are both centrally-assessed taxpayers according to Utah Code Ann. § 59-2-201 (1987). Utah Code Ann. § 59-2-201(1) (1987) requires that all centrally-assessed property be assessed by the Commission at 100% of fair market value. Because of the Commission's reduction of the assessed value of railroad property in 1988, however, Kennecott is taxed at 100% of its property's value, while the railroads are taxed at only 86% of their property's value.

The stated purpose of the 20% Statute, i.e., to account for transactional costs and to equalize state and local assessments, does not justify this detrimentally different treatment of Kennecott's property. Therefore, the Commission's refusal to

grant Kennecott a 14% reduction in the value of its property violates the uniform operation of law clause of Utah's Constitution.

The Commission's decision also violates federal equal protection standards. A similar taxation disparity was unanimously held unconstitutional under the federal equal protection clause by the United States Supreme Court in Allegheny Pittsburgh Coal Co. v. County Commissioner of Webster County, 488 U.S. 336 (1989)<sup>23</sup>.

In Allegheny, West Virginia's Webster County Tax Assessor valued Allegheny's property from 1975 to 1986 on the basis of a recent purchase price, while valuing other similarly situated properties on the basis of previous assessments. This resulted in gross disparities between valuations of properties in the same class. In its analysis of Webster County's treatment of Allegheny, the Court acknowledged:

The use of a general adjustment as a transitional substitute for an individual reappraisal violates no constitutional command. As long as general adjustments are accurate enough over a short period of time to equalize the the differences in proportion between the assessments of a class of property holders, the Equal Protection Clause is satisfied.

Id. at 343.

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<sup>23</sup> A copy of the Allegheny decision is included in the Addendum at page H-1.

It also stated:

In each case, the constitutional requirement is the seasonable attainment of a rough equality and tax treatment of similarly situated property owners.

Id. (emphasis added).

And that:

The States, of course, have broad latitude to impose and collect taxes. A State may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable.

Id. at 344 (emphasis added).

However, the Court concluded:

We have no doubt that petitioners have suffered from such "intentional systematic undervaluation by state officials" of comparable property in Webster County. Viewed in isolation, the assessments for petitioners' property may fully comply with West Virginia law. But the fairness of one's allocable share of the total share of the property tax burden can only be meaningfully evaluated by a comparison with the share of others similarly situated relative to their property holdings. The relative undervaluation of comparable property in Webster County over time therefore denies petitioner the equal protection of the law.

Id. at 346 (emphasis added).

The Court noted that West Virginia's constitution and laws required that taxpayers "be taxed at a rate uniform throughout the state according to its estimated market value." Id. at

345. The Court held that the Webster County's assessment practices violated the federal constitution because:

Intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed on the full value of his property. (Citations omitted).

Id.

The holding in Allegheny should control the outcome of this appeal. Utah's constitution and laws, like West Virginia's, require property to be taxed at a uniform and equal rate. Specifically, Utah Code Ann. § 59-2-201(1) requires state-assessed property to be assessed at 100% of full market value. Nonetheless, the Commission, in 1988, intentionally and systematically undervalued railroad property, which by statute is in the same class as Kennecott's state-assessed property, in contravention of Kennecott's constitutional rights.

D. Kennecott is entitled to the same reduction in value which was granted to the railroads in 1988.

The Nebraska Supreme Court in Northern Natural Gas Company v. State Board of Equalization, 443 N.W.2d 249 (Neb. 1989), cert. denied, 493 U.S. 1078 (1990)<sup>24</sup>, considered the effect of three United States District Court decisions which prohibited Nebraska from imposing its personal property tax on

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<sup>24</sup> A copy of the Northern Natural Gas decision is included in the Addendum at page I-1.



railroad and car companies. The district court had ruled in each case that the personal property tax was an unfair and discriminatory tax burden according to the 4-R Act.

In Northern Natural Gas, the petitioner, a state-assessed pipeline company, sought to be equalized with the railroad and car companies who were also state-assessed. The court held that if Nebraska's State Board of Equalization (the "Board") had arbitrarily undervalued a particular class of property so as to make another class disproportionately higher, the court must correct this constitutional inequality. Id. at 256. This is so even if the undervaluation is the result of the Board's involuntary action under compulsion of federal law. Id. Otherwise, the Board would violate the equal protection requirement of the Fourteenth Amendment. Id.

The court stated that the preferred correction is to lower the value of the property of the party who is required to pay tax on 100% of the property's fair market value in order to equalize taxes with the property of those who are required to pay tax on less than 100%.

[T]he right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and

equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of law.


Id., citing, Sioux City Bridge v. Dakota County, 260 U.S. 441, 446 (1923).

Therefore, in order to satisfy the due process and equal protection requirements of the United States and Utah Constitutions, and the uniform and equal assessment requirements of the Utah Constitution, Kennecott should be granted the same 14% reduction in the value of its state-assessed real and personal property as was granted the railroads in 1988.

#### CONCLUSION

Based on the above, Kennecott is entitled to: (1) a 20% reduction in the assessed value of its real property as granted in Amax; or in the alternative, (2) a 14% reduction in assessed value of its real and personal property as was granted to the railroads as a result of Union Pacific.

DATED this 17<sup>th</sup> day of June, 1992.

  
\_\_\_\_\_  
JAMES B. LEE  
KENT W. WINTERHOLLER  
MAXWELL A. MILLER  
of and for  
PARSONS BEHLE & LATIMER  
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, four true and correct copies of the foregoing BRIEF OF PETITIONER to the following on this 7<sup>th</sup> day of June, 1991:

Rick Carlton  
Office of the Attorney General  
36 South State, Suite 1100  
Salt Lake City, UT 84111

Bill Thomas Peters  
Special Deputy Salt Lake  
County Attorney  
9 Exchange Place #1000  
Salt Lake City, Utah 84111



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KCJ/042092A

## Tab A

## ADDENDUM

A.	Commission's Final Decision.....	A-1
B.	Verbatim presentation of constitutional provisions, statutes, and rules.....	B-1
C.	Determinative Court cases.....	C-1
1.	<u>Amax Magnesium Corporation v. Utah State Tax Commission</u> .....	D-1
2.	<u>Union Pacific Railroad Company v. Utah State Tax Commission</u> .....	E-1
3.	<u>Rio Algom Corporation v. San Juan County</u> .....	F-1
4.	<u>Blue Cross and Blue Shield v. State</u> .....	G-1
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BEFORE THE UTAH STATE TAX COMMISSION

---

KENNECOTT CORPORATION,	)	
	:	
Petitioner,	)	FINDINGS OF FACT,
	:	CONCLUSIONS OF LAW,
v.	)	AND FINAL DECISION
	:	
PROPERTY TAX DIVISION OF THE	)	Appeal No. 88-1347
UTAH STATE TAX COMMISSION	:	
	)	
	:	
Respondent.	)	

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STATEMENT OF CASE

This matter came before the Utah State Tax Commission for a formal hearing on May 10, 1990. G. Blaine Davis, Commissioner, served as the Presiding Officer. In addition, Joe B. Pacheco, Commissioner, and Joseph G. Linford, Administrative Law Judge, heard the matter for and on behalf of the Commission. Present and representing the Petitioner were Maxwell A. Miller and Kent W. Winterholler, Attorneys at law, of Parsons, Behle and Latimer. Present and representing the Respondent was Lee A. Dever, Assistant Utah Attorney General. Present and representing Salt Lake County were Bill Thomas Peters, Special Deputy County Attorney, of Kinghorn, Peters, Styler and Probst, and Karl Hendrickson, Deputy Salt Lake County Attorney.

The Property Tax Division of the Utah State Tax Commission originally mailed its Notice of Assessment to the Petitioner, Kennecott Corporation (Kennecott) on April 28, 1988. The total assessed value as initially determined by the

Property Tax Division for all of the Centrally assessed property of Kennecott located in Utah on January 1, 1988, was \$635,570,036. Kennecott timely appealed that assessment by a Request for Agency Action filed May 31, 1988, and a later Revised Request for Agency Action filed September 9, 1988.

Kennecott and the Property Tax Division entered into a Stipulation on December 9, 1988 in which they stipulated that the assessed value should be reduced to \$617,771,020 as a preliminary assessment, but they agreed that the final valuation could be higher or lower following either further negotiations or litigation.

The affected counties were given notice of the proposed reduction to Kennecott's valuation, and Salt Lake County (the county) objected and filed a Petition for Commencement of Adjudicative Proceedings on January 10, 1989. Salt Lake County also filed a Motion to Consolidate on January 20, 1989. Kennecott objected to the Motion and Petition on February 6, 1989.

On March 3, 1989, the Tax Commission executed and issued an Order of Approval in which they approved the preliminary determination of value at the stipulated amount of \$617,771,020, but the Order of Approval specifically provided that "the acceptance of the assessed value in no way limits any other issues relating to the appeal, and such issues shall be left to further resolution."

On August 7, 1989, Petitioner filed Petitioner's Amended Request for Agency Action. In that Amended Request, Kennecott raised the issues of economic and functional

obsolescence, imputed interest on construction work in progress, and equalization or equal protection of the laws.

On February 14, 1990, the Petitioner entered into a Stipulation with Salt Lake County wherein the parties stipulated to issues relating to this case and other pending cases between the parties. In that stipulation, Kennecott agreed to "withdraw, and dismiss, with prejudice, its Amended Request for Agency Action, as that request for agency action relates to the Property Tax Division's failure to allow for functional obsolescence in its valuation of Kennecott's property, and as a result of the inclusion by the Property Tax Division of imputed interest in the valuation by the Property Tax Division of Kennecott's construction work in progress in 1988." Kennecott did not withdraw the equal protection issues. In that stipulation, Salt Lake County agreed that it would "not contest the valuation of Kennecott's property by the Utah State Tax Commission, or by the Property Tax Division of the Utah State Tax Commission except to the extent that Kennecott seeks a reduction on that valuation as a result of the 4-R case, or related legal theories."

The hearing was held May 10, 1990. At the hearing, Kennecott took the positions that:

- a. The assessed values of its real property should be reduced by 20% to extend to it "the same 20% reduction that county assessed commercial and industrial property owners received" because of the provisions of Utah Code Ann. §59-2-304; or
- b. The assessed values of all of Kennecott's property



should be reduced by 14% to grant to them "the same percentage reduction of 14% that the state assessed railroads received for their taxable property" pursuant to the decision of the United States District Court in Union Pacific v. Utah State Tax Commission, 716 F. Supp. 543 (D. Utah 1988).

No testimony or evidence was presented at the hearing to indicate that the value of Kennecott's property was any amount other than the amount of \$617,771,020 to which Kennecott and the Property Tax Division stipulated. Therefore, the only issues before the Commission at the time of the hearing were the two issues raised by Kennecott.

At the time of the hearing there were at least two pending motions which had not been ruled upon by the Commission. Kennecott had filed a Motion to Strike, and Salt Lake County had filed a Motion for Consolidation.

Subsequent to the date of the formal hearing, but prior to the issuance of a final decision on this case, the Utah Supreme Court issued its decision in the case of Amax Magnesium Corporation v. Utah State Tax Commission, 796 P2d 1256 (Utah 1990) which held that Amax Magnesium was entitled to the 20% discount in the valuation of its taxable property which is extended to some county assessed property pursuant to Utah Code Ann. §59-2-304. That case was decided by the Utah Supreme Court on July 18, 1990, and on July 20, 1990, the Petitioner filed with the Tax Commission in this proceeding a copy of the Amax decision with a Submission of Decision in a Related Case in which they requested that the principles of the Amax case be

applied to this case and that Kennecott's property assessment be immediately reduced.

On October 4, 1990, Kennecott filed Petitioner's Second Amended Request for Agency Action in which they raised substantially the same issues as in their first Amended Petition, but they added further elaboration on the 20% issue because of the Amax decision.

Therefore, to clarify the current positions of each of the parties and to review the issues that must be decided, the Commission entered an order on October 28, 1991, requiring the parties to submit memoranda indicating what effect, if any, the Amax decision had on the present case. Each of the parties timely filed the requested memoranda.

Based upon the evidence and testimony presented at the hearing, as well as post hearing memoranda submitted by the parties, the Tax Commission hereby makes its:

#### FINDINGS OF FACT

1. The tax in question is property tax.
2. The period in question is the lien date January 1, 1988.
3. For the lien date January 1, 1988, the Respondent, pursuant to stipulation and the Order of Approval entered by the Commission, has assessed the Petitioner's taxable centrally assessed property, exclusive of any property which may have been assessed by Salt Lake County, at \$617,771,020.00, including all real property, improvements and personal property. That value has been approved by the

Commission, subject to any changes that might be made through this proceeding.

4. During the period in question, locally assessed commercial and industrial real property located in Salt Lake County was assessed by the county using a combination of the comparable sales method, the cost appraisal method, and the income approach. The value so determined for such real property was then reduced 20% pursuant to the provisions of Utah Code Ann. §59-2-304. The 20% reduction does not apply to personal property and was not applied to personal property by the county.

5. As of January 1, 1988, the fair market value of all real and personal property of Union Pacific Railroad, Denver and Rio Grande Railroad, and Southern Pacific Railroad in Utah was valued by a combination of the cost appraisal method, the income approach, and the stock and debt approach. The values determined by each of those approaches were then correlated based upon the judgment of the appraiser, and the final correlated value so determined by the appraiser was then reduced by 14%, pursuant to a decision of the U.S. District Court for the District of Utah entered December 29, 1988. This reduction was applied to the railroads' state assessed unitary property which includes both real and personal property.

6. The correlation process is not a precise mathematical process, but depends strongly upon the judgment of the appraiser. Different appraisers can begin with the same estimates of value based upon the three different approaches or methods of valuation, and if they have different opinions of

the relative importance of the different approaches to value, then the final determination of value of each appraiser could be significantly different. Nevertheless, each of those determinations of value may still be a fair and reasonable determination of the fair market value of the property.

7. Although the methods and/or approaches for determining value for railroads assessed by the Property Tax Division of the State Tax Commission are similar in name to those used by the counties in determining the values of commercial and industrial properties, the actual methodology is very dissimilar. For example, the cost method for the railroads uses historical cost from the accounting records, whereas the cost method for commercial and industrial properties uses estimated replacement cost as estimated by an appraisal service such as Marshall and Swift. Thus, while the cost method is not normally given substantial weight in the final valuation of a railroad, if replacement cost is used in a railroad valuation, the total value under the cost method will be much greater than it is if the historical cost is used from the accounting records. Similar distinctions exist in the utilization of the income approach, the comparable sales approach, and the stock and debt approach which is utilized for railroad valuation instead of the comparable sales method because there are very few, if any, sales of railroad properties to use as comparables.

8. The value of Petitioner's state assessed property was not reduced below its estimated fair market value for 1988.

9. Mining properties, such as those owned by Petitioner, are not in the same category of properties as railroad properties or most commercial and industrial properties. They have different characteristics and under Utah law they are assessed by different methodologies. Mining properties in Utah are valued using only one method, the "capitalized net revenue method" as set forth in Utah Code Ann. §59-2-201, which method is more fully set forth by the Rules of the Tax Commission in Rule R884-24-7P. Under Utah law, that methodology is exclusive to the assessment of mines.

10. Kennecott was valued pursuant to the same methodology and on a uniform and equal basis with all other mines in the State of Utah.

11. Kennecott is not valued by the unit approach, and does not operate as a unit across state lines.

12. The assessment of Kennecott was not made by the county assessor, but was made by the Property Tax Division of the State Tax Commission.

13. The assessment of Kennecott was not made by using either the comparable sales method or the cost appraisal method, but was made by using the capitalized net revenue method.

14. The capitalized net revenue method calculates fair market value without any consideration to transactional costs, i.e., it assumes that the fair market value is available to the owner without incurring transactional costs.

15. The ratio of real property to personal property for Petitioner is substantially different than the ratio of

real property to personal property for either the railroads or for commercial and industrial properties assessed by the county.

16. Petitioner has not submitted any evidence to establish that its property is not assessed at its fair and just value. In fact, they have stipulated that it is assessed at its fair market value.

17. Petitioner has not submitted any evidence to establish that the tax burden it will pay is disproportionate to the amount of property it owns.

#### CONCLUSIONS OF LAW

1. The Utah State Constitution Article XIII, Section 2(1) provides as follows:

##### Section 2

(1) All tangible property in the state, not exempt under the laws of the United States, or under this Constitution, shall be taxed at a uniform and equal rate in proportion to its value, to be ascertained as provided by law.

2. The Utah State Constitution, Article XIII, Section 3(1) provides as follows:

##### Section 3

(1) The Legislature shall provide by law a uniform and equal rate of assessment on all tangible property in the state, according to its value in money, except as otherwise provided in Section 2 of this Article. The Legislature shall prescribe by law such provisions as shall secure a just valuation for taxation of such property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its tangible property, provided that the Legislature may determine the manner and extent of taxing livestock.

3. Utah Code Ann § 59-2-201(1) provides in pertinent part as follows:

By May 1 the following property shall be assessed by the commission at 100% of fair market value, as valued on January 1, in accordance with this chapter:

(a) All property which operates as a unit across county lines, if the values must be apportioned among more than one county or state; . . . .

(e) All mines and mining claims except in cases as determined by the commission, where the mining claims are used for other than mining purposes, in which case the value of mining claims used for other than mining purposes shall be assessed by the assessor of the county in which the mining claims are located: and.

(f) All machinery used in mining, all property or surface improvements upon or appurtenant to mines or mining claims. For the purposes of assessment and taxation, all processing plants, mills, reduction works, and smelters which are primarily used by the owner of a mine or mining claim for processing, reducing, or smelting minerals taken from a mine or mining claim shall be considered appurtenant to that mine or mining claim, regardless of actual location.

4. Utah Code Ann. §59-2-201(2) provides as follows:

The method for determining the fair market value of productive mining property is the capitalized net revenue method or any other valuation method the commission believes, or the taxpayer demonstrates to the commission's satisfaction, to be reasonably determinative of the fair market value of the mining property. The rate of capitalization applicable to mines shall be determined by the commission, consistent with a fair rate of return expected by an investor in light of that industry's current market, financial, and economic conditions. In no event may the fair market value of the mining property be less than the fair market value of the land, improvements, and tangible personal property upon or appurtenant to the mining property.  
(Emphasis added)

5. Utah Code Ann. §59-2-304(1) provides as follows:

If the county assessor uses the comparable sales or the cost appraisal method in determining the fair market value of taxable property for assessment purposes, the assessor is required to recognize that various fees, services, closing costs, and other expenses related to the transaction lessen the actual amount that may be received in the transaction. The county assessor shall, therefore, take 80% of the value based on comparable sales or cost appraisal of the property as its fair market value.

6. Utah Code Ann. §59-2-304(2), as of January 1, 1988, provided that the Commission would develop and implement methods of appraisal which would not include as part of the fair market value the "intangible values" as outlined in Subsection (1) and that thereafter Subsection (1) would no longer apply. Instead, the methods developed by the Commission were to then be fully implemented.

7. Under the above provisions the Legislature has been given the authority to provide a "uniform and equal rate of assessment on all tangible property in the state" and to "secure a just valuation for taxation of such property" in order for every entity to pay taxes in proportion to the value of that entity's property. Pursuant to that authority granted under the constitution, the Legislature has enacted §§59-2-201 and 59-2-304.

8. The Legislature has made a determination that when fair market value is calculated by using either the comparable sales method or the cost appraisal method there are transaction costs which have been included as part of the determined value. The Legislature has also made the



determination that when fair market value is calculated by any other method, such as the capitalized net revenue method, there are no transaction costs which have been included as part of the determined value. There is a reasonable relationship between that legislatively determined classification and the purpose of §59-2-304(1), the purpose of which is to equalize the tax burdens imposed upon the various properties.

9. The Legislature found no basis for intangible values or transaction costs for centrally assessed properties as is indicated by the exclusion of centrally assessed properties from the provisions of §59-2-304, and also by the express provisions of §59-2-201. The Legislature has determined that centrally assessed properties, including mine properties such as Petitioner's, are to be assessed by the Commission using methods other than the comparable sales method or the cost appraisal method. Those centrally assessed property valuation methods, including the capitalized net revenue method, have been determined to not include transaction costs in the calculation of fair market value. The Legislature has, therefore, specifically excluded properties such as that which is owned by the Petitioner from the operation of §59-2-304 because of the difference in methodology.

10. The 20% reduction provided by Utah Code Ann. §59-2-304 applies only to real property valued by either the comparable sales method or the cost appraisal method. It does not apply to personal property.

11. The federal "4-R" Act does not apply to mining properties such as the property of Petitioner.

12. If the property of Petitioner had been valued by the county pursuant to the capitalized net revenue method, the values so determined would not have been reduced 20% because of the provisions of Utah Code Ann. §59-2-304.

13. Utah Code Ann. §§59-2-1007 and 59-1-210(7) provide that the Tax Commission may equalize an assessment with other similarly assessed property, and ensure that assessments are just, equal and their burden is distributed without favor or discrimination.

14. It is Petitioner's position that the Commission should equalize the assessment of Petitioner's property with property which is similarly assessed. However, the Petitioner's property has not been deemed by the Legislature to be similarly assessed with properties which do receive the 20% or 14% reductions. The subject property as a mine property is centrally assessed under the above provisions and also under section 4 of Article XIII of the Utah State Constitution and the relevant statutes and rules of the Commission. It is therefore in the same category as other property which is centrally assessed and all centrally assessed property is taxed at 100% of fair market value.

15. The Petitioner has not shown that the appraisal methods used by the Petitioner and those used by Salt Lake County were the same. Therefore, the decision of the Utah Supreme Court in Amax Magnesium Corporation v. Utah State Tax Commission, 796 P.2d 1256 (Utah 1990) does not control or govern these proceedings. In the present case, although the methods used by the Respondent and the county may be referred

to by the same names (i.e. income approach, cost approach, and market approach) the techniques and methodologies used within each of those separate methods are quite different with respect to the subject property.

16. In the alternative, Petitioner asserts that it should be accorded the 14% reduction allowed to railroads. The controlling case to this issue is Union Pacific vs. Utah State Tax Commission, 716 F.Supp. 543 (D. Utah 1988). As a result of that case, railroads under the federal "4-R" Act have a 14% reduction in the assessed values of their property. The subject property, however, is not a railroad property and is also not governed by the federal "4-R" Act. It is therefore, not similar to railroad properties that receive the 14% reduction. The subject property is required by law to be assessed at 100% of its full market value.

17. The Commission finds further that the case Rio Algom Corp. vs. San Juan County, 681 P.2d 184 (Utah 1984) states the rationale and principles which are controlling in this case. The Rio Algom Court found that a "certain degree of de facto classification is unavoidable" and the Legislature has a proper amount of discretion in meeting the requirements of uniformity mandated under the Utah Constitution. The court stated:

Under Article XIII, §3, the property taxes paid on each property are required to be uniform and in proportion to the value of the property. Although the objective is easily stated, its attainment is more difficult. Because of the many different kinds of property and the various factors that affect their value, the determination of what constitutes equal "in proportion to the value of his, her, or its tangible

property," under Article XIII, §3, cannot be made by application of any single property formula.

Of primary importance is the determination of what valuation method should be utilized, and that depends on the nature of the properties to be taxed. Residential, commercial, transportation, mining and public utilities, etc., must be treated differently because of the economic conditions that give value to such properties. Rio Algom at 188.

18. Petitioner claims that the Equal Protection Clause of the United States Constitution does not allow Petitioner to be treated differently than those properties which are accorded the 20% and 14% reductions. However, Petitioner does not fall within the classifications of these other properties, so Petitioner has not shown that it is unlawfully treated differently than other mines or others within its classification. Therefore, the equal protection clause does not mandate a reduction of the value of Petitioner's property.

19. The distinctions between property such as that owned by Petitioner and other properties in the state is a reasonable one which has been made by the Legislature in the exercise of its proper discretion and is neither arbitrary nor capricious. The distinctions and classifications established by the Legislature do not result in an intentional or systematic overvaluation of the Petitioner's property from the valuation of the property of other taxpayers within the same class. See Allegheny Pittsburgh Coal Company vs. Webster County West Virginia, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989).

20. Valuations of different types of properties cannot be determined by the application of a single or uniform formula. The value of a mine is not determined by the application of the same formula or methodology as is used to determine the value of a home. Likewise neither a mine nor a home can be determined by the application of the same formula or methodology as is used to determine the value of a railroad.

21. The valuation of property is not subject to mathematical precision. Different appraisers can use the same general methodology such as the income approach, but by making slightly different assumptions, such as capitalization rate, they may arrive at substantially diverse conclusions of fair market value. However, each of those determinations of value may still be a fair and reasonable determination of the fair market value of the property.

22. "Market Value" is a term that cannot be applied in an overly rigid fashion, and is not subject to mathematical precision. It cannot be determined to the nearest dollar. It is a term which is at best a reasonable approximation based upon the best evidence available and the judgment and experience of the person making the determination of value. While the term has a precise meaning, an appraisal is not a wholly fixed, precise, or exact number.

23. The factual premise of the Legislature was that properties valued by either the comparable sales method or the cost appraisal method had elements of transaction costs included in those values, and that since those costs were not included in values determined pursuant to other methods, those

transaction costs should not be required to bear a portion of the tax burdens. It was the Legislature's way of equalizing taxes as required by the constitution. There was no evidence presented at the hearing that the premise assumed by the Legislature was not correct.

24. In Amax, supra, the valuation methods of the Property Tax Division of the Utah State Tax Commission were identical in all respects to the valuation methods of the county. In this proceeding, the property of Petitioner is valued using a different method than was used for residences or railroads.

25. The Utah Supreme Court in Amax, supra, did not hold Utah Code Ann. §59-2-304(1), unconstitutional, but it held that the 20% reduction required by the statute must be applied to the property of AMAX because it had been valued by exactly the same methodology used by the county in valuing county assessed property.

26. Based on the above, the Commission determines that the relief sought by Petitioner cannot be granted. The assessment of Petitioner's property at 100% of its fair market value pursuant to the capitalized net revenue method is proper, fair, reasonable, and required by the constitution and laws of the state of Utah, and does not contravene any provision of

federal law or violate any provisions or requirements of the United States Constitution.

DECISION AND ORDER

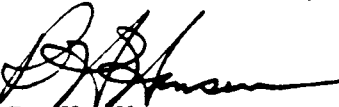
Based upon the foregoing, it is the decision and order of the Utah State Tax Commission that:

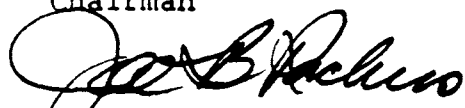
1. The Motion to Consolidate filed by the County, and the Motion to Strike filed by Petitioner are hereby denied. Any other pending motions are also denied.

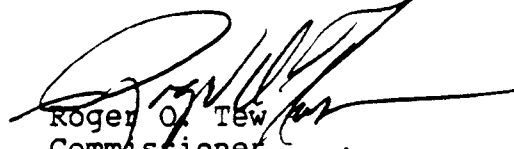
2. The request for a reduction in the value of Petitioner's property is hereby denied, and the value of Petitioner's property for the lien date of January 1, 1988, is affirmed at \$617,771,020. It is so ordered.

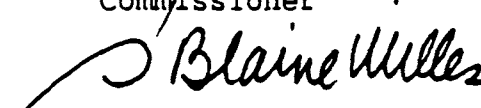
DATED this 3<sup>rd</sup> day of March, 1992.

BY ORDER OF THE UTAH STATE TAX COMMISSION.

  
R. H. Hansen  
Chairman

  
Joe B. Pacheco  
Commissioner

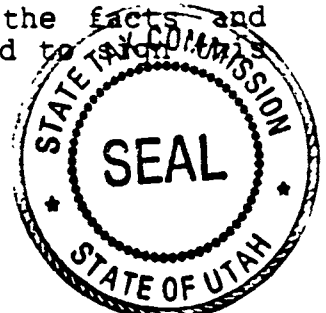
  
Roger O. Tew  
Commissioner

  
S. Blaine Willes\*  
Commissioner

NOTICE: You have twenty (20) days after the date of the final order to file a request for reconsideration or thirty (30) days after the date of final order to file in Supreme Court a petition for judicial review. Utah Code Ann. §§63-46b-13(1), 63-46b-14(2)(a).

\*Since the hearing on this case, Commissioner G. Blaine Davis has been replaced by Commissioner S. Blaine Willes. Commissioner Willes has been duly advised of the facts and circumstances regarding this case and is qualified to sign the decision.

GBD/sj/9416w



00000041

MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing  
Decision to the following:

Kennecott Corporation - Utah Copper  
c/o Kent Winterholler  
185 South State Street, Suite 700  
P.O. Box 11898  
Salt Lake City, UT 84147

Robert L. Yates  
Salt Lake County Assessor  
2001 South State #N2323  
Salt Lake City, UT 84190

Mike Reed  
Salt Lake County Auditor  
2001 South State Street, #N2200  
Salt Lake City, UT 84190

Karl Hendrickson  
Salt Lake County Attorney  
2001 South State Street, S3600  
Salt Lake City, UT 84108

Anne R. Dunyon  
Tooele County Assessor  
County Courthouse  
Tooele,, UT 84074

Glenn W. Caldwell  
Tooele County Auditor  
County Courthouse  
Tooele,, UT 84074

J. Mike Monson  
Director, Property Tax  
Heber M. Wells Bldg.  
Salt Lake City, UT 84134

Brent Eyre  
Assistant Director  
Heber M. Wells Building  
Salt Lake City, UT 84134



L. Brent Gardner  
Utah Association of Counties  
55 South State Street, Suite 300  
Salt Lake City, UT 84111

Bill Thomas Peters  
Deputy County Attorney  
9 Exchange Place #1000  
Salt Lake City, UT 84111

Lee Dever  
Assistant Attorney General  
State Capitol Building  
Salt Lake City, UT 84114

DATED this 3<sup>rd</sup> day of March, 1992.

Sara Jensen  
Secretary

Tab B

**B. VERBATIM PRESENTATION OF CONSTITUTION PROVISIONS,  
STATUTES, AND RULES**

**Constitution**

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**Rules**

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## COLLATERAL REFERENCES

**Utah Law Review.** — The Condemnor's Liability for Damages Arising Through Instituting, Litigating, or Abandoning Eminent Domain Proceedings, 1967 Utah L. Rev. 548

**Comment, Highway Noise Damage and Utah Eminent Domain Law,** 1972 Utah L. Rev. 116

**City of Oakland v. Oakland Raiders** Defining the Parameters of Limitless Power, 1983 Utah L. Rev. 397

**Eminent Domain Compensation in Western States: A Critique of the Fair Market Value Model,** 1984 Utah L. Rev. 429

**The Failure of Subdivision Control in the Western United States: A Blueprint for Local Government Action,** 1988 Utah L. Rev. 569

**Journal of Energy Law and Policy.** **Comment, The Only Way to Manage a Desert Utah's Liability Immunity for Flood Control,** 8 J. Energy L. & Pol'y 95 (1987)

**Harvard Law Review.** — Constitutionality of Zoning, 37 Harv. L. Rev. 834

**Am. Jur. 2d.** — 26 Am. Jur. 2d Eminent Domain §§ 7, 13 et seq.

**C.J.S.** — 29A C.J.S. Eminent Domain § 3

**A.L.R.** — Building restrictions, as property rights for taking of which compensation must be made, 4 A.L.R.3d 1137

**Restrictive covenant, right to enforcement thereof as compensable property right,** 4 A.L.R.3d 1137

**Deduction of benefits in determining compensation or damages in proceeding involving**

**opening, widening, or otherwise altering highway,** 13 A.L.R.3d 1149

**Property for exchange for other property required for public use, condemning,** 20 A.L.R.3d 862

**Restrictive covenant, existence of, as element in fixing price of property condemned,** 22 A.L.R.3d 961

**Eminent domain: right to enter land for preliminary survey or examination,** 29 A.L.R.3d 1104

**Entry upon or exploration of land before condemnation,** 29 A.L.R.3d 1104

**Schools: liability of public schools and institutions of higher learning for taking or damaging private property for public use,** 33 A.L.R.3d 703

**Seizure of property as evidence in criminal prosecution or investigation as compensable taking,** 44 A.L.R.4th 366

**Validity, construction, and application of state relocation assistance laws,** 49 A.L.R.4th 491

**Inverse condemnation: state court class actions,** 49 A.L.R.4th 618

**Court appointment of attorney to represent, without compensation, indigent in civil action,** 52 A.L.R.4th 1063

**Eminent domain: industrial park or similar development as public use justifying condemnation of private property** 62 A.L.R.4th 1183

**Key Numbers.** Eminent Domain ⇐ 3

project did not unconstitutionally grant benefits to private individuals, any benefits were strictly incidental to the public purpose of termination of urban blight. *Tribe v. Salt Lake City Corp.*, 540 P.2d 499 (Utah 1975)

## COLLATERAL REFERENCES

**Am. Jur. 2d.** — 36 Am. Jur. 2d Franchises §§ 9 to 23

**C.J.S.** — 37 C.J.S. Franchises § 26  
**Key Numbers.** — Franchises ⇐ 11

## Sec. 24. [Uniform operation of laws.]

All laws of a general nature shall have uniform operation

**History:** Const. 1896.

**Cross-References.** — Prohibition on pri-

vate or special laws, Utah Const., Art. VI, Sec. 26

## NOTES TO DECISIONS

## ANALYSIS

In general  
Age of majority  
Agent for service of process  
Automobile license law  
Construction with Art. VI, § 26  
Contract carrier permit  
Cosmetologists' license law  
Criminal actions  
— Investigations  
— Prosecution  
Sentence  
Criminal sentence  
Disparate tax assessments  
Excess revenue refunds  
Guest statutes  
Inheritance Tax Law  
Insurance premium tax exemption  
Intoxicating liquor  
Licenses  
Massage parlor ordinance  
Municipal employment prerequisites  
Notice requirements  
Property  
— Responsibility for water service  
Public employees' retirement system  
Public officers' bonds  
Public officers' salaries  
Road poll tax  
School activities  
Search warrants  
Sunday closing laws  
Tax sales  
Unfair Practices Act

## In general.

All laws shall operate uniformly wherever uniform laws can be enacted. *State v. Holtgreve*, 58 Utah 563, 200 P.894, 26 A.L.R. 696 (1921)

Objects and purposes of law present touchstone for determining proper and improper

classifications. *State v. Mason*, 94 Utah 501, 78 P.2d 920, 117 A.L.R. 330 (1938); *State v. J.B. & R.E. Walker, Inc.*, 100 Utah 523, 116 P.2d 766 (1941)

One who assails legislative classification as arbitrary has burden of proving it to be such. *State v. J.B. & R.E. Walker, Inc.*, 100 Utah 523, 116 P.2d 766 (1941)

Classification is never unreasonable or arbitrary in its inclusion or exclusion features so long as there is some basis for differentiation between classes or subject matters included, as compared to those excluded, provided differentiation bears reasonable relation to purposes of act. *State v. J.B. & R.E. Walker, Inc.*, 100 Utah 523, 116 P.2d 766 (1941)

Before legislative enactment can be interfered with, court must be able to say that there is no fair reason for the law that would not require equally its extension to those which it leaves untouched. *State v. J.B. & R.E. Walker, Inc.*, 100 Utah 523, 116 P.2d 766 (1941)

Only where some persons or transactions excluded from operation of law are, as to the subject matter of the law, in no differentiable class from those included in its operation, is the law discriminatory in the sense of being arbitrary and unconstitutional, and if reasonable basis to differentiate can be found, law must be held constitutional. *State v. J.B. & R.E. Walker, Inc.*, 100 Utah 523, 116 P.2d 766 (1941)

Inability of legislature to make perfect classification does not render statute unconstitutional. *State v. J.B. & R.E. Walker, Inc.*, 100 Utah 523, 116 P.2d 766 (1941)

In determining whether classification made by legislature is unconstitutional, discrimination is very essence of classification and is not objectionable unless founded upon unreasonable distinctions. *Gronlund v. Salt Lake City*, 113 Utah 284, 194 P.2d 464 (1948)

An act is never unconstitutional because of

## Sec. 23. [Irrevocable franchises forbidden.]

No law shall be passed granting irrevocably any franchise, privilege or immunity.

**History:** Const. 1896.

## NOTES TO DECISIONS

## ANALYSIS

Alcoholic beverages  
Pioneer Memorial Building  
Public purpose

## Alcoholic beverages.

Former Liquor Control Act held not unconstitutional as violative of this section. *Utah Mfrs' Ass'n v. Stewart*, 82 Utah 198, 23 P.2d 229 (1933)

State legislature was acting within its power in enacting former Liquor Control Act, which in effect revoked previously granted license authorizing the sale of light beer. *Riggins v. District Court*, 89 Utah 183, 51 P.2d 645 (1935)

## Pioneer Memorial Building.

Act pertaining to leasing of portion of state capitol grounds to Daughters of Utah Pioneers for erection and maintenance of Pioneer Memorial Building, and amendments thereto making appropriations therefor, as well as appropriation of \$150,000 for that building, did not violate this section. *Thomas v. Daughters of Utah Pioneers*, 114 Utah 108, 197 P.2d 477 (1948), appeal dismissed for want of a properly presented substantial federal question, 336 U.S. 930, 69 S.Ct. 739, 93 L.Ed. 1090 (1949)

## Public purpose.

Construction and operation of parking facility by city agency as part of a slum clearance

## COLLATERAL REFERENCES

**Utah Law Review.** — An Intermediate Appellate Court — Does Utah Need One?, 1979 Utah L. Rev. 107

**Am. Jur. 2d.** — 16A Am. Jur. 2d Constitutional Law §§ 306 to 310; 20 Am. Jur. 2d Courts § 1 et seq.

**C.J.S.** — 16 C.J.S. Constitutional Law §§ 169 to 214

**A.L.R.** — Judicial power to order discontinuance of life sustaining treatment, 48 A.L.R. 4th 67

**Key Numbers.** — Constitutional Law — 67 to 75, Courts — 147½, 206(12½), States — 52

## Sec. 2. [Supreme court — Chief justice — Declaring law unconstitutional — Justice unable to participate.]

The Supreme Court shall be the highest court and shall consist of at least five justices. The number of justices may be changed by statute, but no change shall have the effect of removing a justice from office. A chief justice shall be selected from among the justices of the Supreme Court as provided by statute. The chief justice may resign as chief justice without resigning from the Supreme Court. The Supreme Court by rule may sit and render final judgment either en banc or in divisions. The court shall not declare any law unconstitutional under this constitution or the Constitution of the United States, except on the concurrence of a majority of all justices of the Supreme Court. If a justice of the Supreme Court is disqualified or otherwise unable to participate in a cause before the court, the chief justice, or in the event the chief justice is disqualified or unable to participate, the remaining justices, shall call an active judge from an appellate court or the district court to participate in the cause.

**History:** Const. 1896; L. 1943, S.J.R. 2; 1984 (2nd S.S.), S.J.R. 1

**Cross-References.** — Election following appointment to judicial office, § 20.1.7.7  
Statutory provisions, § 78.2.1 et seq.

## NOTES TO DECISIONS

## ANALYSIS

"Disqualification" construed  
Effect of syllabus of case  
Powers of district judge sitting in place of deceased justice

## "Disqualification" construed

The term "disqualified" as used in this article is used in its natural and ordinary sense, and thus includes illness or a physical disability or other condition incapacitating a member of the court and may even include the death of such member. In re Thompson's Estate, 72 Utah 17, 269 P. 103 (1928).

This section negates the idea that if a justice is temporarily disqualified, there should be an appointment by the governor. The term "disqualified" used therein has been interpreted to mean not only personal interest in the particular case on the part of a justice, or that he was counsel during the trial or prior proceedings, or

that he was otherwise disqualified to hear the case. Since statehood it has been the practice to call in a district judge when a member of the Supreme Court is ill "or otherwise unable to be present at hearing of a cause." Accordingly, where justice enters armed forces of nation as a reserve officer, a district judge may be called in. Critchlow v. Monson, 102 Utah 378, 131 P.2d 794 (1942). For sequel to this case see State ex rel. Jugler v. Grover, 102 Utah 459, 132 P.2d 125 (1942).

## Effect of syllabus of case

Where it is not clear from separate opinions of the court exactly what the holding is, the decision of the court should be ascertainable by reading the syllabus. Shields v. Utah Light & Traction Co., 99 Utah 307, 105 P.2d 347 (1940).

## Powers of district judge sitting in place of deceased justice.

Under this section, when a justice dies, a va-

cancy in his office occurs and the remaining justices have authority to call in or permit a district judge to sit with them in a particular case which is argued before the vacancy is filled by appointment of the governor and the appointee qualifies. Such district judge is at

least a judge de facto, and he may participate in the case and in the court's decision and the rehearing therein even after vacancy has been filled by appointment. In re Thompson's Estate, 72 Utah 17, 269 P. 103 (1928).

## COLLATERAL REFERENCES

**Am. Jur. 2d.** — 20 Am. Jur. 2d Courts § 87 et seq.

**C.J.S.** — 21 C.J.S. Courts §§ 291, 464 to 466

**A.L.R.** — Disqualification of judge for having decided different case against litigant, 21 A.L.R.3d 1369

**Power of successor or substituted judge in civil case to render decision or enter judgment**

on testimony heard by predecessor, 22 A.L.R.3d 922

**Disqualification of judge on ground of being a witness in the case**, 22 A.L.R.3d 1198

**Disqualification of judge for bias against counsel for litigant**, 23 A.L.R.3d 1416

**Disqualification of judge because of his or another's holding or owning stock in corporation involved in litigation**, 25 A.L.R.3d 1331

**Key Numbers.** — Courts — 248

## Sec. 3. [Jurisdiction of Supreme Court.]

The Supreme Court shall have original jurisdiction to issue all extraordinary writs and to answer questions of state law certified by a court of the United States. The Supreme Court shall have appellate jurisdiction over all other matters to be exercised as provided by statute, and power to issue all writs and orders necessary for the exercise of the Supreme Court's jurisdiction or the complete determination of any cause.

**History:** Const. 1896; 1943, S.J.R. 2; 1984 (2nd S.S.), S.J.R. 1.

**Cross-References.** — Original and appellate jurisdiction, § 78.2.2

**Compiler's Notes.** — Provisions similar to those in this section were formerly found in Art. VIII, Sec. 4.

## NOTES TO DECISIONS

## ANALYSIS

Appellate jurisdiction  
Certiorari  
Habeas corpus  
Legislative enlargement or abridgement of powers

## Appellate jurisdiction

Appellate jurisdiction connotes review of the action of an inferior court. Federal courts are not inferior courts to the Utah Supreme Court and supreme courts answer to certified questions in a case that originated in or is to be adjudicated in a federal court is not an exercise of appellate jurisdiction within the meaning of this section. Holden v. N.L. Indus. Inc., 629 P.2d 428 (Utah 1981).

## Certiorari.

Under this section the Supreme Court, and not a justice thereof, is authorized to issue a writ of certiorari, and a statute conferring such power on a Supreme Court justice must give

way to the Constitution. Carter v. West, 38 Utah 381, 113 P. 1025 (1911).

Where, due to untimeliness, a criminal conviction was no longer subject to review by the statutory remedy of appeal, and a habeas corpus proceeding which was properly before the Supreme Court on appeal held that defendant had been deprived of his constitutional right to an appeal, and the alleged error could not have been corrected on appeal and the defendant had taken the initiative to seek an appeal before the time for appeal had passed, Supreme Court exercised its discretion to issue the common law writ of certiorari to allow defendant a direct review in the Supreme Court of the alleged errors in his trial. Boggess v. Morris, 635 P.2d 39 (Utah 1981).

## Habeas corpus

Matters which have been or could have been raised on appeal cannot be brought before the court by habeas corpus. Habeas corpus is a civil matter and the findings of the trial court

does not prevent the state from going into the liquor business. *Riggins v. District Court*, 89 Utah 183, 51 P 2d 645 (1935)

## COLLATERAL REFERENCES

**Utah Law Review.** Antitrust Symposium, 1969 Utah L. Rev. 617

The Utah Antitrust Act of 1979 (Getting into the State Antitrust Business, 1980 Utah L. Rev. 73)

**Journal of Energy Law and Policy.** An Economic Analysis of Utility Coal Company Relationships, 8J Energy L. & Pol'y 27 (1987)

**A.L.R.** — Divestiture as available relief under § 16 of Clayton Act (15 USC § 26) in action by private parties, 77 A.L.R. Fed. 509

Standing of private party under § 16 of Clayton Act (15 USC § 26) to seek injunction to prevent merger or acquisition allegedly prohibited under § 7 of the Act (15 USC § 18), 78 A.L.R. Fed. 159

**Am. Jur. 2d.** — 54 Am. Jur. 2d Monopolies, Restraints of Trade, and Unfair Trade Practices § 443 et seq

**C.J.S.** — 58 C.J.S. Monopolies § 27  
**Key Numbers.** Monopolies — 10

## ARTICLE XIII

### REVENUE AND TAXATION

## Section

- 1 [Fiscal year]
- 2 [Tangible property to be taxed — Value ascertained — Exemptions — Remittance or abatement of taxes of poor — Intangible property — Legislature to provide annual tax for state]
- 3 [Assessment and taxation of tangible property — Livestock — Land used for agricultural purposes]
- 4 [Mines and claims to be assessed — Basis and multiple — What to be assessed as tangible property]
- 5 [Local authorities to levy local taxes — Sharing tax and revenues by political subdivisions]
- 6 [Annual statement to be published]
- 7 [Repealed]
- 8 [Officer not to make profit out of public moneys]

## Section

- 9 [State expenditure to be kept within revenues]
- 10 [All property taxable where situated]
- 11 [Creation of State Tax Commission — Membership — Governor to appoint — Terms — Duties — County boards — Duties]
- 12 [Stamp, income, occupation, license or franchise tax permissible — Reference to United States laws in imposition of income taxes — Income or intangible property taxes allocated to public school system]
- 13 [Revenue from highway user and motor fuel taxes to be used for highway purposes]
- 14 [Tangible personal property tax exemption]

## Section 1. [Fiscal year.]

The fiscal year shall begin on the first day of January, unless changed by the Legislature

**History:** Const. 1896.

**Compiler's Notes.** — Laws 1980, Senate Joint Resolution No. 6, proposed to amend Article XIII. The proposed amendment was submitted to the electors at the general election in

1980 and failed to pass because it did not receive the necessary majority

**Cross-References.** Fiscal year of state to commence on first of July, § 63.1.1

## NOTES TO DECISIONS

## Bond issue.

City ordinance authorizing bond issue for improvement of waterworks and specifying that for purpose of servicing bonds fiscal year should continue same as calendar year was not

invalid as attempting to fix fiscal year other than that provided by this section. *Fjeldstad v. Ogden City*, 83 Utah 278, 28 P 2d 144 (1933); *Wadsworth v. Santaquin City*, 83 Utah 321, 28 P 2d 161 (1933)

## COLLATERAL REFERENCES

**C.J.S.** — 84 C.J.S. Taxation § 357  
**Key Numbers.** Taxation — 318

### Sec. 2. [Tangible property to be taxed — Value ascertained — Exemptions — Remittance or abatement of taxes of poor — Intangible property — Legislature to provide annual tax for state.]

(1) All tangible property in the state, not exempt under the laws of the United States, or under this Constitution, shall be taxed at a uniform and equal rate in proportion to its value, to be ascertained as provided by law

(2) The following are property tax exemptions.

- (a) The property of the state, school districts, and public libraries,
- (b) The property of counties, cities, towns, special districts, and all other political subdivisions of the state, except that to the extent and in the manner provided by the Legislature the property of a county, city, town, special district or other political subdivision of the state located outside of its geographic boundaries as defined by law may be subject to the ad valorem property tax,
- (c) Property owned by a nonprofit entity which is used exclusively for religious, charitable or educational purposes,
- (d) Places of burial not held or used for private or corporate benefit, and
- (e) Farm equipment and farm machinery as defined by statute. This exemption shall be implemented over a period of time as provided by statute

(3) Tangible personal property present in Utah on January 1, m, which is held for sale or processing and which is shipped to final destination outside this state within twelve months may be deemed by law to have acquired no situs in Utah for purposes of ad valorem property taxation and may be exempted by law from such taxation, whether manufactured, processed or produced or otherwise originating within or without the state

(4) Tangible personal property present in Utah on January 1, m, held for sale in the ordinary course of business and which constitutes the inventory of any retailer, or wholesaler or manufacturer or farmer, or livestock raiser may be deemed for purposes of ad valorem property taxation to be exempted

(5) Water rights, ditches, canals, reservoirs, power plants, pumping plants, transmission lines, pipes and flumes owned and used by individuals or corporations for irrigating land within the state owned by such individuals or corporations, or the individual members thereof, shall be exempted from taxation to the extent that they shall be owned and used for such purposes

(6) Power plants, power transmission lines and other property used for generating and delivering electrical power, a portion of which is used for

furnishing power for pumping water for irrigation purposes on lands in the state of Utah, may be exempted from taxation to the extent that such property is used for such purposes. These exemptions shall accrue to the benefit of the users of water so pumped under such regulations as the Legislature may prescribe.

(7) The taxes of the poor may be remitted or abated at such times and in such manner as may be provided by law.

(8) The Legislature may provide by law for the exemption from taxation: of not to exceed 45% of the fair market value of residential property as defined by law; and all household furnishings, furniture, and equipment used exclusively by the owner thereof at his place of abode in maintaining a home for himself and family.

(9) Property owned by disabled persons who served in any war in the military service of the United States or of the state of Utah and by the unmarried widows and minor orphans of such disabled persons or of persons who while serving in the military service of the United States or the state of Utah were killed in action or died as a result of such service may be exempted as the Legislature may provide.

(10) Intangible property may be exempted from taxation as property or it may be taxed as property in such manner and to such extent as the Legislature may provide, but if taxed as property the income therefrom shall not also be taxed. Provided that if intangible property is taxed as property the rate thereof shall not exceed five mills on each dollar of valuation.

(11) The Legislature shall provide by law for an annual tax sufficient, with other sources of revenue, to defray the estimated ordinary expenses of the state for each fiscal year. For the purpose of paying the state debt, if any there be, the Legislature shall provide for levying a tax annually, sufficient to pay the annual interest and to pay the principal of such debt, within twenty years from the final passage of the law creating the debt.

**History:** Const. 1896; L. 1930 (Spec. Sess.), S.J.R. 2; 1946, H.J.R. 3; 1967, H.J.R. 7; 1961, S.J.R. 6; 1963, S.J.R. 5; 1967, S.J.R. 1; 1982, S.J.R. 3; 1986, H.J.R. 18.

**Compiler's Notes.** — Laws 1959, Senate Joint Resolution No. 5 proposed a constitutional amendment to be voted on by the electors at the general election in 1960. The proposed amendment failed to pass because it did not receive the necessary majority.

The 1979 proposed amendments to this section by House Joint Resolutions Nos. 23 and 25 were repealed and withdrawn by Senate Joint Resolution No. 6, Laws 1980.

Laws 1986, Senate Joint Resolution No. 4, proposed to amend Subsection (2) of this section. The proposed amendment was submitted to the electors at the general election in 1986 and failed to pass because it did not receive the necessary majority.

**Cross-References.** — Armories exempt from taxation, § 39-2-1.

Civil Air Patrol equipment exempt, § 2-1-41.

County service area property exempt, § 17A-2-429.

Disabled veteran's exemption, §§ 59-2-1104, 59-2-1105.

Exemptions generally, § 59-2-1101 et seq., Chapter 23 of Title 78.

Indigent persons, abatement or deferral of taxes, §§ 59-2-1107 to 59-2-1109.

Industrial facilities development property exempt, § 11-17-10.

Mine and mining claim improvements, machinery or structures not exempt, § 59-5-64.

Privilege tax on possession and use of tax-exempt properties, § 51-4-101.

Property of higher education institutions exempt, § 53B-20-106.

Property tax relief, § 59-2-1201 et seq.

Rate of assessment of property, § 59-2-103.

School property exempt from taxation, § 53A-3-408.

Tangible personal property held for sale on January 1 exempt, § 59-2-1114.

## ANALYSIS

## In general

## Banks

## Boundaries of taxing districts

## Charitable organization's property

## Charitable purpose

## Charitable use exemption

## — Government subsidies

## Hospital under construction

## — Material reciprocity test

## — Operating expenses

## Church property

## City property

## Cooperative corporation property

## Corporations for irrigating land

## County improvement district contingent tax

## Disparity in state and county assessment

## Excess revenue refunds

## Labor union property

## Mining claims

## Property of United States or its instrumentalities

## Remission of taxes of indigent or insane persons

## Roll back of assessed value

## Scientific research institute

## Sewer charges against city school board property

## Special assessments

## State colleges

## State property

## Transfer of property to tax exempt corporation

## True market value

## — Intentional discrimination

## Utah State Retirement Fund property

## Value determination by classification

## Cited

## In general.

State's power of taxation is not within application of, and is not limited by, Art. I, Sec. 22, providing that private property shall not be taken or damaged for public use without just compensation. *Kimball v. Grantsville City*, 19 Utah 368, 57 P. 1, 45 L.R.A. 628 (1899).

Unless tax laws conflict with some constitutional provision, either expressly or by implication, courts have no authority to prevent their execution. *Kimball v. Grantsville City*, 19 Utah 368, 57 P. 1, 45 L.R.A. 628 (1899).

## Banks.

All nonexempt local property of national bank located in state is within state's power of taxation. *Commercial Nat'l Bank v. Chambers*, 21 Utah 324, 61 P. 560, 56 L.R.A. 346 (1900), *aff'd*, 182 U.S. 556, 21 S.Ct. 863, 45 L.Ed. 1227 (1901).

## Boundaries of taxing districts

Fixing of boundaries of taxing district and

its area is wholly matter of legislative discretion, and exercise of such discretion is not subject of judicial investigation or revision. *Kimball v. Grantsville City*, 19 Utah 368, 57 P. 1, 45 L.R.A. 628 (1899).

## Charitable organization's property.

Housing facility operated by nonprofit corporation was not exempt from taxation as a charity where senior citizen residents were paying for all the services they received and rental of apartments was determined not by need but by what was required to pay mortgage and operational expenses. *Friendship Manor Corp. v. Tax Comm'n*, 26 Utah 2d 227, 487 P.2d 1272 (1971).

If charitable organization does not use its real property and building thereon exclusively for charitable purposes such property is not exempt. Fact that organization is exempt from federal taxation is not determinative, nonprofit character of organization is essential but not determinative. *Friendship Manor Corp. v. Tax Comm'n*, 26 Utah 2d 227, 487 P.2d 1272 (1971).

Where plaintiff applied for exemption from ad valorem taxation as a nonprofit organization with charitable purpose and where plaintiff carried on various charitable activities both in building and away from premises for which exemption was sought "exclusive use" of lot with building thereon did not require all charitable activity take place in that building, and Tax Commission's refusal of exemption was reversed. *Benevolent & Protective Order of Elks No. 85 v. Tax Comm'n*, 536 P.2d 1214 (Utah 1975).

Fraternal organization's lot and the lodge building thereon were not entitled to a tax exemption on the basis of charitable use where the activities conducted in the lodge consisted chiefly of drinking, card playing, dancing and other social rather than fraternal functions, and the organization's expenditures on charitable objects amounted to only slightly more than 2% of total expenditures. *Baker v. One Piece of Improved Real Property*, 570 P.2d 1023 (Utah 1977).

It is the use to which the real property is put, not the nature of the owning organization, which is determinative of whether or not the property is exempt as being used exclusively for charitable purposes. *Yorgason v. County Bd. of Equalization*, 714 P.2d 653 (Utah 1986).

An apartment building for needy elderly and handicapped families and individuals is exempt from real property tax where it is used exclusively for charitable purposes. *Yorgason v. County Bd. of Equalization*, 714 P.2d 653 (Utah 1986).



**Scientific research institute.**

Exemption is the exception to the rule, and property owner has burden of demonstrating clearly and unequivocally that he falls within the exemption. Scientific research institute failed to meet this burden where evidence was that almost half of its efforts were expended for the U.S. Defense Department, its efforts were circumscribed by individual employment contracts, and it occasionally restricted disclosure of its findings at request of a non governmental client, all of which combined to indicate that the institute was benefiting the public only incidentally and was therefore not a charitable institution. *Eyring Research Inst., Inc v. Tax Comm'n*, 598 P.2d 1348 (Utah 1979).

**Sewer charges against city school board property.**

Charges by city levied against board of education for connections to city sewer system and services thereof were mere payments for services enjoyed by the board and were not "taxes" or "assessments" from which board of education was exempt and a resulting lien from delinquent payment of such charges was not an exercise of the city taxing power. *Murray City v. Board of Educ.*, 16 Utah 2d 115, 396 P.2d 628 (1964).

**Special assessments.**

Provision of this section that all property not exempt under laws of United States or under state Constitution shall be taxed refers to general taxes and not to special assessments, and hence does not invalidate a statutory provision, which provides that property held by board of education shall be exempt from local assessments. *Wey v. Salt Lake City*, 35 Utah 504, 101 P. 381 (1909).

This section does not apply to special assessments. *State ex rel. Lundberg v. Green River Irrigation Dist.*, 40 Utah 83, 119 P. 1039 (1911).

**State colleges.**

A bond issue by board of trustees of state agricultural college in accordance with legislative enactment for purpose of financing construction of student union building would not violate this section by creating debt against state, where bonds showed on their face that they were special obligations payable solely from revenue to be derived from operation of union, including proceeds of student fee, and not obligations of the state. *Spence v. Utah State Agril. College*, 119 Utah 104, 225 P.2d 18 (1950).

"Property of" a state university means property owned by it, where university possessed equipment leased from corporation which retained title to it, the equipment was not exempt from county property taxation, and under the terms of the lease, university was bound to

pay taxes due. *University of Utah v. Salt Lake County*, 547 P.2d 207 (Utah 1976).

**State property.**

Where the state holds title to land in its governmental capacity, the property is exempt from taxation under the constitutional mandate. *Duchesne County v. State Tax Comm'n*, 104 Utah 365, 140 P.2d 335 (1943).

Under this section lands, title to which is acquired by the state by foreclosure of mortgage or conveyance for the extinguishment of a debt for money loaned from the state school fund, are exempt from taxation. This is partly due to the reason that the property is owned by the state in its governmental capacity, but according to some of the judges is due solely to the fact that such lands come within the meaning of the term "property" in constitutional provision. *Duchesne County v. State Tax Comm'n*, 104 Utah 365, 140 P.2d 335 (1943).

**Transfer of property to tax-exempt corporation.**

Where a private corporation conveyed property to a tax-exempt municipal corporation prior to assessment and levy of taxes, the ad valorem tax on the property was erroneously and illegally levied and collected by the county even though the corporation owned the property on January 1 when the lien for tax attached, and the corporation's application for a refund was proper. *Utah Parks Co v. Iron County*, 14 Utah 2d 178, 380 P.2d 924 (1963).

**True market value.****—Intentional discrimination.**

A federal district court is precluded from probing into the assessment process to determine whether the state has accurately determined the "true market value" of a railroad's property absent a strong showing by the railroad that the state has purposefully overvalued its property with discriminatory intent. *Union Pac. R.R. v. State Tax Comm'n*, 635 F. Supp. 1060 (D. Utah 1986).

To the extent that railroads allege that the state has intentionally discriminated against them, they may introduce evidence of their true market value, as well as other probative evidence, to establish their prima facie case of intentional discrimination. *Union Pac. R.R. v. State Tax Comm'n*, 635 F. Supp. 1060 (D. Utah 1986).

**Utah State Retirement Fund property.**

Real property of the Utah State Retirement Fund was "property of the state" within the meaning of this section, and was therefore tax-exempt. *Utah State Retirement Office v. Salt Lake County*, 780 P.2d 811 (Utah 1989).

**Value determination by classification.**

County board of equalization was not authorized to determine value by classification of

property, and assessment based thereon was in violation of this section. *Harmer v. State Tax Comm'n*, 22 Utah 2d 324, 452 P.2d 876 (1969).  
Cited in *Salt Lake County v. Tax Comm'n ex rel. Utah Transit Auth.*, 780 P.2d 1231

(Utah 1989), *Salt Lake County ex rel. County Bd. of Equalization v. State Tax Comm'n ex rel. Kennecott Corp.*, 779 P.2d 1131 (Utah 1989).

## COLLATERAL REFERENCES

**Utah Law Review.** — Note, Financing Modernized and Unmodernized Local Government in the Age of Aquarius, 1971 Utah L. Rev. 30.

**Housing in Salt Lake County — A Place to Live for the Poor?**, 1972 Utah L. Rev. 193.

**Brigham Young Law Review.** — A Municipality's Interest in an Electrical Power Generating Facility: Some Tax Considerations, 1979 BYU L. Rev. 125.

**Am. Jur. 2d** — 71 Am. Jur. 2d State and Local Taxation §§ 194 et seq., 307 et seq.

**C.J.S.** — 84 C.J.S. Taxation §§ 52, 57 et seq., 215 et seq.

**A.L.R.** — Oil and gas royalty as real or personal property, 56 A.L.R. 4th 539.

Property tax effect of tax-exempt lessor's reversionary interest on valuation of nonexempt lessee's interest, 57 A.L.R. 4th 950.

Exemption from real property taxation of residential facilities maintained by hospital for patients, staff, or others, 61 A.L.R. 4th 1105.

Propriety of federal court's ordering state or local tax increase to effectuate civil rights decree, 76 A.L.R. Fed. 504.

**Key Numbers.** — Taxation — 49, 57 et seq., 191 et seq.

### Sec. 3. [Assessment and taxation of tangible property — Livestock — Land used for agricultural purposes.]

(1) The Legislature shall provide by law a uniform and equal rate of assessment on all tangible property in the state, according to its value in money, except as otherwise provided in Section 2 of this Article. The Legislature shall prescribe by law such provisions as shall secure a just valuation for taxation of such property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its tangible property, provided that the Legislature may determine the manner and extent of taxing livestock.

(2) Land used for agricultural purposes may, as the Legislature prescribes, be assessed according to its value for agricultural use without regard to the value it may have for other purposes.

**History:** Const. 1896; Nov. 6, 1900; Nov. 6, 1906; L. 1930 (S.S.), S.J.R. 2; 1946 (1st S.S.), H.J.R. 2; 1967, S.J.R. 2; 1982, S.J.R. 3.  
**Compiler's Notes.** — The 1979 proposed amendment of this section by House Joint Res.

olution No. 23 was repealed and withdrawn by Senate Joint Resolution No. 6, Laws 1980.

**Cross-References.** — Uniform School Fund, taxes allocated to, § 53A 16 101.

## NOTES TO DECISIONS

## ANALYSIS

## In general

"According to value in money" construed

Charitable association

Co-operative corporation property

County clerk's probate fees

County improvement district contingent tax

Disparity in state and county assessment

Double taxation

Drainage assessments

## Occupation and license taxes

Remission of taxes of indigent or insane persons

Road poll taxes

Roll back of assessed value

Special assessments

State property

Telephone license tax

Uniformity and equality

Utility rates

Cited



## Sec. 4. [Mines and claims to be assessed — Basis and multiple — What to be assessed as tangible property.]

All metalliferous mines or mining claims, both placer and rock in place, shall be assessed as the Legislature shall provide; but the basis and multiple now used in determining the value of metalliferous mines for taxation purposes and the additional assessed value of \$5.00 per acre thereof shall not be changed before January 1, 1935, nor thereafter until otherwise provided by law. All other mines or mining claims and other valuable mineral deposits, including lands containing coal or hydrocarbons and all machinery used in mining and all property or surface improvements upon or appurtenant to mines or mining claims, and the value of any surface use made of mining claims, or mining property for other than mining purposes, shall be assessed as other tangible property.

**History:** Const. 1896; Nov. 8, 1908; L. 1930 (S.S.), S.J.R. 5; 1982, S.J.R. 3.

**Cross-References.** — Statutory provisions, § 59-2-201.

### NOTES TO DECISIONS

#### ANALYSIS

Construction and operation of section.

Drain tunnels

Notice

Unpatented mining claims

Water rights

Construction and operation of section.

Classification under this section as it formerly read was not intended to limit phrase "or other valuable mineral deposits," but embraced all mineral deposits including gypsum, and net annual profits from products manufactured therefrom were taxable. *Nephi Plaster & Mfg. Co. v. Juab County*, 33 Utah 114, 93 P. 53, 14 L.R.A. (n.s.) 1043 (1907).

Under this section as it once read, a blanket assessment of all coal lands in county could not be made at a flat or uniform rate. *Ririe v. Randolph*, 51 Utah 274, 169 P. 941 (1917).

Under this section as it formerly read, it was held that for purpose of taxing net proceeds of mines, the cost of mining incurred in any one year must be considered independently from the cost incurred in any other year, and only such costs as were incurred during year in which net proceeds were obtained could be considered. *Mammoth Mining Co. v. Juab County*, 51 Utah 316, 170 P. 78 (1918).

**Drain tunnels.**

Under this section, drain tunnels, used to drain a mine, may not be separately taxed where it appears that they have no separate and independent value, but are inseparably connected with the operation of the mine. *Ontario Silver Mining Co. v. Hixon*, 49 Utah 359, 164 P. 498 (1917).

**Notice.**

Assessment of mines was not defective where notice described property with reasonable certainty as to locality and identity. *Consolidated Uranium Mines, Inc. v. Moffitt*, 257 F.2d 396 (10th Cir. 1958).

**Unpatented mining claims.**

A tax imposed under state law upon the possessory right to explore and develop mines located upon unpatented claims located upon land belonging to the unappropriated public domain of the United States is not open to challenge upon the ground that it constitutes a tax against property belonging to the United States. *Consolidated Uranium Mines, Inc. v. Moffitt*, 257 F.2d 396 (10th Cir. 1958).

**Water rights.**

Water rights are taxable whether considered appurtenant to mine or independent property. *Utah Metal & Tunnel Co. v. Groesbeck*, 62 Utah 251, 219 P. 248 (1923).

**Am. Jur. 2d.** 71 **Am. Jur. 2d State and Local Taxation** § 218

**C.J.S.** 84 **C.J.S. Taxation** §§ 68, 73, 170 **Key Numbers.** Taxation — 63, 158

## Sec. 5. [Local authorities to levy local taxes — Sharing tax and revenues by political subdivisions.]

The Legislature shall not impose taxes for the purpose of any county, city, town or other municipal corporation, but may, by law, vest in the corporate authorities thereof, respectively, the power to assess and collect taxes for all purposes of such corporation. Notwithstanding anything to the contrary contained in this Constitution, political subdivisions may share their tax and other revenues with other political subdivisions as provided by statute.

**History:** Const. 1896; L. 1982, S.J.R. 3.  
**Cross-References.** — Appropriations and tax limitation, § 59-17a-101 et seq.  
City taxing power, Utah Const., Art. XI, sec 5.

County taxing power, § 17-4-3.  
Revenue sharing between political subdivisions, § 11-13-16.5

### NOTES TO DECISIONS

#### ANALYSIS

Agricultural extension work

Allocation of future tax

"Corporate authorities" construed.

Court fees

Dependent mothers

Discriminatory tax

Excess revenue refunds

License fees

Purpose of taxation

Utah Neighborhood Development Act

Water district

**Agricultural extension work.**

Statute (Comp. Laws 1917, § 5292) authorizing contracts between trustees of state agricultural college and county commissioners with respect to agricultural extension work, and authorizing commissioners to provide funds necessary for the work in their respective counties, was not invalid as imposing a tax for county purposes by the legislature. *Bailey v. Van Dyke*, 66 Utah 184, 240 P. 454 (1925).

**Allocation of future tax.**

The law is well settled that in exercising the powers of the state, the legislature may require the revenue of a municipality to be applied to uses other than that for which the taxes were levied, thus there was no constitutional transgression in the allocation of certain expected tax increments (generated by new construction in an area of urban blight) for repayment of Redevelopment Agency bonds. *Tribe v. Salt Lake City Corp.*, 540 P.2d 499 (Utah 1975).

**"Corporate authorities" construed.**

"Corporate authorities," as used in this section, are those municipal officers who either are directly elected by municipality's inhabitants or are appointed in some mode to which such inhabitants have given their assent. *State ex rel. Wright v. Stanford*, 24 Utah 148, 66 P. 1061 (1901).

**Court fees.**

The provisions of this section were contravened by statute which attempted to fix schedule of county clerks' fees for services in probate matters based on sliding scale where fees increased as values of estates increased, since such attempt was an imposition of taxes without uniformity for counties' use and benefit. *Smith v. Carbon County*, 90 Utah 560, 63 P.2d 259, 108 A.L.R. 513 (1936).

**Dependent mothers.**

The phrase "for all purposes of such corporation," is synonymous with the phrase, "public purposes," and Chapter 13 of Title 17 (Public Aid for Dependent Mothers) would be upheld as "public purpose." *Denver & R.G.R.R. v. Grand County*, 51 Utah 294, 170 P. 74, 3 A.L.R. 1224 (1917).

**Discriminatory tax.**

A city licensing ordinance which was a revenue raising measure and put some of the businesses affected on a flat fee basis with only about one twelfth as much tax as other businesses which paid on a sales tax basis was an constitutionally discriminatory. *Orem City v. Pyne*, 16 Utah 2d 355, 401 P.2d 181 (1965).

**History:** C. 1953, 59-2-104, enacted by L. 1987, ch. 4, § 51.

**Compiler's Notes.** — Former § 59-4-1, as last amended by Laws 1935, ch. 81, § 1, contained provisions similar to this section.

**Effective Dates.** — Laws 1987, ch. 4, § 308 makes the act effective on February 6, 1987.

**Retrospective Operation.** — Laws 1987, ch. 4, § 307 provides: "This act has retrospective operation to January 1, 1987, except for Sections 59-2-201, 59-2-205, and 59-2-207, which take effect January 1, 1988."

**Cross-References.** — Property taxable where situated, Utah Const. Art. XIII, § 10.

#### NOTES TO DECISIONS

##### ANALYSIS

Boundaries of taxing district.  
Location of property.  
Property of foreign corporations.  
Rolling stock of railroads.  
Unity of use doctrine.  
Water rights.

##### Boundaries of taxing district.

Fixing of boundaries of taxing district and its area is wholly matter of legislative discretion, and exercise of such discretion is not subject of judicial investigation or revision. *Kimball v. Grantsville City*, 19 Utah 368, 57 P. 1, 45 L.R.A. 628 (1899).

##### Location of property.

Term "owned," as used in Utah Const. Art. XIII, § 10, which provides that all persons in state shall be subject to taxation on real and personal property "owned" or used by them within territorial limits of authority levying tax, has reference to place where property is, and not to where owner may reside; therefore, sheep were not assessable in certain city where none of them had been within territorial limits of city at any time during period for which taxes were assessed. *Murdock v. Murdock*, 38 Utah 373, 113 P. 330 (1910).

With respect to personal property of a tangible and corporeal nature and capable of having a situs of its own, residence of owner is generally immaterial, and property is taxable where it is found. *Hamilton & Gleason Co. v. Emery County*, 75 Utah 406, 285 P. 1006 (1930). See *Union Refrigerator Transit Co. v. Lynch*, 18 Utah 378, 55 P. 639, 48 L.R.A. 790 (1898), aff'd, 177 U.S. 149, 20 S. Ct. 631, 44 L. Ed. 708 (1900).

##### Property of foreign corporations.

Neither tangible nor intangible property owned and used by foreign corporation in states other than Utah was taxable in Utah county in which corporation's principal office was situated. *Utah-Idaho Sugar Co. v. Salt Lake County*, 60 Utah 491, 210 P. 106, 27 A.L.R. 874 (1922).

##### Rolling stock of railroads.

As against contention of foreign corporation that taxation of its refrigerator cars in Utah was forbidden by U.S. Constitution because such cars had no situs in Utah for purpose of taxation and tax on them would impose burden on interstate commerce, held that cars were taxable in Utah on basis of average number thereof used and employed by their owner in Utah during year for which assessment was made. *Union Refrigerator Transit Co. v. Lynch*, 177 U.S. 149, 20 S. Ct. 631, 44 L. Ed. 708 (1900).

##### Unity of use doctrine.

The doctrine of unity of use for purpose of determining assessment for taxation cannot be applied to manufacturing or other similar plants or industries which may be under common ownership but used or operated in different states. *Utah-Idaho Sugar Co. v. Salt Lake County*, 60 Utah 491, 210 P. 106, 27 A.L.R. 874 (1922).

##### Water rights.

Where flow of percolating waters was developed in process of mining operations, which water was piped and sold to another company which took such water in another county and through its own pipes conducted it so its own mine, water rights were properly assessed against mining company selling such water in county in which its operations were conducted and in county where water was transferred and tax apportioned between such counties. *Utah Metal & Tunnel Co. v. Groesbeck*, 62 Utah 251, 219 P. 248 (1923).

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 71 Am. Jur. 2d State and Local Taxation §§ 648 to 651.

**C.J.S.** — 84 C.J.S. Taxation §§ 113, 115.

**A.L.R.** — Validity of municipal ordinance

imposing income tax or license upon nonresidents employed in taxing jurisdiction (commuter tax), 48 A.L.R.3d 343.

**Key Numbers.** — Taxation — 98

### 59-2-105. Situs of public utilities, bridges, ferries, and canals.

Public utilities, and bridges and ferries not public utilities, when operated wholly in one county, and electric light lines and similar improvements, canals, ditches, and flumes when separately taxable, shall be listed and assessed in the county in which the property is located.

**History:** C. 1953, 59-2-105, enacted by L. 1987, ch. 4, § 52.

**Compiler's Notes.** — Former § 59-4-2, as last amended by Laws 1931, ch. 53, § 1, contained provisions similar to this section.

**Effective Dates.** — Laws 1987, ch. 4, § 308 makes the act effective on February 6, 1987.

**Retrospective Operation.** — Laws 1987, ch. 4, § 307 provides: "This act has retrospective operation to January 1, 1987, except for Sections 59-2-201, 59-2-205, and 59-2-207, which take effect January 1, 1988."

**Cross-References.** — Property taxable where situated, Utah Const. Art. XIII, § 10.

#### NOTES TO DECISIONS

##### Railroad rolling stock.

As against contention of foreign corporation that taxation of its refrigerator cars in Utah was forbidden by U.S. Constitution because such cars had no situs in Utah for purpose of taxation and tax on them would impose burden on interstate commerce, held that cars were

taxable in Utah on basis of average number thereof used and employed by their owner in Utah during year for which assessment was made. *Union Refrigerator Transit Co. v. Lynch*, 177 U.S. 149, 20 S. Ct. 631, 44 L. Ed. 708 (1900).

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 71 Am. Jur. 2d State and Local Taxation § 652.

**C.J.S.** — 84 C.J.S. Taxation §§ 339 to 348.  
**Key Numbers.** — Taxation — 98.

## PART 2 ASSESSMENT OF PROPERTY

### 59-2-201. Assessment by commission — Determination of value of mining property — Notification of assessment — Property assessed by the unitary method which is locally assessed.

(1) By May 1 the following property shall be assessed by the commission at 100% of fair market value, as valued on January 1, in accordance with this chapter:

- (a) all property which operates as a unit across county lines, if the values must be apportioned among more than one county or state;
- (b) all property of public utilities;

(c) all mines and mining claims and other valuable mineral deposits;  
 (d) all machinery used in mining, all property or surface improvements upon or appurtenant to mines or mining claims, and the value of any surface use made of mining claims or mining property for other than mining purposes. For the purposes of assessment and taxation, all processing plants, mills, reduction works, and smelters which are primarily used by the owner of a mine or mining claim for processing, reducing, or smelting minerals taken from a mine or mining claim, shall be considered appurtenant to that mine or mining claim, regardless of actual location; and

(e) in all cases where the surface of lands is owned by one person and the mineral underlying those lands is owned by another, the property rights shall be separately assessed to the respective owners. If the surface is used for other than mining purposes, the value of the surface shall be assessed by the assessor of the county in which the property is located.

(2) The method for determining the fair market value of productive mining property is the capitalized net revenue method or any other valuation method the commission believes, or the taxpayer demonstrates to the commission's satisfaction, to be reasonably determinative of the fair market value of the mining property. The rate of capitalization applicable to mines shall be determined by the commission, consistent with a fair rate of return expected by an investor in light of that industry's current market, financial, and economic conditions. In no event may the fair market value of the mining property be less than the fair market value of the land, improvements, and tangible personal property upon or appurtenant to the mining property.

(3) Immediately following the assessment, the owner or operator of the assessed property shall be notified of the assessment. The assessor of the county in which the property is located shall also be immediately notified of the assessment.

(4) Property assessed by the unitary method, which is not necessary to the conduct and does not contribute to the income of the business as determined by the commission, shall be assessed separately by the local county assessor.

History: C. 1983, 59-2-201, enacted by L. 1987, ch. 4, § 53.

Compiler's Notes. — Former § 59-2-52, as amended by Laws 1983, ch. 76, § 1, contained provisions similar to this section.

Effective Dates. — Laws 1987, ch. 4, § 308 makes the act effective on February 6, 1987.

**Retroactive Operation.** Laws 1987, ch. 4, § 307 provides: "This act has retrospective operation to January 1, 1987, except for Sections 59-2-201, 59-2-205, and 59-2-207, which take effect January 1, 1988."

**Cross-References.** — Taxation of mines, Utah Const. Art. XIII, § 4.

#### NOTES TO DECISIONS

##### ANALYSIS

Challenging assessment  
 By county  
 Intentional discrimination  
 Coal lands  
 Date of assessment  
 Life tenant and remainderman  
 Location of property  
 Mineral land  
 "Mines"

Notice of assessment  
 Public utilities  
 Separate assessment

#### Challenging assessment.

##### —By county.

Since underassessment of mining property can cause a distinct and palpable injury to a county by limiting its tax base, a county has standing to sue the tax commission on the ground that such property was underassessed. *Kennecott Corp. v. Salt Lake County*, 702 P.2d 451 (Utah 1985).

##### —Intentional discrimination.

A federal district court is precluded from probing into the assessment process to determine whether the state has accurately determined the "true market value" of a railroad's property absent a strong showing by the railroad that the state has purposefully overvalued its property with discriminatory intent. *Union Pac. RR v. State Tax Comm'n*, 635 F. Supp. 1060 (D. Utah 1986).

#### Coal lands.

A blanket assessment of all coal lands in county could not be made at a flat or uniform rate. *Ririe v. Randolph*, 51 Utah 274, 169 P. 941 (1917).

#### Date of assessment.

Property not within city on January 1st is not liable for payment of city taxes for those years. *Plutus Mining Co. v. Orme*, 76 Utah 286, 289 P. 132 (1930).

#### Life tenant and remainderman.

A life tenant should be assessed as owner during the continuance of the life estate. *Sheppick v. Sheppick*, 44 Utah 111, 138 P. 1169 (1914).

#### Location of property.

Property of electric company operating in only one county was assessable in county in which property was located although electric company was owned by company operating in several counties. *Telluride Power Co. v. Gates*, 61 Utah 337, 213 P. 175 (1923).

#### Mineral land.

Until there is proof that land has lost its character as mineral or mining property, it is assessable by State Tax Commission. *Crystal Lime & Cement Co. v. Roblins*, 116 Utah 314, 209 P.2d 739 (1949).

Where title to land is derived from federal government through issuance of a patent as mining property there is a presumption that it is property of that character until it is proved otherwise. *Crystal Lime & Cement Co. v. Roblins*, 116 Utah 314, 209 P.2d 739 (1949).

#### "Mines."

The terms "mines" and "mineral" are not

limited to mere subterranean excavations or workings or to the metals or metalliferous deposits, whether contained in veins that have well defined walls or in beds or deposits that are irregular and are found at or near the surface or otherwise. *Nephi Plaster & Mfg. Co. v. Juab County*, 31 Utah 114, 93 P. 53, 14 L.R.A. (n.s.) 1041 (1907).

#### Notice of assessment.

Assessment of mines was not defective where notice described property with reasonable certainty as to locality and identity. *Consolidated Uranium Mines, Inc. v. Moffitt*, 257 F.2d 396 (10th Cir. 1958).

#### Public utilities.

This section confers no authority upon tax commission to assess car companies which are not public utilities. *Crystal Car Line v. State Tax Comm'n*, 110 Utah 426, 174 P.2d 984 (1946).

#### Separate assessment.

A person in adverse possession of the surface ground of a mining claim, who has been assessed with such surface area and has paid taxes thereon, may claim adverse possession to such surface, although owner of mining claim has paid the taxes thereon. *Utah Copper Co. v. Eckman*, 47 Utah 165, 152 P. 178 (1915).

Where there is common ownership of both the surface and mineral rights in land used for mining purposes, and no request is made that the surface be taxed on its valuation separately from the mines and mineral rights, it is proper for the county officials to aggregate the valuations of both surface and mineral rights in applying the tax levy and in all proceedings subsequent thereto. *Telonis v. Staley*, 104 Utah 517, 144 P.2d 513 (1943).

When the surface and mineral estates of a mining claim are owned by the same person, only one tax is assessed on the claim. This is because the statute provides for separate assessment of the surface only when the surface and mineral estates are owned by different owners. The statute makes no other provision for separate assessment of the two estates. Therefore, separate taxation of surface and mineral interests does not constitute double taxation because the separate taxes would be on different property interests. *United Park City Mines Co. v. State of Okla.*, 737 P.2d 173 (Utah 1987).

The assessment of the value of the surface use of property used for mining is in addition to the per acre assessment of the mining claim, and the additional assessment is required whether the surface is owned by the same

## 59-2-304

## REVENUE AND TAXATION

## NOTES TO DECISIONS

## ANALYSIS

Constitutionality.  
Duties of assessor and taxpayers.  
Effect of erroneous assessment.  
Nature of tax debt.  
Nonresident's property.  
Owner's obligation to pay tax.  
Transfer of property to tax-exempt corporation.

**Constitutionality.**

Section is not so vague and uncertain as to be unconstitutional. *Norville v. State Tax Comm.*, 98 Utah 170, 97 P.2d 937, 126 A.L.R. 1318 (1940).

**Duties of assessor and taxpayers.**

It is duty of assessor to assess all property at its value, and it is likewise duty of every person and corporation having taxable property to list same for taxation. *Utah-Idaho Sugar Co. v. Salt Lake County*, 60 Utah 491, 210 P. 106, 27 A.L.R. 874 (1922).

**Effect of erroneous assessment.**

Failure to assess taxes to owner did not invalidate assessment. *Jones v. Box Elder County*, 52 F.2d 340 (10th Cir. 1931), cert. den. 285 U.S. 555, 52 S.Ct. 456, 76 L.Ed. 944 (1932).

Where property is not assessed to the real owner, and it is sold under such assessment, a tax deed issued in pursuance thereof has no binding effect as against real owner. *Salt Lake Inv. Co. v. Oregon Short Line R.R.*, 46 Utah 203, 148 P. 439 (1915), aff'd, 246 U.S. 446, 38 S.Ct. 348, 62 L.Ed. 823 (1918).

**Nature of tax debt.**

This section seems to make the tax a debt against the individual owning the property and a lien on his property, rather than a

charge against the property alone. *Hayes v. Gibbs*, 110 Utah 54, 169 P.2d 781, 168 A.L.R. 513 (1946).

**Nonresident's property.**

Property brought into this state by a nonresident company and used in construction work for an indefinite period is subject to taxation in county where used, under Utah Const. Art. XIII, § 10. *Hamilton & Gleason Co. v. Emery County*, 75 Utah 406, 285 P. 1006 (1930).

**Owner's obligation to pay tax.**

Record owners of real property on January 1, 1964, were obligated to pay the 1964 property tax; if January 1 record owner transfers his interest in the property and does not want to be held liable for the tax, it is his obligation to make arrangements for payment by his transferee. *Dillman v. Foster*, 656 P.2d 974 (Utah 1982).

**Transfer of property to tax-exempt corporation.**

Where a private corporation conveyed property to a tax-exempt municipal corporation prior to assessment and levy of taxes under this section, the ad valorem tax on the property was erroneously and illegally levied and collected by the county. *Utah Parks Co. v. Iron County*, 14 Utah 2d 178, 380 P.2d 924 (1963).

## COLLATERAL REFERENCES

**Utah Law Review.** — Personal Obligation to Pay Real Property Taxes in Utah: *Dillman v. Foster*, 1983 Utah L. Rev. 845.

**C.J.S.** — 84 C.J.S. Taxation § 376.  
**Key Numbers.** — Taxation 4-310 et seq.

### 59-2-304. Recognition of expenses in using comparable sales or cost appraisal method — Implementation of new program.

(1) If the county assessor uses the comparable sales or cost appraisal method in valuing taxable property for assessment purposes, the assessor is required to recognize that various fees, services, closing costs, and other expenses related to the transaction lessen the actual amount that may be received in the transaction. The county assessor shall, therefore, take 80% of the

value based on comparable sales or cost appraisal of the property for purposes of assessment under Subsection 59-2-103(1).

(2) (a) Prior to January 1, 1989, the commission shall develop and implement comparable sales or cost appraisal methods in valuing taxable property for assessment purposes which provide that the various fees, services, closing costs, and other expenses related to the sales transaction and other intangible values are not included as part of the fair market value for purposes of taxation.

(b) Beginning January 1, 1989, the provisions of Subsection (1) do not apply. Beginning January 1, 1989, the commission shall, by rule, order county assessors to use the comparable sales or cost appraisal methods which are required to be developed and implemented in Subsection (2)(a) in place of the requirement of Subsection (1).

**History:** C. 1953, 59-2-304, enacted by L. 1987, ch. 4, § 72; 1987, ch. 150, § 1.

**Amendment Notes.** — The 1987 amendment by Chapter 150, effective April 27, 1987, substituted "1989" for "1988" in Subsections (2)(a) and (2)(b).

**Compiler's Notes.** — Former § 59-5-4.5, as amended by Laws 1986, ch. 115, § 1, contained provisions similar to this section.

**Effective Dates.** — Laws 1987, ch. 4, § 308 makes the act effective on February 6, 1987.

**Retrospective Operation.** — Laws 1987, ch. 4, § 307 provides: "This act has retrospective operation to January 1, 1987, except for Sections 59-2-201, 59-2-205, and 59-2-207, which take effect January 1, 1988."

## NOTES TO DECISIONS

**Constitutionality.**

The provision that reduces by 20% the value of county-assessed property by comparable sales or cost materials is constitutional under Article XIII of the Utah Constitution and does

not violate the equal protection provisions of the Utah or United States Constitutions. *Rio Algom Corp v. San Juan County*, 681 P.2d 184 (Utah 1984).

## COLLATERAL REFERENCES

**Utah Law Review.** — Recent Developments in Utah Law, 1985 Utah L. Rev. 131, 207.

### 59-2-305. Listing property in taxing districts.

The county assessor shall list all property in each taxing district in the county by identifier and value. The commission may prescribe procedures and formats, after consultation with affected state agencies and county assessors, which will provide reasonable uniformity and reduced costs in listing property.

**History:** C. 1953, 59-2-305, enacted by L. 1987, ch. 4, § 73.

**Compiler's Notes.** — Former § 59-5-5, as amended by Laws 1982, ch. 71, § 23, contained provisions similar to this section.

**Effective Dates.** — Laws 1987, ch. 4, § 308 makes the act effective on February 6, 1987.

**Retrospective Operation.** — Laws 1987, ch. 4, § 307 provides: "This act has retrospective operation to January 1, 1987, except for Sections 59-2-201, 59-2-205, and 59-2-207, which take effect January 1, 1988."



(b) The Utah Rules of Evidence apply in judicial proceedings under this section.

**History:** C. 1953, 63-46b-15, enacted by L. 1987, ch. 161, § 271; 1988, ch. 72, § 25.

**Amendment Notes.** — The 1988 amendment, effective April 25, 1988, deleted "except that final agency action from informal adjudicative proceedings based on a record shall be reviewed by the district courts on the record

according to the standards of Subsection 63-46b-16(4)" at the end in Subsection (1)(a) and made minor stylistic changes.

**Effective Dates.** — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988.

#### NOTES TO DECISIONS

##### Function of district court.

Section 63-46b-16(1) provides that all final agency decisions through formal adjudicative proceedings will be reviewed by the Utah Supreme Court or Court of Appeals. Therefore,

the district court will no longer function as intermediate appellate court except to review informal adjudicative proceedings de novo pursuant to Subsection (1)(a) of this section. In re Topik, 761 P.2d 32 (Utah Ct. App. 1988).

### 63-46b-16. Judicial review — Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, filing, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.

**History:** C. 1953, 63-46b-16, enacted by L. 1987, ch. 161, § 272; 1988, ch. 72, § 26.

**Amendment Notes.** — The 1988 amendment, effective April 25, 1988, substituted "As provided by statute, the Supreme Court or the Court of Appeals" for "The Supreme Court or other appellate court designated by statute" in Subsection (1), inserted "with the appropriate

appellate court" in Subsection (2)(a); and substituted "appellate rules of the appropriate appellate court" for "Utah Rules of Appellate Procedure" in Subsections (2)(a) and (2)(b).

**Effective Dates.** — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988.

#### NOTES TO DECISIONS

##### Function of district court.

Subsection (1) provides that all final agency decisions through formal adjudicative proceedings will be reviewed by the Utah Supreme Court or Court of Appeals. Therefore, the dis-

trict court will no longer function as intermediate appellate court except to review informal adjudicative proceedings de novo pursuant to § 63-46b-15(1)(a). In re Topik, 761 P.2d 32 (Utah Ct. App. 1988).

### 63-46b-17. Judicial review — Type of relief.

(1) (a) In either the review of informal adjudicative proceedings by the district court or the review of formal adjudicative proceedings by an appellate court, the court may award damages or compensation only to the extent expressly authorized by statute.

(b) In granting relief, the court may:

(i) order agency action required by law;

(ii) order the agency to exercise its discretion as required by law;

(iii) set aside or modify agency action;

(iv) enjoin or stay the effective date of agency action; or

(v) remand the matter to the agency for further proceedings.

(2) Decisions on petitions for judicial review of final agency action are reviewable by a higher court, if authorized by statute.

**History:** C. 1953, 63-46b-17, enacted by L. 1987, ch. 161, § 273.

**Effective Dates.** — Laws 1987, ch. 161,

§ 315 makes the act effective on January 1, 1988.

**History:** L. 1951, ch. 58, § 1; C. 1943, Supp., 104-2-1; L. 1969, ch. 247, § 1; 1966, ch. 47, § 40; 1968, ch. 248, § 4; 1990, ch. 80, § 4.

**Amendment Notes.** — The 1988 amendment, effective April 25, 1988, in Subsection (2), rewrote the second sentence which read "Thereafter, the term of office of a justice of the Supreme Court is ten years and until his successor is appointed and approved in accordance with Section 20-1-7.1" and, in Subsection (6), substituted "determines" for "decides" at the end of the fourth sentence.

The 1990 amendment, effective April 23, 1990, deleted "next" after "January" and made punctuation changes in Subsection (2); deleted "not" following "chief justice may" in the third sentence of Subsection (3); deleted "additional" before "duties" in Subsection (5); deleted

"where not inconsistent with the law" following "chief justice" and added "as consistent with the law" at the end of Subsection (6).

**Cross-References.** — Chief justice, Utah Const., Art. VIII, Sec. 2.

Disqualification in particular case, Utah Const., Art. VIII, Sec. 2.

Judicial nomination and selection, § 20-1-7.1 et seq.

Membership on state law library board, § 37-1-1.

Proceedings unaffected by vacancy, § 78-7-21.

Qualifications of justices, Utah Const., Art. VIII, Sec. 7.

Retirement, Utah Const., Art. VIII, Sec. 15; § 49-6-101 et seq., §§ 78-7-29, 78-7-30.

Salary, Utah Const., Art. VIII, Sec. 14.

#### COLLATERAL REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d Courts §§ 67, 68.

C.J.S. — 21 C.J.S. Courts § 111 et seq.; 48A C.J.S. Judges §§ 3, 7, 8, 21 to 25, 85.

**Key Numbers.** — Courts — 101. 248: Judges — 1, 7 to 12.

### 78-2-1.5, 78-2-1.6. Repealed.

**Repeals.** — Section 78-2-1.5 (L. 1969, ch. 225, § 2), relating to salaries of Supreme Court justices, was repealed by Laws 1971, ch. 182, § 4.

Section 78-2-1.6 (L. 1979, ch. 134, § 1; 1981, ch. 156, § 1), relating to salaries of justices, was repealed by Laws 1981, ch. 267, § 2, effective July 1, 1982.

### 78-2-2. Supreme Court jurisdiction.

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

- (a) a judgment of the Court of Appeals;
- (b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;
- (c) discipline of lawyers;
- (d) final orders of the Judicial Conduct Commission;
- (e) final orders and decrees in formal adjudicative proceedings originating with:
  - (i) the Public Service Commission;
  - (ii) the State Tax Commission;
  - (iii) the Board of State Lands and Forestry;
  - (iv) the Board of Oil, Gas, and Mining; or
  - (v) the state engineer;
- (f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (e);

(g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;

(h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;

(i) appeals from the district court involving a conviction of a first degree or capital felony; and

(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:

(a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;

(b) election and voting contests;

(c) reapportionment of election districts;

(d) retention or removal of public officers;

(e) general water adjudication;

(f) taxation and revenue; and

(g) those matters described in Subsection (3)(a) through (f).

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Title 63, Chapter 46b, in its review of agency adjudicative proceedings.

**History:** C. 1953, 78-2-2, enacted by L. 1946, ch. 47, § 41; 1967, ch. 161, § 303; 1968, ch. 248, § 5; 1989, ch. 67, § 1.

**Repeals and Reenactments.** Laws 1986, ch. 47, § 41 repeals former § 78-2-2, as enacted by Laws 1951, ch. 58, § 1, relating to original appellate jurisdiction of Supreme Court, and enacts the above section.

**Amendment Notes.** — The 1988 amendment, effective April 25, 1988, substituted "formal adjudicative proceedings" for "cases" in Subsection (3)(e); added Subsection (3)(f); redesignated former Subsections (3)(f) to (3)(i) accordingly; substituted "(i)" for "(b)" at the end of Subsection (4)(g); and made minor stylistic changes.

The 1989 amendment, effective April 24, 1989, added "and Forestry" at the end of Subsection (3)(e)(iii), rewrote Subsection (4)(a) which read "first degree and capital felony con-

victions", substituted "(f)" for "(b)" at the end of Subsection (4)(g); and made minor stylistic changes.

**Cross-References.** Appeals from juvenile courts, § 78-3a-51.

Appeals in criminal cases, U.R.C.P. 26.

Chief justice to preside over impeachment of governor, § 77-5-2.

Election contest appeals, §§ 20-3-35, 20-15-14.

Extraordinary writs, Utah Const. Art. VIII, Sec. 3, U.R.C.P. 65B.

Industrial commission orders, review of, § 35-1-36.

Jurisdiction, Utah Const., Art. VIII, Sec. 3.

State bar, promulgation of rules, review of disciplinary orders, §§ 78-51-14, 78-51-19.

Unemployment compensation decisions, review of, § 35-4-10.

or an order of occupancy or the execution of a right of entry agreement, bears to the taxable year 1967

## Article 2. Assessment by County Assessor

59-5-4. General duties of county assessor - Assessing interstate carriers.

59-5-4.5. Recognition of expenses in using comparable sales or cost appraisal method.

59-5-5. Listing property in cities, towns, school districts and special taxing districts.

59-5-6. Report of valuation of property to county auditor - Transmittal by auditor to governing bodies - Certified tax rate.

59-5-7. Listing property brought into county after January 1 - Duties of assessor.

59-5-7.1. Transitory personal property brought from outside state - Assessment - Proration of tax - Property tax in another state - Claims for rebates and adjustments.

59-5-8. Statements by taxpayers.

59-5-9. Power of assessors respecting statements - Delict of taxpayer - Penalty.

59-5-10. Assessor to estimate value where taxpayer refuses to give statement.

59-5-11. Assessor to report information gained to other counties.

59-5-12. In name of owner, mandatory, if known - If unknown.

59-5-13. Assessment in name of representative - Designation.

59-5-14. Assessment of property of decedents.

59-5-15. Assessment of property in litigation.

59-5-16. Assessment of concealed property - Penalty.

59-5-17. Property escaping assessment - Five-year limitation period on assessment - Duties of assessor.

59-5-18. Assessment in name of claimant as well as owner.

59-5-4. General duties of county assessor - Assessing interstate carriers.

The county assessor shall, before May 15 of each year, ascertain the names of all taxable inhabitants and all property in the county subject to taxation except that assessed by the State Tax Commission and shall assess the property to the person by whom it was owned or claimed, or in whose possession or control it was, at 12 o'clock m. of January 1 next preceding, and at its value on that date, unless a subsequent conveyance of ownership of the real property has been duly recorded in the office of the county recorder more than 14 calendar days before the date of mailing of the tax notice, in which case the tax notice may be mailed to the new owner. No mistake in the name of the owner or supposed owner of property renders the assessment invalid. Assessors shall become fully acquainted with all property in their respective counties, and, either in person or by deputy, shall annually visit each separate district and establish the values of the property they are required to assess. When assessing contract, private, and exempt carriers covering interstate routes, the county assessor shall apportion the assessment for the rolling stock used in interstate commerce at the same percentage ratio that has been filed with the Prorate Department of the Motor Vehicle Division of the tax commission for determining the proration of registration fees. 1966

59-5-4.5. Recognition of expenses in using comparable sales or cost appraisal method.

(1) When the county assessor uses the comparable sales or cost appraisal method in valuing taxable property for assessment purposes, the assessor is required to recognize that various fees, services, closing costs, and other expenses related to the transaction lessen the actual amount that may be rec-

eived in the transaction. The county assessor shall, therefore, take 80% of the value based on comparable sales or cost appraisal of the property as its reasonable fair cash value for purposes of assessment.

(2)(a) Prior to January 1, 1988, the State Tax Commission shall develop and implement comparable sales or cost appraisal methods in valuing taxable property for assessment purposes which provide that the various fees, services, closing costs, and other expenses related to the sales transaction and other intangible values are not included as part of the reasonable fair cash value for purposes of assessment.

(b) Beginning January 1, 1988, the provisions of Subsection (1) do not apply to county assessors using the sales or cost appraisal method in valuing taxable property for assessment purposes. For assessments beginning January 1, 1988, the State Tax Commission shall by rule order county assessors to use the comparable sales or cost appraisal methods which are required to be developed and implemented in Subsection (2)(a) in place of the requirement of Subsection (1). 1986

59-5-5. Listing property in cities, towns, school districts and special taxing districts

The list of the property in each city, town, school district, and special taxing district in his county, and the valuation thereof, shall be so made by the county assessor that the property in each and the valuation thereof can be separately shown. 1982

59-5-6. Report of valuation of property to county auditor - Transmittal by auditor to governing bodies - Certified tax rate.

(1) Before June 1 of each year, the county assessor of each county shall deliver to the county auditor a statement showing the aggregate valuation of all taxable property in each taxing district, together with a statement showing the assessed valuation of any additional personal property estimated by the county assessor to be subject to taxation in the current tax year. The county auditor shall, on or before June 1, transmit this statement together with the certified tax rate and all forms necessary to submit a tax levy request, to the governing body of each taxing district.

(2)(a) The "certified tax rate" means a tax rate that will provide the same ad valorem property tax revenue for each taxing district as was charged for the prior year by that taxing entity, except in the case of the minimum school levy established under Section 53-7-18 and any debt service voted on by the public under Section 53-7-8.1, in which case the certified tax rate shall be the actual levy imposed by those sections. The certified tax rate shall be established in accordance with Section 59-9-8. For new taxing districts, the certified tax rate shall be zero.

(b) For the purpose of calculating the certified tax rate the county auditor shall use the taxable roll, exclusive of new growth. New growth is the increase in value of the taxing district from the previous calendar year to the current year less the amount of increase to locally assessed real property values resulting from factoring, reappraisal, or any other adjustments.

(c) As used in this chapter, "taxing district" means any county, city, town, school district, special taxing district, or any other political subdivision of the state with the authority to levy a tax on property.

chapter" are omitted as unnecessary in view of the restatement. The words "in the enforcement or administration of any provision of this chapter" in 49:305(f) are omitted as unnecessary in view of the restatement. The words "and safety" in 49:305(f) are omitted as being transferred to the Secretary of Transportation.

In subsection (b), the words "When an investigation under this subtitle" are substituted for "Whenever in any investigation under the provisions of this chapter, or in any investigation instituted upon petition of" for clarity. The words "providing transportation or service subject to the jurisdiction of the Commission under subchapter I or IV of chapter 105 of this title" are inserted for clarity. The words "is about a" are substituted for

"shall be brought in issue" for clarity. The words "made or imposed by" are omitted as surplus. The words "disposing of" are substituted for "proceeding to hear and dispose of" for clarity and as being more inclusive.

In subsection (c), the words "subchapter III of chapter 105" are used to make the subsection apply to water carriers since the words "under the provisions of this section" require that result in view of 49:13(3). The words "in cases pending before the Commission" are omitted as unnecessary in view of the restatement. The words "may be given" are substituted for "shall receive" for clarity. The words "may determine" are substituted for "shall provide" for clarity.

### § 11503. Tax discrimination against rail transportation property

#### (a) In this section—

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section—

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax rate applicable to taxable property in the taxing district.

(Pub L. 95-473, Oct. 17, 1978, 92 Stat. 1445)

#### Historical and Statutory Notes

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
11503	49.26c	Feb. 4, 1887, ch. 104, 24 Stat. 379, § 28, added Feb. 5, 1976, Pub. L. 94-210, § 306, 90 Stat. 54, Oct. 19, 1976, Pub. L. 94-555, § 220(o), 90 Stat. 2630



- 7 Motor vehicle salesman:
    - (a) application for license;
    - (b) salesman bond as prescribed in Utah Code Ann. Section 41-3-17;
    - (c) picture of the applicant; and
    - (d) the fee required by law.
  - 8 Distributor factory branch, distributor branch representative:
    - (a) application for license; and
    - (b) the fee required by law.
  - 9 New applicants may also be required to attend an orientation class on motor vehicle laws and motor vehicle business laws before their license is issued.
- 1987 41-1-4, 41-3-5, 41-3-12, 41-3-27, 41-3-28, 41-3-29, 41-3-4, 41-3-6, 41-3-12

## R884. Property Tax

### R884-24. Property Tax

#### R884-24. Property Tax

- R884-24-5P. Abatement or Deferral of Property Taxes of Indigent Persons Pursuant to Utah Code Ann. Sections 59-2-1107 through 59-2-1109**
- R884-24-7P. Assessment of Mining Properties Pursuant to Utah Code Ann. Section 59-2-201**
- R884-24-8P. Property Tax Withholding For Uranium and Vanadium Mines Pursuant to Utah Code Ann. Section 59-2-210 and 59-2-211**
- R884-24-10P. Taxation of Underground Rights in Land That Contains Deposits of Oil or Gas Pursuant to Utah Code Ann. Sections 59-2-201, 59-2-210, and 59-2-211**
- R884-24-14P. Historic Preservation Easements Pursuant to Utah Code Ann. Sections 63-18A-1 through 6**
- R884-24-16P. Assessment of Interlocal Cooperation Act Project Entity Properties Pursuant to Utah Code Ann. Section 11-13-25(4)**
- R884-24-17P. Reappraisal of Real Property by County Assessors Pursuant to Utah Constitution, Article XIII, Subsections 2 and 11, and Utah Code Ann. Sections 59-2-103, 59-2-302, and 59-2-704.**
- R884-24-19P. Appraiser Certification Program Pursuant to Utah Code Ann. Sections 59-2-701 and 59-2-702**
- R884-24-20P. Construction Work in Progress Pursuant to Utah Const. Art. XIII, Section 2; Utah Code Ann. Section 59-1-1; and Utah Code Ann. Section 59-5-1.**
- R884-24-24P. Form for Notice of Property Valuation and Tax Changes Pursuant to Utah Code Ann. Section 59-2-919**
- R884-24-25P. Procedure for Abeyance of 1906 Property Tax Exemption Hearings For Nonprofit Hospitals and Nursing Homes Pursuant to Utah Code Ann. Section 59-1-210**
- R884-24-26P. Requirements of the Farmland Assessment Act of 1969 Pursuant to Utah Code Ann. Sections 59-2-501 through 59-2-515**
- R884-24-27P. Standards for Assessment Level Performance Pursuant to Utah Code Ann. Section 59-2-704**
- R884-24-28P. Reporting Requirements For Leased or Rented Personal Property, Pursuant to Utah Code Ann. Section 59-1-210**
- R884-24-29P. Taxable Household Furnishings Pursuant to Utah Code Ann. Section 59-2-103**
- R884-24-32P. Leasehold (Tenant) Improvements Pursuant to Utah Code Ann. Section 59-2-102**
- R884-24-33P. Personal Property Valuation Guides and Schedules Pursuant to Utah Code Ann. Section 59-1-210**
- R884-24-34P. Use of Appraisal Information Gathered in Conjunction With Assessment/Sales Ratio Studies Pursuant to Utah Code Ann. Section 59-2-704**

#### R884-24-5P. Abatement or Deferral of Property Taxes of Indigent Persons Pursuant to Utah Code Ann. Sections 59-2-1107 through 59-2-1109

A. All sources of cash income shall be included in arriving at annual gross income, including net rents, interest, retirement income, welfare, social security, etc.

B. Absence from the residence due to vacation, confinement to hospital, or other similar temporary situation shall not be deducted from the time requirement of ten-month's residency.

C. Written notification shall be given to any applicant whose application for abatement or deferral is denied.

#### R884-24-7P. Assessment of Mining Properties Pursuant to Utah Code Ann. Section 59-2-201

##### A. Definitions.

1. "Mining property" means all taxable interests in real property, improvements, and tangible personal property owned or used in mining, processing, or transportation of the product to the customary point of sale or to the implied point of sale in the case of a self-consumed mineral for both metalliferous and nonmetalliferous mines.

2. "Gross income" means actual receipts, plus the fair value of self-consumed minerals.

a. The fair value of self-consumed minerals is determined annually by the Property Tax Division to be either:

(1) allowable costs, plus an amount equal to allowable costs times the capitalization rate. Where the taxpayer has outside sales and self-consumed minerals, the allowable costs shall be allocated between the two on the basis of the respective units of measure in each category; or

(2) value based upon representative sales price per ton or other standard unit of measure of a like mineral.

b. The method approved cannot be changed from year to year unless approved by the Tax Commission.

3. "Allowable costs" means costs deductible in the respective year, limited to the following:

- a. management salaries;
- b. labor;
- c. payroll taxes and benefits;
- d. workers' compensation insurance;
- e. general insurance;
- f. taxes;
- g. supplies and tools;
- h. power;
- i. maintenance and repairs;
- j. office and accounting;
- k. engineering;
- l. sampling and assaying;
- m. treatment;
- n. legal fees;
- o. royalties;
- p. development expense;
- q. transportation;
- r. miscellaneous; and
- s. capital expenditures.

(1) No deduction is allowed for interest or mine exploration costs.

4. "Net revenue" means gross income minus allowable costs.

5. "Capital expenditure" means the total cost of purchasing an asset used in the mining operation and includes:

- a. purchase price,
- b. transportation costs,

- c. transportation costs,
- d. installation charges, and
- e. sales tax

6. "Nonproducing mine" means a mine that has been closed for a continuous 12-month period, or land held in reserve under a mineral lease not reasonably necessary, indispensable, or needed in the actual mining and extraction process in the current tax year.

B. The capitalization rate shall be determined by the Tax Commission using methods such as:

- 1. the summation method;
- 2. the weighted cost of capital

a. The cost of debt should consider current market yields.

b. The cost of equity shall be determined by the capital asset pricing model, risk premium model, discounted cash flow, or a combination thereof or any other accepted methodology.

C. The income indicator of value shall be computed as follows:

1. annual net revenue, both net losses and net gains, from the mining property for each of the immediate past five years (or years in operation if less than five years), shall be adjusted by an appropriate index of inflation;

2. average annual net revenue is the sum of the values obtained above divided by the number of years; i.e., five or less;

3. the average annual net revenue is divided by the capitalization rate.

D. Reporting shall be on a calendar or fiscal year basis consistently followed, with Tax Commission approval.

#### **R884-24-8P. Property Tax Withholding For Uranium and Vanadium Mines Pursuant to Utah Code Ann. Sections 59-2-210 and 59-2-211**

A. A list of mine owners and operators who have made lump sum security deposits with the Tax Commission will be furnished annually by the Commission to any person, mill, buying station, or other legal entity receiving uranium or vanadium ore mined, produced, or received from within Utah.

B. If not on the Tax Commission's original, or subsequently updated list, the security deposit shall be obtained through withholding as provided below:

1. Any person, mill, buying station, or other legal entity receiving uranium or vanadium ore mined, produced, or received from within Utah shall withhold 4 percent (or such higher amount as determined by the Tax Commission) of the gross proceeds due to the mine operators or owners.

2. All amounts withheld shall be remitted to the Tax Commission by the last days of April, July, October, and January for the immediately preceding calendar quarter, on forms and in a manner as set forth by the Tax Commission.

3. Not later than the last day of February, the owners or operators of each uranium and vanadium mine shall be provided with a statement from the Tax Commission showing all security deposit amounts withheld from their gross proceeds during the previous calendar year.

4. The Tax Commission shall provide the county treasurers with a list of all uranium and vanadium producers who have had security deposit amounts withheld. The county treasurers shall then forward to the Tax Commission an accounting of the amount of taxes due from each taxpayer on the Tax Commission's list.

5. Once all county treasurers have responded, the

Tax Commission shall forward to each county treasurer the taxes due, or the pro rata portion thereof, to the extent said taxes have been withheld and remitted to the Tax Commission.

a. Any amount withheld in excess of the total taxes due to all counties shall be refunded to the appropriate producer by the Tax Commission.

b. If the amount withheld is not sufficient to pay the full amount of taxes due, the county treasurers shall collect the balance of said taxes directly from the producers.

#### **R884-24-10P. Taxation of Underground Rights In Land That Contains Deposits of Oil or Gas Pursuant to Utah Code Ann. Sections 59-2-201, 59-2-210, and 59-2-211**

##### **A. Definitions.**

1. "Person" as defined in Utah Code Ann. Section 68-3-12.

2. "Unit" as defined in Utah Code Ann. Section 59-2-210(3)(F).

3. "Working interest owner" as defined in Utah Code Ann. Section 59-2-210.

4. "Unit operator" means a person who operates all of the producing wells in a unit.

5. "Independent operator" means a person operating an oil or gas producing property not in a unit.

6. One person can, at the same time, be a unit operator, a working interest owner, and an independent operator and must comply with all requirements of this rule based upon his status in the various situations.

##### **B. Assessment Procedures.**

1. Underground rights in lands containing deposits of oil or gas and tangible property used in the operation of such rights, are subject to assessment by the Tax Commission.

2. These rights and the tangible property used therewith shall be assessed in the name of the unit operator, the independent operator or other person as the facts may warrant.

3. The taxable value of the underground oil rights shall be 400 percent of the proceeds from the sale of oil production from each such property during the calendar year prior to the date of assessment, less applicable exempt federal, state, Indian royalties, and windfall profits tax.

4. The taxable value of the underground gas rights shall be 400 percent of the proceeds from the sale of gas production from each such property during the calendar year prior to the date of assessment, less applicable exempt federal, state, and Indian royalties.

5. The reasonable taxable value of productive underground oil and gas rights shall be determined by the method described in Subsections B.1. or B.2. of this rule or such other valuation method that the Tax Commission believes to be reasonably determinative of the property's fair market value.

6. All other tangible property shall be valued at fair market value as determined by the Tax Commission.

##### **C. Assessment Credits Greater Altamont/Bluebell Field**

1. Oil properties in the Greater Altamont/Bluebell field shall receive a credit of 20 percent. All qualified property shall therefore be valued at 80 percent of the taxable value. This credit does not apply to gas production.

2. The Greater Altamont/Bluebell field is actually comprised of three separate fields. These include Altamont field, Bluebell field, and Cedar Run field as recorded by the Utah Division of Oil, Gas and

Tab C

**C. DETERMINATIVE COURT CASES**

1. Amax Magnesium Corporation v. Utah  
State Tax Commission.....D-1
2. Union Pacific Railroad Company v.  
Utah State Tax Commission.....E-1
3. Rio Algom Corporation v. San Juan County.....F-1
4. Blue Cross and Blue Shield v. State.....G-1
5. Allegheny Pittsburgh Coal Company v.  
Webster County.....H-1
6. Northern Natural Gas Company v. State  
Board of Equalization.....I-1

Tab D

**AMAX MAGNESIUM  
CORPORATION, Petitioner,**

v.

**UTAH STATE TAX  
COMMISSION, Respondent.**

No. 880251.

Supreme Court of Utah

July 18, 1990

Taxpayer sought review of decision of the Tax Commission. The Supreme Court, Hall, C.J., held that (1) taxpayer's plant at which magnesium was extracted from brine waters of the Great Salt Lake was subject to assessment by the state, rather than county, as a facility appurtenant to a mining operation, but (2) it was not constitutionally permissible for state to assess property of 100% of its value while county assessed property at 80% of the value.

Reversed and remanded.

Stewart, J., filed an opinion concurring in the result in which Howe, Associate C.J., concurred.

**1. Taxation — 493.8**

When reviewing final decisions of the Tax Commission, Supreme Court shows no deference to the Commission's conclusions as to the legality or constitutionality of tax statutes, as those are conclusions of law.

**2. Constitutional Law — 48(4)**

In any challenge to the constitutionality of a tax statute, petitioner bears the burden of demonstrating its unconstitutionality.

**3. Statutes — 205**

Principal rule of statutory construction is that the terms of a statute should not be interpreted in a piecemeal fashion, but as a whole.

**4. Statutes — 189**

Statute must be read according to its literal wording, unless it would be unreasonably confusing or inoperable.

**5. Statutes — 212**

It is presumed that a statute is valid and that words and phrases were chosen carefully and advisedly.

**6. Taxation — 158**

Taxpayer's plant which extracted magnesium from brine waters in evaporation ponds owned by the state and the federal government fell within the category of "all property or surface improvements upon or appurtenant to mines or mining claims," for purposes of statute subjecting mines and appurtenant property to property taxation by the state rather than the county. Const. Art. 13, § 4, U.C.A. 1953, 59-5-3 (Repealed).

**7. Taxation — 347**

Property must be assessed at its just value and owners of property must bear an equal proportion of the tax burden in proportion to the amount of property owned.

**8. Taxation — 40(8)**

If both just value and equal proportionality cannot be obtained because some assessments are made at a fixed percentage of true value, equality must prevail so that fixed percentage of true value is uniformly applied.

**9. Taxation — 40(8)**

Assuming that legislature was correct in determining that market value appraisal method overvalues property by 20%, it would be unconstitutional to apply statute reducing overall assessment by 20% to properties which were assessed by counties but not to properties assessed by the state. U.C.A. 1953, 59-5-4.5 (Repealed), Const. Art. 13, §§ 2, 3.

**10. Constitutional Law — 209**

Constitutional provision requiring that all laws of a general nature have uniform operation is Utah's equal protection clause. Const. Art. 1, § 24.

**11. Constitutional Law — 16(1)**

If challenged statute cannot withstand attack under State Constitution, there is no reason to reach federal equal protection question.

**12. Taxation — 40(8)**

Assuming that legislatively created classifications of state assessed property and county assessed property are legitimate with regard to county properties assessed by comparable sales or cost appraisal methods and state properties assessed by other methods, classifications would not be valid where the state and counties properties are both assessed by the comparable sales or cost appraisal method, but county values are reduced by 20%. U.C.A. 1953, 59-5-4.5 (Repealed), Const. Art. 1, § 24.

Mark K. Buchi, David K. Detton, Richard G. Wilkins, Salt Lake City, for petitioner.

R. Paul Van Dam, Stephen G. Schwenchman, L.A. Dever, Salt Lake City, and Ronald L. Elton, Tooele, for respondent.

James B. Lee, Kent W. Winterholler, Salt Lake City, for amicus Utah Min. Ass'n.

Bill Thomas Peters, Harriet E. Styler, Salt Lake City, for amicus Utah Ass'n of Counties.

HALL, Chief Justice.

This case is before the court on a writ of review from a Utah State Tax Commission ("Tax Commission") decision determining the 1986 assessed value of petitioner Amax Magnesium Corporation's ("Amax") real and personal property located in Tooele County, Utah.

The Tax Commission originally assessed the value of Amax's property as of January 1, 1986, at \$84,332,150. After an informal hearing held on August 25, 1986, the Tax Commission reduced the assessed value of Amax's property to \$78,312,895.

The Tax Commission thereafter held a plenary formal hearing to determine the fair market cash value of Amax's property. Amax sought a 20 percent reduction of the assessed fair market cash value of its properties pursuant to Utah Code Ann. § 59-5-1.5 (1953 & Supp. 1986). On December 21, 1987, the Tax Commission issued a final decision further reducing the assessed value of Amax's property by approximately \$6,000,000 based upon the Commission's finding that adequate maintenance should have

been expensed rather than included as a capital investment. The Tax Commission confirmed all other aspects of the property tax division's assessment and refused to apply section 59-5-4.5 to reduce Amax's assessment by 20 percent. Amax filed a petition for reconsideration, which the Tax Commission denied by order dated May 31, 1988. Amax then filed a petition for a writ of review with this court on June 29, 1988.

Amax is a company the main function of which is to extract magnesium from the brine waters of the Great Salt Lake. Amax is the fee owner of approximately seven square miles of land in Tooele County, Utah, and maintains improvements on the real property in the form of various buildings and facilities (collectively referred to as the "plant") designed to aid in the extraction of magnesium from the brine.

Amax obtains its concentrated brine solution principally from a series of evaporation ponds located along the shores of the Great Salt Lake and close to the plant. Although Amax owns the plant, the evaporation ponds are located on land owned by the state of Utah and the federal government. Amax pays a royalty to the state of Utah for the nonexclusive right to extract minerals from the Great Salt Lake.

The Tax Commission assessed Amax as a mining operation pursuant to Utah Code Ann. §§ 59-5-3 and 59-5-1 (1953 & Supp. 1986) at 100 percent of its fair market cash value. On appeal, Amax asserts that (1) it is not a mine and therefore not subject to assessment by the state pursuant to section 59-5-3, (2) it should be assessed by Tooele County and receive a 20 percent reduction in the assessment for fair market cash value pursuant to Utah Code Ann. § 59-5-4.5 (1986), and (3) even if Amax is assessed by the state and not Tooele County, it would violate the equal protection guarantees of the Utah Constitution and the United States Constitution for the state not to apply section 59-5-4.5 to Amax's assessment in the same manner as if Amax were assessed by Tooele County.

[1, 2] When reviewing the final decision of the Tax Commission, this court shows no deference to the Tax Commission's conclusion as to the legality or constitutionality of tax statutes because they are conclusions of law.<sup>1</sup> In any challenge to the constitutionality of a tax statute, the petitioner has the burden of demonstrating its unconstitutionality.<sup>2</sup>

### 1 TAX ASSESSMENT AUTHORITY

Amax's first contention is that it is neither a mine nor a mining operation and its facilities should not be "deemed appurtenant" to a mining operation, subjecting it to assessment by the Tax Commission<sup>3</sup> pursuant to section 59-5-3. Section 59-5-3 reads in pertinent part:

[A]ll other mines and mining claims and other valuable deposits, . . . all machinery used in mining and all property or surface improvements upon or appurtenant to mines or mining claims . . . must be assessed by the State Tax Commission. For the purposes of taxation all mills, reduction works, and smelters used exclusively for the purpose of reducing or smelting the ores from a mine or mining claim by the owner thereof shall be deemed to be appurtenant to such mine or mining claim though the same is not upon such mine or mining claim.

Amax argues that it is neither a mine nor a mining claim as defined in Utah Code Ann. § 59-3-1(8) (Supp.1986), which states: "'Mine' means a natural deposit of either

metalliferous or nonmetalliferous valuable mineral." Although the Tax Commission found that Amax, by its processes, "is obtaining metal products from the brine and, therefore, is effectively 'mining,'" the Commission focused its conclusion of law on the determination that Amax's plant should be "deemed appurtenant" to a mining operation pursuant to section 59-5-3. The issue here is not whether the Amax plant is a mine or mining operation, but rather whether it is "deemed appurtenant to such mine or mining claim." <sup>4</sup>

[3] A principal rule of statutory construction is that the terms of a statute should not be interpreted in a piecemeal fashion, but as a whole.<sup>5</sup> The plant and the evaporation ponds function as a unit, and the plant is generally dependent upon the ponds for the magnesium it produces.<sup>6</sup>

[4,5] A second rule of statutory construction mandates that a statute be read according to its literal wording unless it would be unreasonably confusing or inoperable.<sup>7</sup> It is presumed that a statute is valid and that the words and phrases used were chosen carefully and advisedly.<sup>8</sup>

[6] The integration of the plant and the evaporation ponds (mine) in the magnesium extracting process and the practical interpretation and literal wording of the statute make it clear that the Amax plant falls under the category of "all property or surface improvements upon or appurtenant to mines or mining claims." Because the Amax plant is property or a surface im-

provement upon or appurtenant to the mine or mining operation, Amax is properly assessed by the Tax Commission pursuant to the Utah Constitution article XIII, § 4 and Utah Code Ann. § 59-5-3.

### II. MEASUREMENT OF TAXABLE CASH VALUE OF PROPERTY

Amax also contends that even if it should be centrally assessed by the Tax Commission, it should be assessed at the same taxable cash value at which Tooele County would assess. Section 59-5-4.5 allows county assessors to assess property at 80 percent of its reasonable fair cash value.<sup>9</sup> Even though section 59-5-4.5 allows county-assessed property to be assessed at 80 percent of its reasonable fair cash value, section 59-5-1 requires that all centrally assessed or state assessed property be assessed at 100 percent of its reasonable fair cash value.<sup>10</sup>

Specifically, Amax argues that by requiring the state to assess property at 100 percent of value and the county to assess property at 80 percent of value, the legislature has created a law that violates sections 2 and 3 of article XIII of the Utah Constitution, which require equality and uniformity in assessing all real and personal property in the state.<sup>11</sup> Amax also argues that the apparently unequal state and county assessments violate the equal pro-

tection of the laws as guaranteed by the Utah Constitution.<sup>12</sup>

#### A Article XIII, Sections 2 and 3

Amax's first contention is that the application of section 59-5-4.5 to county-assessed properties but not to Amax's property is a violation of article XIII, sections 2 and 3 of the Utah Constitution. In *Rio Algom*, we upheld section 59-5-4.5 against a challenge that it violated the tax uniformity requirement of article XIII, section 3 of the Utah Constitution. The plaintiffs in *Rio Algom* claimed that since section 59-5-4.5 reduced the tax assessment to county properties by 20 percent, it caused state-assessed properties to bear the burden of greater taxes to compensate for the reduced taxes paid by county-assessed property owners. We held that absent a showing by the plaintiffs (1) that their own properties were assessed at market value, (2) that they bear a tax burden greater than their pro rata share of the property taxes in the county, and (3) that the "deduction of 'transaction costs' from comparable sales figures or estimates of cost as permitted by section 59-5-4.5 defeats the constitutional objective of establishing 'a valuation [that is] fair and equitable in comparison with and commensurate with the valuation of other kinds of property,'" the constitutionality of the statute will be upheld.<sup>13</sup>

*be taxed at a uniform and equal rate in proportion to its value, to be ascertained as provided by law.*" (Emphasis added.) Utah Constitution article XIII, section 3(1) (as amended 1982) reads in pertinent part:

*The Legislature shall provide by law a uniform and equal rate of assessment on all tangible property in the state, according to its value in money, except as otherwise provided in Section 2 of this Article. The Legislature shall prescribe by law such provisions as shall secure a just valuation for taxation of such property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its tangible property.* (Emphasis added.)

#### 12. Art. I, § 24

13. *Rio Algom*, 681 P.2d at 192 (quoting *United States Smelting, Refining & Mining Co. v. Haynes*, 111 Utah 172, 181, 176 P.2d 622, 627 (1947)).

1. *County Bd. of Equalization of Salt Lake County v. Nupetto Assocs.*, 779 P.2d 1138, 1139 (Utah 1989); *Hurley v. Board of Review of the Indus. Comm'n*, 767 P.2d 524, 527 (Utah 1988); *Kennecott Corp. v. Salt Lake County*, 702 P.2d 451, 455 (Utah 1985).
2. *Rio Algom Corp. v. San Juan County*, 681 P.2d 184, 191 (Utah 1984).
3. The Utah Constitution requires all mines to be assessed by the state. Article XIII, section 11 states: "The State Tax Commission shall administer and supervise the tax laws of the State. It shall assess mines and public utilities and adjust and equalize the valuation and assessment of property among the several counties."
4. Utah Code Ann. § 59-5-3 (Supp.1986).

5. *Peay v. Board of Education of Provo City Schools*, 377 P.2d 490, 492 (1962).
6. The record reflects that because of the 1983 flood waters and the rising level of the Great Salt Lake for subsequent years, Amax was required to purchase a portion of its brine from outside suppliers.
7. *Horne v. Horne*, 737 P.2d 244, 247 (Utah 1987); accord *Gord v. Salt Lake City*, 434 P.2d 449, 451 (Utah 1967).
8. *West Jordan v. Morrison*, 656 P.2d 445, 446 (Utah 1982); see generally *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 105 S.Ct. 638, 83 L.Ed.2d 556 (1985).

#### 9. Section 59-5-4.5(1) (Supp.1986) reads in pertinent part:

When the county assessor uses the comparable sales or cost appraisal method in valuing taxable property for assessment purposes, the assessor is required to recognize that various fees, services, closing costs, and other expenses related to the transaction lessen the actual amount that may be received in the transaction. The county assessor shall, therefore, take 80% of the value based on comparable sales or cost appraisal of the property as its reasonable fair cash value for purposes of assessment.

#### 10. Utah Code Ann. § 59-5-1(1)(a) (Supp.1986) states: "All taxable property, except as otherwise provided by law, shall be assessed at 100% of its reasonable fair cash value."

#### 11. Utah Constitution article XIII, section 2(1) (as amended 1982) reads: "All tangible property in the state, not exempt under the laws of the United States, or under this Constitution, shall



Cite as 796 P.2d 1256 (Utah 1990)

The present case is distinguishable from *Rio Algom* because it involves similar valuation processes used by the state and county assessors and yet results in different outcomes and because Amax is not challenging the facial validity of the statute, but only its validity as applied to Amax. In *Rio Algom*, the county assessor used the "comparable sales" method of valuation that is very sensitive to inflation, while the Tax Commission used income or other valuation methods that gave very little effect to the impact of inflation.<sup>14</sup>

An additional distinguishing factor is that the premise of section 59-5-4.5, that state assessments and county assessments are not uniform, was not attacked in *Rio Algom*.<sup>15</sup> The very essence of Amax's argument is that the nonuniformity between similarly assessed state and county properties engendered by section 59-5-4.5 violates the uniformity clauses of article XIII, sections 2 and 3 of the Utah Constitution.

One of the purposes for section 59-5-4.5 was a legislative determination that certain transactional costs actually lessen the amount received by a seller under the market value evaluation and, therefore, the true value of the property to the seller is less than the assessment.<sup>16</sup> Another purpose for section 59-5-4.5 was a legislative attempt to equalize the tax burden between state and county assessments. Section 59-5-4.5 was initially passed because inflation caused county assessed properties to be assessed significantly higher than state properties.<sup>17</sup> The remedy contained in section 59-5-4.5 was to reduce the overall county assessment by 20 percent.

[7.8] Two principles govern the law of taxation: (1) that property be assessed at its just value, and (2) that the owners of

property bear an equal portion of the tax burden in proportion to the amount of property owned.<sup>18</sup> If both just value and equal proportionality cannot be obtained because some assessments are made at a fixed percentage of true value, then equality must prevail so that the fixed percentage of true value must be uniformly applied.<sup>19</sup>

In the present case, the record reflects that the Tax Commission admits that it assessed Amax at 100 percent of the current fair cash value and that its assessor used the same market value method of assessment used by county assessors. The only reason Amax's property is assessed at 100 percent of value rather than at 80 percent is that Amax's property is required by the Utah Constitution<sup>20</sup> and by statute<sup>21</sup> to be taxed as state assessed property.

[9] It strains reason to assert that if assessors using the cost and market appraisal methods overvalue county properties, the same overvaluation would not occur with state properties appraised by the same methods. Assuming that the legislature was correct in determining that the market value appraisal method overvalues property by 20 percent, it would be unconstitutional to apply section 59-5-4.5 to county assessed properties and not to state assessed properties. Applying section 59-5-4.5 to the facts of this case, we hold that it would be in violation of the constitutional mandate of article XIII, sections 2 and 3 that all property be taxed in a uniform and equal manner if section 59-5-4.5 is not applied to Amax's property.

#### B Equal Protection

[10] Our holding that section 59-5-4.5 is unconstitutional as applied to Amax need

not be based solely upon a violation of article XIII, sections 2 and 3 of the Utah Constitution, but may also be based upon a violation of equal protection. In *Blue Cross and Blue Shield v. State*,<sup>22</sup> we held that in order to establish a violation of the equal protection component of the Utah Constitution<sup>23</sup> with regard to taxation, a party must demonstrate that a law creates certain classes of persons and that the law is applied differently to each classification without a reasonably related legitimate government purpose.<sup>24</sup>

[11] Also in *Blue Cross*, we concluded that the principles and concepts embodied in the federal equal protection clause<sup>25</sup> and the state uniform operation of the laws provision are substantially similar, but as we stated in *Blue Cross*:

[O]ur examination into the reasonableness of economic legislation under article I, section 24 of the Utah Constitution [the uniform operation of the laws provision] is at least as vigorous as that required by the federal equal protection clause, and probably more so. Therefore, if the statutes under attack can withstand scrutiny under article I, section 24, they will not be found to violate the federal equal protection clause.<sup>26</sup>

(Citations omitted, emphasis added.) Conversely, if the challenged statute cannot withstand attack under the state constitution, there is no reason to reach the federal question. Such appears to be the case here; hence, we do not reach the federal question.

[12] Assuming that the legislatively created classifications of state assessed property and county assessed property are legitimate with regard to county properties

assessed by the comparable sales or cost appraisal methods and state properties assessed by other methods, the classifications would not be valid where the state and county properties are both assessed by the comparable sales or cost appraisal methods. The state assessor testified that he used the cost appraisal method of evaluation for Amax's personal property and that it did not differ in basic theory from the cost appraisal method used by county assessors.

The very purpose of section 59-5-4.5 was to allow a 20 percent reduction where the comparable sales or cost appraisal methods of evaluation were used because the legislature found that those methods typically overvalued property by not taking into account transaction costs and other intangibles. If county properties assessed by the cost appraisal method receive a 20 percent reduction and state properties assessed by the same method receive no reduction, then section 59-5-4.5 has created two classes of properties assessed by the cost appraisal method and arbitrarily discriminated against one class merely because it is a state assessed property. This disparity does not pass the constitutional muster set out in *Blue Cross*. Indeed, there is no reasonable basis for the classification of county properties assessed by the cost appraisal method versus state assessed properties assessed by similar methods. The objectives of section 59-5-4.5 are not met when the same method is used for both state and county assessments.

Finally, there is no reasonable relationship between the classification and the purpose of the statute, which is to equalize the tax burdens. In fact, when the same as

22 779 P.2d 634 (Utah 1989).

23 Utah Constitution article I, section 24 states: "All laws of a general nature shall have uniform operation. This section acts as Utah's equal protection clause." See *Blue Cross and Blue Shield v. State*, 779 P.2d 634 (Utah 1989); *Mountain Fuel Supply Co. v. Salt Lake City Corp.*, 752 P.2d 884 (Utah 1988); *Thompson v. Salt Lake City Corp.*, 724 P.2d 958 (Utah 1986); *Aladan v. Lewis*, 693 P.2d 661 (Utah 1984); *Johnston v. Stoker*, 685 P.2d 539 (Utah 1984); *Baker v. Williamson*, 607 P.2d 333 (Utah 1979).

24 *Blue Cross and Blue Shield*, 779 P.2d at 637.

25 Amendment XIV, section 1 states: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

26 *Blue Cross and Blue Shield*, 779 P.2d at 637.

14 *Rio Algom*, 681 P.2d at 189-90.

15 *Id.* at 193.

16 Section 59-5-4.5(1). See also *Rio Algom*, 681 P.2d at 193.

17 *Rio Algom*, 681 P.2d at 193.

18 *Id.* at 194; *Kittery Elect. Light Co. v. Assessors of the Town of Kittery*, 219 A.2d 728, 734 (Me. 1966).

19 *Rio Algom*, 681 P.2d at 194; *Kittery Elect. Light Co.*, 219 A.2d at 734.

20 Art. XIII, § 11.

21 Utah Code Ann. § 59-5-3 (1953 & Supp. 1986).



assessment method is used by the state as is used by the county, section 59-5-4.5 merely aggravates the taxing disparity unless the 20 percent reduction is applied to all state properties assessed by the comparable sales or cost appraisal methods.

#### CONCLUSION

Although Amax itself might not be deemed a mine or a mining operation, its property and facilities are properly "deemed appurtenant" to a mine or mining operation under Amax's control making Amax subject to central assessment by the Tax Commission.

As applied to Amax, section 59-5-4.5 is not only an unconstitutional violation of article XIII, sections 2 and 3, but also a violation of article I, section 24 of the Utah Constitution. We reverse and remand to the Tax Commission for the purpose of calculating the reasonable fair cash value of Amax's real and personal property pursuant to the formula set out in Utah Code Ann. § 59-5-4.5.

HOWE, Associate C.J., and DURHAM and ZIMMERMAN, JJ., concur.

STEWART, Justice, concurring in the result.

*Rio Algom Corp. v. San Juan County*, 681 P.2d 184 (Utah 1984), held that § 59-5-4.5, as applied to county-assessed properties, was constitutional, even though that section provides for a value that is 20 percent less than the "gross market value of a property. The constitutionality of that statute rested on the premise that the reduction in the assessment rate of county-assessed property was necessary to effectuate tax uniformity between inflated county-assessed properties and state-as-

sessed properties. The basic cause of the disparity was that state assessments were made on the basis of formulae that were less responsive to inflation than the formulae used by county assessors.

The Amax properties in the instant case are state-assessed; however, they are not assessed on the basis of the net proceeds formula used to assess mines, but on the basis of a formula typically used by county assessors. As stated, the crux of *Rio Algom* was the fact that state-assessed properties did not shoulder a fair share of the tax burden vis-a-vis the county-assessed properties. That may or may not continue to be the case. Suffice it to say that the parties have not addressed the issue. Nevertheless, I agree that whether an assessment is made by a state assessor instead of a county assessor cannot by itself justify a different assessment. Since the disparity between state-assessed and county-assessed properties arose because of the different formulae used by state assessors for mines, utilities, railroads, etc., and perhaps because of administrative and enforcement reasons, it cannot now be demonstrated that the value of the petitioner's parcels should be assessed at a higher rate than county-assessed parcels when they are valued on a market or cost-of-replacement method. For that reason, I concur in the result reached by the majority.

HOWE, Associate C.J., concurs in the concurring opinion of STEWART, J.



115 Wash.2d 1006  
Chris DEMOPOLIS, Petitioner,  
v.

Dale GALVIN, Trustee, et al.,  
Respondents.

No. 57128-7.

Supreme Court of Washington.

July 2, 1990.

Prior Report: 57 Wash.App. 47, 786 P.2d 804.

#### ORDER GRANTING MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REVIEW AND DENYING PETITION FOR REVIEW

This matter came before Department I of the Court on its July 2, 1990, Motion Calendar on Petitioner's Motion for Extension of Time to File Petition for Review. Department I having considered the motion and the files herein;

Now, therefore, it is hereby

#### ORDERED:

That Petitioner's Motion for Extension of Time to File Petition for Review is granted and the Petition for Review is denied on the merits.



115 Wash.2d 211

WARREN, LITTLE & LUND, INC.,  
a Washington corporation,  
Respondent,

v.

MAX J. KUNEY COMPANY, a  
Washington corporation,  
Petitioner.

No. 56810-5.

Supreme Court of Washington,  
En Banc.

Sept. 13, 1990.

Reconsideration Denied Nov. 5, 1990.

Subcontractor brought suit to recover retainage withheld by general contractor.

General contractor counterclaimed for breach of contract and claimed the withheld retainage as a setoff. The Superior Court, Spokane County, Harold D. Clarke, J., granted summary judgment to subcontractor and dismissed contractor's counterclaim without prejudice. Contractor appealed. The Court of Appeals, 56 Wash. App. 74, 782 P.2d 222, affirmed, and contractor's petition review was granted. The Supreme Court, Dolliver, J., held that contingent unliquidated counterclaim may be pleaded as a setoff unless plaintiff can show prejudice or court finds counterclaim would make proceedings unwieldy.

Reversed and remanded.

#### 1. Courts $\approx$ 97(1)

Where state and federal rules are the same and there is little or no authoritative guidance for state rule, courts may look to decisions and analysis under federal rule.

#### 2. Set-Off and Counterclaim $\approx$ 35(1), 37

Contingent unliquidated counterclaim may be pleaded as a setoff unless plaintiff can show prejudice or court finds counterclaim would make proceedings unwieldy. CR 13(b).

Winston & Cashatt, Carl E. Hueber, Lynden O. Rasmussen, Spokane, for petitioner.

Witherspoon, Kelley, Davenport & Toole, P.S., Leslie R. Weatherhead, Spokane, for respondent.

DOLLIVER, Justice.

This case arises from the construction of two county jails, one in Yakima County and one in Spokane County. Max J. Kuney Company (Kuney) was the general contractor for both jails; Warren, Little & Lund, Inc. (WLL) was the mechanical subcontractor.

The parties contracted for the construction of the Yakima County jail in October 1981. After completion, and despite some problems with the jail, the Board of Yaki-

## Tab E

conflicting affidavits are to be construed in ICA's favor. *Behagen v Amateur Basketball Association of the United States*, 744 F.2d 731, 733 (10th Cir. 1984), cert. denied, 471 U.S. 1010, 105 S.Ct. 1879, 85 L.Ed.2d 171 (1985).

In determining personal jurisdiction questions in diversity cases, a two-step analysis is applied. The court must decide whether the defendants have sufficient contacts with the forum state so that the exercise of jurisdiction is consistent with the constitutional requirements of due process. See *Keeton v Hustler Magazine, Inc.*, 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984) (the minimum contacts requirement extends to federal courts sitting with diversity jurisdiction). Additionally, we must determine whether the law of the forum state authorizes the exercise of jurisdiction over the defendants. See *Yarborough v Elmer Hunker & Associates*, 669 F.2d 614, 616 (10th Cir. 1982), see also *Hoffman*, 575 F.Supp. at 1469 (stating that the constitutional minimum contacts test and the state's jurisdictional statute must be satisfied).

Initially, we focus on the law of Kansas. ICA asserts that jurisdiction in this case is proper under subsection 5 of the Kansas long arm statute, K.S.A. 60-308(b). The long arm statute provides as follows:

(b) Any person, whether or not a citizen or resident of this state, who in person or through an agent or instrumentality does any of the acts hereinafter enumerated, thereby submits the person and, if an individual, the individual's personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of these acts:

(5) entering into an express or implied contract, by mail or otherwise, with a resident of this state to be performed in whole or in part by either party in this state.

K.S.A. 60-308(b)(5)

In the instant action, the requirements of K.S.A. 60-308(b)(5) are met. ICA and the defendants entered into a contract for the installation of an insulation system. Under the contract, ICA installed in the defen-

dants' New Jersey sports facility an insulation system which was designed, fabricated, and partially assembled in Kansas. Thus, the contract was performed in part by ICA in Kansas, and the conditions of the long arm statute are satisfied.

Next, we address the constitutional requirement of due process. The Tenth Circuit has endorsed a three-prong analysis for use when considering due process in the context of personal jurisdiction. See *Rambo v American Southern Insurance Co.*, 839 F.2d 1415, 1419 n.6 (10th Cir. 1988) (adopting the three-stage analysis set forth by the Ninth Circuit in *Data Disc, Inc. v Systems Technology Associates, Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977)). As indicated in the discussion below, clear boundaries do not separate the three prongs.

First, the defendants must have minimum contacts with the forum state. In *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and its progeny, the Supreme Court set forth the minimum contacts test, which requires that defendants in a state court action have sufficient contacts with the forum state such that the suit "does not offend 'traditional notions of fair play and substantial justice'." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293, 100 S.Ct. 559, 565, 62 L.Ed.2d 490 (1980) (quoting *International Shoe*, 326 U.S. at 316, 66 S.Ct. at 158 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278 (1940))).

Second, the defendants must "purposefully [avail themselves] of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). The purposeful availment requirement "ensures that [defendants] will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts or of the 'unilateral activity of another party or a third person.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985).

Third, the exercise of jurisdiction over the defendants must be reasonable. It must be "reasonable, in the context of our federal system of government, to require

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the [defendants] to defend the particular [diversity] suit which is brought [in the federal district court of the forum state]." *International Shoe*, 326 U.S. at 317, 66 S.Ct. at 158. In making the reasonableness inquiry, the court must consider several factors, including:

the burden on the defendant[s], the interests of the forum state, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies."

*Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113, 107 S.Ct. 1026, 1034, 94 L.Ed.2d 92 (1987) (quoting *World-Wide Volkswagen*, 444 U.S. at 292, 100 S.Ct. at 564). The court must examine the quality and the nature of the defendants' contacts with the forum state to determine if it is reasonable to hale the defendants into court in the forum state. *Kulko v. Superior Court of California*, 436 U.S. 84, 92, 98 S.Ct. 1690, 1696, 56 L.Ed.2d 132 (1978).

In the instant action, the defendants entered into a contract with ICA, a Kansas corporation. In connection with the contract, the defendants made telephone calls to ICA in Kansas. Although they assert that they did not know the destination of their calls to the toll free, "1-800" number, the assertion is not plausible in light of the fact that they had received literature with numerous indications that ICA was a Kansas corporation. Moreover, Kessler told the defendants that ICA was located in Kansas. Additionally, at least part of the contract (ICA's design, fabrication, and partial assembly of the insulation system) was to be performed in Kansas. Again, the defendants should have been aware that the contract would be partially performed in Kansas because of Kessler's statements and the literature that they received. Given these facts, we find that asserting jurisdiction over the defendants is consistent with the principles of fourteenth amendment due process. They had minimum contacts with the state of Kansas, and these contacts were the result of and pursuant to their decision to enter into a contract with a Kansas corporation to be

partially performed in Kansas. As the Tenth Circuit recognized in *Continental American Corp. v. Camera Controls Corp.*, 692 F.2d 1309 (10th Cir. 1982), "modern commercial transactions often involve little contact with the forum beyond that of mail and telephone communications, and defending a suit in a foreign jurisdiction is not as burdensome as in the past." *Id.* at 1314 (citation omitted). Thus, this court's assertion of jurisdiction does not offend due process standards.

IT IS THEREFORE ORDERED that the motion of the defendants Sportsplex, Inc., and Sportsplex Associates to dismiss for lack of personal jurisdiction is denied.



UNION PACIFIC RAILROAD COMPANY, a Utah corporation, and the Denver & Rio Grande Western Railroad Company, a Delaware corporation, Plaintiffs,

v

STATE TAX COMMISSION OF UTAH and State of Utah, Defendants,

and

Salt Lake County, et al., Defendants in Intervention

SOUTHERN PACIFIC TRANSPORTATION COMPANY, Plaintiff,

v

STATE OF UTAH, et al., Defendants,

and

Salt Lake County, et al., Defendants in Intervention

Nos. C-84-0839J, C-84-0840J and 82-C-0998J

United States District Court  
D. Utah, (D)

Dec 19, 1988

Railroads brought action challenging ad valorem property tax assessments by

Utah on grounds that assessments discriminated against them in violation of Railroad Revitalization and Regulatory Reform Act. The District Court, Jenkins, Chief Judge, held that Utah discriminated against railroads in its assessments of their ad valorem property tax for two years.

Judgment for plaintiff

# 1 Taxation $\Rightarrow$ 390(2)

Railroad Revitalization and Regulatory Reform Act does not require district court to make state apply a particular evaluation methodology in determining whether ad valorem property tax assessments discriminate against railroads. 49 U.S.C.  $\S$  11503.

# 2 Taxation $\Rightarrow$ 390(2)

Evidence established that Utah's use of stock and debt approach to valuing railroads' property, for purposes of ad valorem taxation, had a rational basis and was not chosen for discriminatory purpose, therefore, district court would not second guess state's choice of method in determining whether ad valorem property tax assessments discriminated against railroads in violation of Railroad Revitalization and Regulatory Reform Act. 49 U.S.C.  $\S$  11503.

# 3. Taxation $\Rightarrow$ 390(2)

As long as state's methodology for valuing railroad's property, for purposes of ad valorem taxation, has a rational basis and was not chosen for a discriminatory purpose, district court will not disturb that choice in determining whether property tax assessment discriminated against railroad in violation of Railroad Revitalization and Regulatory Reform Act. 49 U.S.C.  $\S$  11503.

# 4 Taxation $\Rightarrow$ 390(2)

Utah's application of its valuation methods, for purposes of valuing railroads' property for ad valorem taxation, was not improper, it could not be said that railroads Utah chose to compare with complaining railroads were not comparable and any mismatch Utah created by using current earnings price ratio and applying it to projected earnings was insignificant.

# 5. Taxation $\Rightarrow$ 390(2)

Application to railroad property of Utah statute, which discounts assessed value of real property an additional 20%, discriminated against railroads under Railroad Revitalization and Regulatory Reform Act with respect to property values for purposes of ad valorem taxation by artificially increasing ratio for other commercial and industrial property. 49 U.S.C.  $\S$  11503, U.C.A. 1953, 59-5-4.5.

# 6. Taxation $\Rightarrow$ 390(2)

In determining whether Utah's ad valorem property tax assessments for railroads discriminates against railroads in violation of Railroad Revitalization and Regulatory Reform Act, district court must consider value of locally assessed real property before Utah statute discounting assessed value of real property in state an additional 20% is applied. 49 U.S.C.  $\S$  11503, U.C.A. 1953, 59-5-4.5.

# 7. Taxation $\Rightarrow$ 390(2)

Utah discriminated against railroads in ad valorem property tax assessments in that it assessed railroad property at higher rate than it assessed all other commercial and industrial property within state for same period. 49 U.S.C.  $\S$  11503.

Leonard J. Lewis, Robert A. Peterson and Eric C. Olson, VanCott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for Union Pacific R. Co.

L. Ridd Larson and William A. Marshall, Salt Lake City, Utah, and Wm. E. Saul, San Francisco, Cal., for Southern Pacific Transp.

Stephen G. Schwendiman and Maxwell A. Miller, Asst. Attys. Gen., Bill Thomas Peters and Gary Thorup, Sp. Asst. Atty. Gen., Prince Yeates & Geldzahler, Salt Lake City, Utah, for defendants.

## MEMORANDUM OPINION AND ORDER

JENKINS, Chief Judge

The plaintiff railroads—Union Pacific (UP), the Denver & Rio Grande Western (D

& RG) and Southern Pacific (SP)—brought these consolidated actions to challenge their ad valorem property tax assessments for 1984 and 1985 on the grounds that the assessments discriminated against them in violation of section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4R Act), Pub. L. No. 94-210,  $\S$  306, 90 Stat. 3154 (1976). The cases were tried to the court beginning on February 9, 1988, and ending on March 17, 1988, with some brief respites in between. The court heard closing arguments on March 30, 1988. Robert A. Peterson and Eric C. Olson represented the plaintiffs UP and D & RG. L. Ridd Larson and William A. Marshall represented plaintiff SP. Rex E. Madsen, Reed L. Martineau and Maxwell A. Miller represented the defendants, and Bill Thomas Peters represented the defendants in intervention, some twenty Utah counties.<sup>1</sup> There were 788 exhibits, some of great complexity. After digesting the evidence and the arguments of counsel, the court now enters this memorandum opinion and order, which, under Federal Rule of Civil Procedure 52(a), shall constitute the court's findings of fact and conclusions of law.

## I

### THE STATUTE

In 1976, in part to "restore the financial stability of the railway system of the United States," Pub. L. No. 94-210,  $\S$  101(a), 90

<sup>1</sup> The intervening counties are Box Elder, Cache, Carbon, Davis, Emery, Grand, Iron, Juab, Millard, Morgan, Piute, Salt Lake, Sanpete, Sevier, Summit, Tooele, Utah, Wasatch, Washington, and Weber.

<sup>2</sup> The wording and structure of section 306 were changed when the section was recodified as part of the revised Interstate Commerce Act. See Act

Stat. 31, 33 (1976). Congress passed the 4R Act. Section 306 of the act, codified at 49 U.S.C.  $\S$  11503, prohibits states and local taxing authorities from discriminating against railroad property. That section makes it unlawful for a state to assess railroad

transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

*Id.*  $\S$  306(1)(a), 90 Stat. at 54.<sup>3</sup> A railroad that thinks it has been treated unfairly may bring an action in federal district court for injunctive and declaratory relief. *Id.*  $\S$  306(2). The court is then required to compare two ratios: the ratio of the assessed value of rail transportation property to its true market value, and the ratio of the assessed value of all other commercial and industrial property in the same assessment jurisdiction to its true market value. The court may grant relief to the railroad only if the ratio of assessed value to true market value for rail transportation property "exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction" (in this case, the state of Utah). *Id.*  $\S$  306(2)(c).<sup>4</sup>

of Oct. 17, 1978, Pub. L. No. 95-473,  $\S$  11503, 92 Stat. 1337, 1445-46. Because the recodification was not meant to change the substantive law, see *id.*  $\S$  3(a), 92 Stat. at 1466, this court will use the original language of section 306 for convenience and clarity.

<sup>3</sup> The court's analysis can be expressed by a simple equation:

$$\frac{\text{Assessed value of rail transportation property}}{\text{True market value of rail transportation property}} > \frac{\text{Assessed value of all other commercial and industrial property}}{\text{True market value of all other commercial and industrial property}} \times 1.05$$

At the time of the assessments at issue in this case, Utah law required that all taxable property in the state not specifically exempt from taxa-

tion be assessed at 20% of its reasonable fair cash value. See Utah Code Ann.  $\S$  59-5-1 (Supp. 1985). See also *infra* note 6 (reasonable

The plaintiff railroads claimed that Utah had discriminated against them in two ways by overvaluing their property and by denying them a twenty percent discount in their assessed value that was available to locally assessed commercial and industrial real property under Utah law, Utah Code Ann § 59-5-4.5 (Supp 1986). Plaintiff SP settled its valuation claim with the state before trial. At the trial, the parties presented the court with a stipulation setting forth two alternatives for the ratio of assessed value to true market value for all other commercial and industrial property in Utah—one ratio if the court upholds the twenty percent discount statute and another if the court strikes down the twenty percent discount statute.<sup>4</sup> Because the railroads' assessed value is given, *see infra* note 48 and accompanying text, the only issues for the court to decide are the true market value of the UP and D & RG as of the assessment dates (January 1, 1984, and January 1, 1985) and the allegedly discriminatory effect of the twenty percent discount statute. The court will consider these issues in order.

## II

## THE PLAINTIFFS' VALUATION CLAIMS

Plaintiffs UP and D & RG claim that Utah has discriminated against them by

fair cash value" is synonymous with true market value.) Thus, the ratio for both rail transportation property and all other commercial and industrial property for the years in question should be 20.

In 1985 the statute was amended to make the assessed value the same as "reasonable fair cash value." However, the statute did not take effect until January 1, 1986. *See* 1985 Utah Laws ch 165, § 64.

4 In other words the parties have stipulated to the right half of the equation set forth in foot note 3 *supra*. Which stipulated value the court will ultimately apply depends on the court's holding on the plaintiffs' claim of de jure discrimination under the equalization aspect of this case. *See infra* part III.

5 Originally UP took the position that it was foreclosed from challenging the state's valuation of its property by the Tenth Circuit's decision in *Burlington Northern Railroad Company v. Lennan*, 715 F.2d 494 (10th Cir 1983), *cert denied*, 467 U.S. 1230, 104 S.Ct. 2690, 81 L.Ed.2d 884 (1984). *See Union Pac. R. Co. v. State Tax*

overvaluing their rail transportation property for the assessment years 1984 and 1985.<sup>5</sup> To determine whether that is so, the court must determine the plaintiffs' true market value and then compare that figure to the state's assessed value, which was based on the state's determination of the plaintiffs' true market value.<sup>6</sup> Under Utah law, the plaintiffs' assessed value for assessment years 1984 and 1985 should be 20 of their true market value. *See supra* note 3. If it is greater, then the state has overvalued the railroads, regardless of any equalization claim they may have.

The court's task is complicated by the fact that the defendants concede that the plaintiffs' initial assessed values for 1984 and 1985 were not based on their true market value. In May 1984 the state assessed UP based on a true market value of \$3,875,000,000. On June 4, 1984, the state issued a revised assessment for UP based on a true market value of \$3,600,000,000. The state has since become convinced that the methods it used to arrive at those figures were wrong and has abandoned those appraisals. *See* Transcript [hereinafter Tr.] at 341, 345-46, 350-51. For trial the state relies on a new appraisal for UP based on a different approach, which places

*Comm'n*, 635 F.Supp. 1060, 1063 (D.Utah 1986). However, the Supreme Court opened the door for UP to assert its valuation claims in this case by its decision in *Burlington Northern Railroad Company v. Oklahoma Tax Commission*, 481 U.S. 454, 107 S.Ct. 1855, 95 L.Ed.2d 404 (1987). Ironically SP, which had asserted that Lennan did not preclude it from challenging the state's valuation, *see* 635 F.Supp. at 1065-66, is no longer asserting a valuation claim, it having settled its valuation dispute with the state.

6 Utah law requires that taxable property within the state be assessed on the basis of its "reasonable fair cash value." *See* Utah Code Ann. § 59-5-1, *see also supra* note 3. "Reasonable fair cash value" is equivalent to "market value." *Kennecott Copper Corp. v. Salt Lake County*, 122 Utah 431, 250 P.2d 938, 939-40 (1952). For simplicity unless otherwise indicated the court shall use the terms value and true market value to refer to both "reasonable fair cash value" and true market value.

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the value of UP for assessment year 1984 at \$3,700,000,000. The state followed a similar approach for UP for assessment year 1985 and for the D & RG for 1984 and 1985, with similar results.<sup>7</sup> Thus, the defendants concede that the plaintiffs were assessed at rates that were not based on their true market value for assessment years 1984 and 1985. To determine how much the plaintiffs' newly determined values differ from their "true market value," if at all, the court must still determine their true market value as of January 1, 1984, and January 1, 1985.

In deciding the valuation question, the court has the advantage of expert help. The plaintiffs have presented the appraisals of their expert witness, Dr. Arthur Schoenwald, a financial consultant specializing in railroad and utility ratemaking and valuation. *See* common exhibits 30 & 33, 36 & 39. The defendants rely on the newly prepared appraisals of Mr. Ekhardt Prawitt, the utility and railroad valuation manager for the Property Tax Division of the Utah State Tax Commission. *See* common exhibits 32, 35, 38 & 41. However, to bolster Mr. Prawitt's appraisals, the defendants also offered appraisals prepared jointly by Mr. Michael Goodwin, an independent appraiser specializing in the valuation of public utilities, railroads and other multistate corporations, and Dr. James Iflander, an assistant professor of finance at Arizona State University. *See* common exhibits 31, 34, 37 & 40. The plaintiffs and intervenors also offered the testimony of various experts retained to critique or comment on the competing appraisals.

Unfortunately, all these expert opinions may only verify George Bernard Shaw's observation that, "[i]f all economists were

laid end to end, they would not reach a conclusion." The operative word here is "a", for, after listening to seventeen full days of expert testimony spread over six weeks, the court suffers from no lack of conclusions. The problem is that the proffered expert conclusions differ from one another by over a billion dollars in the case of UP and by a like order of magnitude in the case of the D & RG.<sup>8</sup> Fortunately, the parties do agree on some things. To that extent the court can begin on common ground.

The parties agree, for example, that the proper approach for valuing a railroad for taxation purposes is the so-called unitary approach. Under that approach, the state determines the value of the entire railroad as a unit, even though its assets may be located in several states, and then allocates a portion of that total value to the taxing state (in this case, Utah) based on such factors as the percentage of the railroad's total trackage that runs through the taxing state. The parties also agree on the percentage of the total value of each railroad's property that should be allocated to Utah. *See infra* note 47 and accompanying text, Tr. at 13-14. Finally, the parties agree in principle on the three standard methods for valuing a railroad: the cost approach, the income approach and the stock and debt approach. It is in applying the three standard approaches to reach a conclusion as to true market value that the parties part ways.

## A Overview of Valuation Approaches

At the risk of oversimplification,<sup>9</sup> the court can summarize the three basic approaches as follows:

on a new appraisal placing the true market value at \$320 million.

8 The results of the various appraisals are summarized in appendix A.

9 Cf. Louis L. Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises* 80 Harv. L. Rev. 986, 991 (1967). (It is of course one of the risks of subjecting complex controversies to judicial determination that the rules evolved compel arbitrary simplification.)

7 The state's original assessment for UP for assessment year 1985 was based on a true market value of \$4 billion. In this proceeding the state relies on a new appraisal which places the value of UP for 1985 at \$3.4 billion.

The state initially valued the D & RG based on a true market value of \$370 million for assessment year 1984. In June 1984 it revised its valuation based on a value of \$340 million. In this proceeding it relies on a new appraisal placing the true market value of the D & RG at \$320 million. Similarly it initially valued the D & RG for 1985 at \$375 million and now relies



**The Cost Approach.** The cost approach values a railroad based on historical costs—that is, how much it actually cost to produce the assets initially. From historical cost is deducted accumulated depreciation to get net book value. Then, from net book value an amount is deducted to reflect obsolescence. The final figure is the cost indicator of value. All the parties agree that the cost indicator is the least accurate indicator of true market value.<sup>10</sup>

**The Stock and Debt Approach.** The stock and debt approach is a substitute market approach. Because of the infrequent sales of railroad properties, the absence of an organized market for such properties and the lack of accurate, current information about sales of railroad properties as such, appraisers must look to a substitute source for accurate information. There is an organized market for the purchase and sale of fractional ownership interests in railroad properties; shares or ownership interests in debt, bonds and such are bought and sold with some regularity. A specialist in dealing with such shares on an organized exchange “makes a market” for them. He offers to buy. He offers to sell. He can thus respond to offers to buy and sell. An appraiser uses such market information as some indication of value.

Those who use such data assume that the “market” has depth as of a particular moment in time and that multiplying the market value of the fractional share by the number of outstanding shares will produce a figure equal to the whole market value, which, when added to outstanding debt, will produce an approximation of true market value of company assets subject to ad valorem taxation. The argument is that the whole is equal to the sum of its parts, a conservative position, one could argue, in today's era of leveraged buyouts. It does not factor in the element of control or the break-up value frequently perceived by some to be hidden in the assets of a target company

Often the outstanding shares of a railroad are held in their entirety by a holding company. The organized market to which an appraiser looks for data is in the shares of the holding company—not in the shares of the railroad. Thus, the data to which the appraiser looks for an indication of value is two steps removed from the actual assets appraised. The appraiser must determine in some appropriate fashion what fraction of the market value attributed to the shares of the holding company is represented by the holding company's ownership, through its railroad subsidiary, of railroad assets.

In applying the stock-and-debt approach, there is relatively little disagreement among the parties as to the value of the plaintiff companies' debt. *See, e.g., Tr. at 1243.* The main disagreement is over the companies' equity value and specifically over how to determine what portion of the holding company's gross equity is attributable to railroad property.

The state of Utah uses basically two approaches for attributing a portion of the holding company's equity to the railroad. Both use various multipliers. In the first approach, the state compares the subject railroad to other railroads in the industry. It calculates an industry multiplier based on the ratio of various railroads' stock prices to their cash flows and earnings. It then applies those price/cash flow and price/earnings ratios or multipliers to the subject railroad's cash flow and earnings to get estimates of the value of the railroad's stock. In its second approach, the state compares the subject railroad to its holding company. The state calculates multipliers based on the ratio of the railroad's net profit, revenues, income and assets to the holding company's net profit, revenues, income and assets and applies the multipliers to the company's total equity value to determine the equity value of the railroad. *See, e.g., common ex 32 at S/2.*

On the other hand, Dr. Schoenwald, the railroads' expert, calculates the equity val-

ue of each of the nonrail assets of the holding company and deducts those values from the holding company's total equity value. What's left over, he concludes, is the equity value of the railroad.

**The Income Approach.** The theory behind the income approach is that anyone who buys a railroad buys it only for the income the railroad will generate. The basic principle is that the present value of a company is equal to the value of all future benefits to be derived from ownership of the company, discounted to their present value (expressed in dollars). Since the future benefits to be derived from ownership of a company are simply the income one can expect to receive from the company, the income approach tries to project the income from the railroad's operations over a period of time and then places a present value on that income.<sup>11</sup> The present value of future income is expressed by the following formula:

$$V_0 = \frac{I_1}{(1+i)^1} + \frac{I_2}{(1+i)^2} + \dots + \frac{I_n}{(1+i)^n}$$

where  $V_0$  is the value at time zero,  $I_1$  is the income for year 1, and  $i$  is an interest rate or discount rate.

Obviously, this basic valuation formula is almost impossible to apply accurately because one can't know precisely the value of all the variables. It is impossible to predict

accurately the income for each future year for the life of the railroad, to know how long the railroad will continue to produce income and to predict the appropriate interest rate for future years. Thus, each of the appraisers in this case simplifies the basic formula based on certain assumptions.

All the experts essentially agree on at least one simplification of the basic formula, namely,

$$V_0 = \frac{CF_1}{k-g}$$

where  $CF_1$  represents the net cash flow in period 1,  $k$  represents the cost of capital, and  $g$  represents the growth rate. *See plaintiffs' ex 358 (Dr Schoenwald), Tr at 1088 (Dr Ifflander) & 1455 (Dr Pettit)*<sup>12</sup>

This approach to income valuation, which tries to estimate future cash flows over a period of time and discount them to their present value, is called yield capitalization or a “discounted cash flow” (DCF) model and is widely used (in one form or another) by appraisers and financial analysts to value income-producing property. *See, e.g., Tr at 1348-49 (testimony of Dr Ifflander), 1491 (testimony of Dr Pettit), 1728 (testimony of Mr Van Drimmelen, a real estate appraiser), 2077 (testimony of Mr Fitzgerald)*<sup>13</sup>

where  $D_1$  is the dividends at year 1 and  $g$  is the growth rate.

The basic formula was also sometimes recast to include another variable,  $b$ , which represents the percentage of the firm's earnings that it retains to reinvest

$$V_0 = \frac{E_1(1-b)}{k-g}$$

where  $E_1$  is the earnings in period 1. *See Tr at 1455, intervenors' ex 6*

11. The court uses the term “income” loosely. More precisely, what the appraiser tries to value is net cash flow, which Dr. Schoenwald defined as net operating income plus depreciation and deferred income taxes (where applicable) less capital expenditures. *See plaintiffs' ex 73.* Because capital expenditures for railroads in recent years have generally exceeded depreciation and deferred taxes, Dr. Schoenwald has used net railroad operating income (NROI)—which he characterizes as a “generous” measure of net cash flows—as his income stream to capitalize.

12. All of the experts also basically agree on another variation of the basic model, the dividend model. *See, e.g., plaintiffs' ex 54, Tr at 1088-89.* The dividend model uses dividends paid out in year 1 as the income to be capitalized and is expressed by the following equation

$$V_0 = \frac{D_1}{k-g}$$

13. Mr. Goodwin and Dr. Ifflander used (or misused, from the plaintiffs' perspective) a standard yield capitalization or DCF model for their appraisal of UP for 1984, in which they projected the railroad's cash flows for the next five years, discounted them to present value and added a terminal value, representing the present value of all the cash flows after the five year period. *See common ex 31 at 76-102.* For all of the years in question, they also use a direct capital-

10. Although he calculates a cost indicator of value, Dr. Schoenwald gives it no weight in determining the final value of the railroads.

The other appraisers give it some weight but less than they give the other indicators of value.

The standard simplifications of the basic formula used in a yield capitalization model assume that  $k$ ,  $g$  and  $b$  (the retention rate, *see supra* note 12) are constant and are all equally influenced by inflation. They also assume that the growth rate,  $g$ , is equal to  $b$  times  $r$ , the marginal rate of return on new investment. *See Tr.* at 1455.

The plaintiffs' appraiser, Dr. Schoenwald, on the other hand, starts from the basic formula but makes a different assumption, namely, that  $r$  (the rate of return on new investment) equals  $k$  (the cost of capital). Using this assumption, he simplifies the basic formula to

$$V_0 = \frac{NCF_1}{k}$$

where  $NCF_1$  is the net cash flow for year 1.<sup>14</sup> In essence, he has eliminated growth from the equation. He is able to do this because, given his assumption that  $r$  equals  $k$ , any growth in the company's future earnings is merely expansion growth and not real growth, thus, according to the witness it does not add anything to present value.<sup>15</sup> Hence, Dr. Iflander has called Dr. Schoenwald's income valuation model an expansion model, a term the court will use at times to distinguish it from the standard yield capitalization model. Although Dr. Schoenwald's model is in theory

zation method similar to the state's. *See infra* p. 550.

14 Dr. Schoenwald further assumes that net railroad operating income (NROI) is a generous estimate of net cash flow, *see supra* note 11, so he substitutes NROI for  $NCF_1$  in the equation. For his projected net railroad operating income for year 1 he uses an average of the railroad's NROI for the five previous years.

15 According to Dr. Schoenwald a company may grow through new additional investment but if the returns on new investment are not greater than the cost of capital—that is, if the cost of the growth offsets any gain from the new investment—then there is no actual or net growth. Net growth occurs when the company earns more than the cost of its additional capital and only net growth—as opposed to gross or expansion growth—increases net present value. A company that only earns its cost of capital may grow and that growth may make the company worth more five years down the road but that future growth adds nothing to the compa-

a yield capitalization model, it proceeds from a very different assumption than the standard yield capitalization models described by the other experts.<sup>16</sup>

The state uses another method to value the railroads based on their projected income, called direct capitalization. In the direct capitalization method, the appraiser determines a company's value by multiplying its accounting earnings by a price/earnings ratio or by dividing the earnings by the earnings/price ratio. The ratios are derived from stock market data for comparable companies.

Under the state's direct capitalization method, value at time zero ( $V_0$ ) is equal to earnings for time 1 ( $E_1$ ) divided by the earnings/price ratio ( $E/P$ ), or, expressing the relationship algebraically,

$$V_0 = \frac{E_1}{E/P}$$

Although not directly derived from the basic valuation formula,<sup>17</sup> the direct capitalization method proceeds from the assumption that the price of a company's stock will represent the consensus of investors' opinions about a company's future cash flows, cost of capital and growth prospects. In other words, it uses the stock market as the best evidence of willing buyers' and sellers' opinions of value, which presum-

es its value today because it will cost the company as much as it will add to its value in the future. *See Tr.* at 33-39, *pliffs ex.* 54.

16 The court has spared the reader the mathematical manipulations by which one gets from one formula to another. Suffice it to say that the various formulae appear to be mathematically correct and internally consistent if one accepts the underlying assumptions. It is a simple matter of applying mathematical principles to the basic formula. In making that application however one should bear in mind Robert Heilbroner's observation that "[m]athematics has given economics rigor but alas also morris. The simplified formulae are no better than the basic formula and the experts' assumptions.

17 While recognizing that direct capitalization is not merely a variation of the yield capitalization model by making certain assumptions, Dr. Iflander showed how one might conclude that Dr. Schoenwald's expansion model also uses an earnings/price ratio for its capitalization rate ( $k$ ). *See Tr.* at 1107-09.

ably are based on their own yield capitalization analyses.

For its earnings figure, the state uses a five year weighted average of the railroad's net operating income, adjusted for inflation, in which income for more recent years is weighted more heavily than income for earlier years.

Obviously, the two basic questions in applying the income approach are, How do you define the income stream to be capitalized? and What capitalization rate do you use? Although the parties disagree somewhat about what constitutes the proper income stream to capitalize, their most fundamental disagreement is over the capitalization rate. As one can see from the basic valuation formulae, since the capitalization rate is a fraction that appears in the denominator, a small change in the capitalization rate can produce a big difference in computed value.<sup>18</sup>

The plaintiffs argue that the state's capitalization rates, which vary from 8.28 to 11.98 percent, *see* appendix A, are clearly wrong since all the experts agreed that the driving force behind the capitalization rate, however expressed, namely, the cost of capital (debt and equity), was no less than 13 percent and closer to 15 percent during the relevant periods. *See, e.g., intervenors' exs.* 1a through 1d at 2. However, that argument overlooks the fundamental differences between yield capitalization and direct capitalization. The capitalization rate for yield capitalization is based directly on  $k$ , the cost of capital, and therefore should be on the order of 15 percent. The capitalization rate for direct capitalization, on the other hand, is based on price-earnings ratios taken from stock market data. It is not based directly on the cost of capital. Because there is no direct relationship

18. For example Dr. Schoenwald calculated an income indicator of value for UP for 1984 of \$2,198,981,000 based on earnings of \$338,643,000 and a capitalization rate of 15.4%. *See* common ex. 30 & 33 at 89. Lowering the capitalization rate just 1%, to 14.4%, increases the value of UP by almost 7% to \$2,351,687,500.

19. Were the court to undertake its own independent appraisal, its choice of methods would enjoy undue sanction and the application of its

between the cost of capital and P/E or E/P ratios, the fact that a direct cap rate or E/P ratio may be less than the cost of capital ( $k$ ) is of no moment. Although there was wide disagreement among the experts about the price-earnings ratios to be used and their importance in the process, the evidence suggested that the state values were well within the very broad range of possible ratios. Thus, the plaintiffs' argument has merit only if the state was required to use a yield capitalization method as opposed to a direct capitalization method in arriving at an approximation of value.

### B. Choice of Method

The parties do not disagree so much over the proper application of each other's methodology as they do over the choice of method in the first place.

Technically, methodology is not the issue in this case—discrimination is. But discrimination under the 4R Act must be measured in terms of "true market value"—the congressionally mandated measure—and one's conclusion as to true market value depends on the path one takes to reach the conclusion.

One problem with subjecting complex issues like valuation to judicial determination is that the court generally must choose among the competing claims of experts. Unless the court performs its own appraisal—a task it is not inclined to undertake<sup>19</sup>—the court must hold either for the plaintiff or the defendant, when often the truth—or at least a more exact picture of reality—lies somewhere in between. The court, of course, may adjust an expert's appraisal up or down based on other experts' critiques of the appraisal,<sup>20</sup> but the starting point for judicial determination is

methods would be subject to many of the same types of criticisms that the parties' appraisals are subject to but without the same opportunity the parties have had to critique each other's appraisals.

20. The court's task is complicated by the fact that often as here the experts themselves can not always agree whether the appraisals were properly performed or not.

always one appraisal or another, and each appraisal is based on a particular methodology that, to a large extent, predetermines the result. Thus, implicit in the court's holding is a decision as to method.

For example, if the court were to hold for the plaintiff and accept Dr. Schoenwald's valuations, it would in effect be saying that Dr. Schoenwald's methodology produces the correct result, and any methodology that produces a different result must be wrong. Given that hypothetical premise, it naturally follows that, if the state must tax the plaintiffs in proportion to their true market value, which it must under the 4R Act, then the state should apply Dr. Schoenwald's methodology in valuing the railroads, since that is the only methodology that will consistently produce the right result.<sup>21</sup>

Thus, although the plaintiffs argue that the court need not dictate to the state a particular methodology, some choice of methodology is inescapable. The court's decision on valuation must recognize (at least implicitly) one valuation method at the expense of other methods. That in no sense determines that one is right and the others are wrong.

The defendants suggest that the court should simply defer to their current choice of methodology. However, the plaintiffs were initially assessed based on a methodology that even the state now concedes was flawed. The question, then, is whether the state's new appraisals, based on a new methodology, are entitled to the same deference.

The plaintiffs argue that they are not.<sup>22</sup> They argue that the court should determine the valuation question based on which method it finds the most reasonable. They further contend that Dr. Schoenwald's val-

uation method is more reasonable than the state's, best reflects reality and leads to the actual or correct true market value.

The evidence suggested that yield capitalization is generally preferred to direct capitalization because it is directly derived from basic value theory, is more sophisticated than direct capitalization and generally produces a better result. However, the evidence also showed that both approaches were widely used to value railroads and other properties. The question, then, is whether the state is free to choose among accepted valuation methods or whether the 4R Act compels the use of one particular method.

[1] In the *Burlington Northern* case the Supreme Court expressly left open the question "whether a railroad may, in an action under [the 4R Act], challenge in the district court the appropriateness of the accounting methods by which the State determined the railroad's value, or is instead restricted to challenging the factual determinations to which the State's preferred accounting methods were applied." *Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 107 S.Ct. 1855, 1861 n. 5, 95 L.Ed.2d 404 (1987). Although the question may be an open one, this court has found nothing in the 4R Act itself or in its legislative history that requires this court to make the state apply a particular valuation methodology.

Indeed, the legislative history of the 4R Act suggests just the opposite. The committee report on Senate Bill 927, one of several precursors to the 4R Act,<sup>23</sup> stated that the bill

does not suggest or require a State to change its assessment standards, assessment practices, or the assessments them-

21. None of the experts in this case suggest that all roads lead to Rome. Rather, the testimony was that two different methods will produce the same result only by coincidence. As one can see from appendix A, the varying methods the three sets of appraisers used produced widely varying results.

22. The plaintiffs suggest that if anything the state should have the burden of proving the validity of its new appraisals. See *infra* note 29.

23. It is well settled that the legislative history of precursors to a statute are relevant in construing the statute. See *Burlington Northern Railroad Company v. Lennen*, 573 F.Supp. 1155, 1160 n. 5 (D.Kan.1982), *aff'd*, 715 F.2d 494, 497 (10th Cir.1983), *cert. denied*, 467 U.S. 1230-31, 104 S.Ct. 2690, 81 L.Ed.2d 884 (1984), and cases cited therein.

selves. It merely provides a single standard against which all affected assessments must be measured in order to determine their relationship to each other. It is not a standard for determining value, it is a standard to which values that have already been determined must be compared.

S.Rep. No. 1483, 90th Cong., 2d Sess. app. B (1968), quoted in *Burlington Northern Railroad Company v. Lennen*, 573 F.Supp. 1155, 1161 (D.Kan.1982) (emphasis omitted), *aff'd*, 715 F.2d 494 (10th Cir.1983), *cert. denied*, 467 U.S. 1230-31, 104 S.Ct. 2690, 81 L.Ed.2d 884 (1984).<sup>24</sup>

In subsequent legislative proposals Congress reaffirmed its position that it did not intend to dictate state valuation methods. See *Lennen*, 573 F.Supp. at 1163-64. For example, in hearings on House Bill 16245, another forerunner of the 4R Act, Philip M. Lanier, a railroad representative, testified that the bill "would not deal with valuation being standard. The standards and methods of valuation that any State wishes to use would be totally unaffected by this legislation." Hearing Before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce on H.R. 16245, 91st Cong., 1st Sess. 138 (1970), quoted in 573 F.Supp. at 1163 (emphasis omitted). Thus, the legislative history suggests that the statute was not meant to dictate a state's choice of methodology, at least as long as the methodology chosen had a rational basis and

was not chosen for a discriminatory purpose.<sup>25</sup>

The plaintiffs argue, however, that the statute itself requires this court to choose the correct valuation method from among the competing methods. They argue that the statute requires the court to determine their "true market value" and that the only way the court can do that is by determining which method gives the "true" true market value. That method is the one that is most reasonable and most accurate and hence arrives at the most correct result. They further argue that Dr. Schoenwald's methodology and data are the most reasonable and most accurate and can be applied most consistently and hence give the best indication of true market value. See Tr. at 1151-52.

The court declines the plaintiffs' invitation to adopt Dr. Schoenwald's methodology as the only correct methodology for determining true market value.

Each expert asserts that his methodology results in a value that most closely corresponds to reality. However, absent a willing buyer and a willing seller, there is no absolute way to test the assertions of competing valuations or competing claims of correspondence to "true market value," if such a thing exists in the order of things.

From the beginning of this case, the court was willing to assume that there was such a thing as "true market value" that could be determined objectively from evidence much the same way a court can

ing procedures for the states in the valuing of railroads. 573 F.Supp. at 1164. It is one thing to say that the 4R Act allows federal courts to review railroads' claims of overvaluation. It is quite another to say that the Act dictates a state's choice of valuation methods. The 4R Act may provide relief if a state overvalues a railroad by misapplying its chosen methodology or by using a methodology that has no rational basis or is chosen for the purpose of overvaluing railroads. See, e.g., *Burlington N. 107 S.Ct. at 1859* (the railroads' only claim of discriminatory taxation was that the state had misapplied its own valuation methodology). But this court believes the Act does not necessarily provide relief just because the state's chosen methodology results in higher values than some other method the state could have chosen.

24. The quoted passage from appendix B to Senate Report 1483 appears to have been taken from the testimony of James N. Ogden, Vice-President and General Counsel of the Gulf Mobile and Ohio Railroad Company during hearings on Senate Bill 927. See *Burlington Northern*, 573 F.Supp. at 1161-62.

25. To the extent *Lennen* concluded from the legislative history that the whole valuation question was essentially off limits to federal courts see 573 F.Supp. at 1164 (the issue of the appropriate true market value of a railroad is generally not to be an issue in a Section 306 case) it has since been overruled. See *Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 107 S.Ct. 1855, 95 L.Ed.2d 404 (1987). However, this court agrees with Judge Rogers's conclusion that Congress did not intend for the federal courts to become involved in establish-



determine a wrongfully discharged employee's back wages from evidence. See *Union Pac RR Co v State Tax Comm'n*, 635 F Supp 1060, 1067 at n 10 (D Utah 1986). Indeed, the approach of the 4R Act presupposes that, like Plato's ideal, there is in fact a "true market value," that it exists, that it can be pointed to, pictured, recognized and can be used as the standard against which valuation figures may be compared. Success in valuation would be indicated by the correspondence of the valuation figures with the ideal.

From the six weeks of testimony in this case, however, certain things became apparent. First, valuation is an art, not a science. It is a function of judgment, not of natural law. Try as it might, even Congress is incapable of enacting either a natural law of the market or Plato's ideal "True market value," then, must needs mean something else. Absent a miracle of time, place and circumstance—willing buyer, willing seller, high noon, January 1, 1984, for example—true market value for purposes of ad valorem taxation is always an estimate, always an expression of judgment, always a result built on a foundation of suppositions about knowledgeable and willing buyers and sellers endowed with money and desire, whose desires are said to converge in a dollar description of the asset. All of this is simply a sophisticated effort at "let's pretend" or "modeling," in modern jargon, and all of it involves judgment. Not natural law, not science—judgment.

The appraisals in this case generally contain two or three estimates of value, which, within the same appraisal, may vary by as much as 100 percent or more. See, e.g., common ex 30 & 34 at 75 & 83, see also appendix A. Thus, the same appraiser may come to vastly different conclusions as to the value of the same railroad for the same assessment date, depending on the method he uses. Moreover, each method requires

26 The court is reminded of the old story of the economist marooned with a companion on a desert island. A can of food washed up on the beach. The economist's starving companion asked him how they could open the can to

various estimates and calculations, small variations in any of which may lead to large differences in value. See, e.g., *supra* note 18. Absent evidence of an actual sale, the term "true market value" is at best a rational fiction. Conclusions as to true market value are based on each appraiser's best judgment, and each appraiser approaches the task of valuation a little differently, with his own assumptions and theories as to what mythical buyers and sellers consider (or should consider) in arriving at an agreed-on price. Perhaps Clifford Fitzgerald, a corporate finance expert who testified on behalf of the plaintiffs, said it best: "There is not one universal concept of value." Tr at 2096. Nor is there "any one perfectly correct method." *Id.* at 2110-11. See also *id.* at 1718 (testimony of Mr. Voytko that there is no standard approach to value).

Mr. Goodwin described Dr. Schoenwald's methodology as "assumption driven." The epithet was apparently meant disparagingly and was contrasted with his own methods, which, he claimed, were "market driven." In truth, however, each appraiser's methodology is assumption driven.<sup>26</sup> The assumption may be that the price of a company's stock is the best indicator of the value of its assets (Presumably that is what Mr. Goodwin meant when he said his model was "market driven.") The latter assumption, of course, may oversimplify matters by not accounting for the effect of other variables on the stock market—economic and otherwise (perhaps even including the conference of the Super Bowl winner). See, e.g., Tr at 1337-39, 1421 (testimony of Dr. Ifflander that stock market prices do not always accurately reflect value), *id.* at 1607-10 (Dr. Pettit's attempt to explain the stock market crash of 1987 based on various factors unrelated to a company's true market value).<sup>27</sup>

which the economist blithely replied: Assume a can opener.

27 The vagaries of the stock market once prompted a member of the Council of Economic Advisors to suggest that market behavior

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[2] From all the evidence presented it is clear that there is more than one way to value a railroad. See, e.g., Tr at 1718, 2110-11. Each method may represent what some buyers and sellers actually do.<sup>28</sup> All the methods may be equally rational given their underlying assumptions. And they are all irrational if pressed to extremes. For example, using the income approach, one would be forced to conclude that a company with a net loss for the year or over a period of years actually had a negative value—a skewed and discordant picture of reality. See, e.g., Tr at 2201-03. Or, using the stock and debt approach, one might be forced to conclude that over 20 percent of the value of a company evaporated in the few short hours between the opening and closing of the New York Stock Exchange on October 19, 1987, despite the fact that the company's functioning assets remained virtually unchanged over that period. Each method or theory depends on certain assumptions that cannot ultimately be proved or disproved by reason alone nor replicated in experience. Thus, this court cannot say that any one method is necessarily more rational than any other. Nor can the court say that one method alone arrives at the railroad's "true market value." Rather, the evidence suggests that the term "true market value" "is a judgment not subject to mathematical precision that is based on a wide variety of factors" and "is at best an approximation." *Rio Algom Corp v San Juan County*, 681

could be explained not so much by market analysis but by psychoanalysis.

28 Indeed, perhaps the best evidence of the railroads' true market value is not any single appraisal but assuming that each appraiser has performed his work accurately and in good faith the average of all the appraisers' judgments concerning true market value.

29 In a 4R Act case "the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law. Pub L No 94-210 § 306(2)(d) 90 Stat at 55 (1976). The plaintiffs argue that the burden of proof should be on the state to prove its assessment is correct. They cite the court to no authority for this proposition. Rather they argue that under Utah law once it is shown that a state's assessment is wrong the burden shifts to the state to prove

P 2d 184, 192 (Utah 1984). From all the evidence in this case, the court cannot say that the state's judgment as to the plaintiffs' true market value is wrong.<sup>29</sup>

The state suggests that its methods have the advantage that they are used consistently to value all centrally assessed property, so if the method produces any error in valuations, the effect is not to discriminate against the railroad. Presumably, if application of the same method overvalues or undervalues all commercial and industrial property in the state equally, there is no discrimination against railroads. However, the state concedes that it did not treat all centrally assessed property equally for the assessment years in question. For 1984 and 1985 it assessed all centrally assessed property using its discarded methodology. If one of the 350 centrally assessed property owners appealed, the state prepared a new assessment based on its new methodology, as it did in this case. Thus, the state did not treat all centrally assessed property equally in 1984 and 1985.

Moreover, even if the state did treat all centrally assessed property equally (as it claims to do now), it may still have violated the 4R Act if its uniform method has the effect of overvaluing railroads. It is no defense under the 4R Act "to say that the state may also be discriminating against other companies." *Louisville & Nashville RR Co v Louisiana Tax Comm'n*, 498 F Supp 418, 422 (M D La 1980).<sup>30</sup>

that its new assessment is correct and they note the state has already admitted its original assessments were wrong. But see *Utah Power & Light Co v Utah State Tax Comm'n*, 590 P 2d 332, 335 (Utah 1979) (if the taxpayer claims error in a proceeding before the tax commission "it has an obligation not only to show substantial error or impropriety in the assessment but also to provide a sound evidentiary basis upon which the Commission could adopt a lower valuation") (citations omitted). Even assuming that the plaintiffs' argument is correct, given the court's decision that the state was free to adopt the method of its choice the court concludes that the state has met the burden of proving the correctness of its new assessments by a preponderance of the evidence.

30 Although it may not be a defense to say that all centrally assessed properties are overvalued as a result of the state's choice of methodology

Nevertheless, the state's argument may have some force. If the court were to require the state to use Dr Schoenwald's valuation methods, the state would have to apply the methods to all centrally assessed property so that the discriminatory effect of the state's valuations could be properly measured. The court has found no evidence that Congress intended the 4R Act to dictate how a state must value *non* railroad property. If, as it appears from the record, all centrally assessed properties are now appraised using the methods the state used in its current appraisals of the plaintiff railroads, that may be reason to give those appraisals greater weight.

But the court believes that it should not disturb the state's choice of methodology for other reasons as well. From the testimony of the state's witnesses, the court concludes that the state's appraisers sincerely seek to arrive at what they consider to be the railroads' true market value and that, to that end, they constantly reevaluate their methods and change them when they become convinced that they are wrong.<sup>31</sup> The state's witnesses also testified that appraisal methods and philosophy are continually changing, presumably for

if in fact they are. It is likely that together all the owners of centrally assessed property will have sufficient political power to force the state to change its valuation methods. After all it is not every property owner that can achieve beneficial legislation such as the 4R Act. As Auberon Herbert once observed: "It is the small owner who offers the only really profitable and reliable material for taxation. He is made for taxation. [H]e has less skill and ingenuity as regards escape, and he still has a large supply of ignorant patience of taxation." Quoted in F. Colfield, *A Popular History of Taxation*, quoted in *A Dictionary of Legal Quotations* 165 (S. James & C. Stebbings comp. 1987). The court, however, does not base its conclusions as to discrimination on the state's relative treatment of centrally assessed properties but on its conclusion as to the railroads' true market value.

31. Indeed, of all the appraisers in this case, the court was most impressed with the credibility of the state appraiser, Mr. Prawitt, and of his supervisor, Mr. Munson. Of all the appraisers, Mr. Prawitt seemed the only one who was not out to achieve a particular predetermined result. Indeed, he testified that he prepared his appraisals without even looking at the state's

the better, and that they try to keep current on new developments in the field without regard for the source, that is, whether the developments be from other state appraisers or from industry experts. Were this court to conclude that the 4R Act codified the Schoenwald method of valuation, it would prevent states from critically examining their appraisal methods and would discourage them from adopting new and better methods as they become accepted by the appraisal profession.

For all of these reasons, the court concludes that the 4R Act no more enacts the Schoenwald method of valuation than the fourteenth amendment enacts Herbert Spencer's "Social Statics." Cf. *Lochner v. New York*, 198 U.S. 45, 75, 25 S.Ct. 539, 546, 49 L.Ed. 937 (1905) (Holmes, J., dissenting).

[3] All parties must remember that the purpose of producing a figure as to value, whether we label it "fair cash value" or "true market value," is to provide a figure against which one may then apply the tax percentage to arrive at what is due and owing by the taxpayer to the taxing unit. If one has a choice of methods and chooses a method with a rational footing and is

earlier appraisals so that the earlier appraisals would not affect his conclusions. The other experts all had a theory to defend, which colored their choice of data and methods. Each appraisal required the appraisers to make numerous judgments, but the other appraisers of ten seemed to base their judgments on the end result using a technique or methodology if it tended to support the desired result and changing it when convenient. For example, the plaintiffs criticized the state's witnesses for using average  $P/E_s$ , arguing that a mechanical computation of averages ignored the factors that went into an informed judgment. See, e.g., Tr. at 1661-63. Yet they then turned around and argued that their true market value should be determined by mechanically computing the average of Dr. Schoenwald's income and stock and debt indicators of value (ignoring the cost indicator altogether) when the disparity between Dr. Schoenwald's income and stock and debt indicators was so great as to make one or the other suspect without even comparing Dr. Schoenwald's figures with the other appraisers. See, e.g., Tr. at 1511. None of the appraisers may have been perfectly consistent, but Mr. Prawitt seemed most concerned with discovering an objective value and least committed to a particular theory or methodology.

consistent and evenhanded in applying the method to all comparable properties, then conceptually the end result should be payment by taxpayers of a tax bill that is not disproportionate to the like payments of all other comparable taxpayers. The court holds that, as long as the state's methodology has a rational basis and was not chosen for a discriminatory purpose, the court will not disturb that choice. The court concludes from all the evidence that the state's methodology has a rational basis and was not chosen with the intent of overvaluing railroads. Thus, it will not second-guess the state's choice of method.

Even if the court were forced to choose among the competing methodologies, the court believes that the state's methodology has much to commend it. Not only does the state consistently use essentially the same approach for all centrally assessed property, but also its approach is based on historical data and market data readily available both to investors and to the state.<sup>32</sup> Moreover, it is easy to apply—an important consideration given the state's limited resources and the tremendous time pressures under which the state's appraisals must be prepared. See, e.g., Tr. at 339 & 402. For example, although a yield capitalization model is more elegant and might be preferred to a direct capitalization model, Mr. Fitzgerald, one of the plaintiffs' experts, testified that it took him two and one-half years, working full time, to value seven railroads, an average of over four months for each. See *id.* at 2068. The state simply does not have that luxury. Given its time constraints, it may legitimately choose an approach that is easier to apply than a more precise but more complex model.

In many respects, the state's methodology is closer to Dr. Schoenwald's than is

Messieurs Goodwin and Ifflander's. For example, both the state and Dr. Schoenwald use a five-year average of NROI as the basis for their income calculations, whereas Mr. Goodwin and Dr. Ifflander use projections based on strategic plans known more for their inspirational value than for their prediction value and on a form of regression analysis discredited by the plaintiffs' statistical expert. Both the state and Dr. Schoenwald use the full debt rate in determining the cost of debt, whereas Mr. Goodwin and Dr. Ifflander use what they call current yield. Both the state and Dr. Schoenwald treat current assets and current liabilities in their stock and debt approach, Messieurs Goodwin and Ifflander do not. Both the state and Dr. Schoenwald allocate both debt and equity to the railroad. Mr. Goodwin and Dr. Ifflander allocate only equity. And in the cost approach both the state and Dr. Schoenwald purport to measure obsolescence based on the entire railroad industry, the other appraisers do not. See generally *id.* at 1898-1913 (Dr. Schoenwald's summary of the basic differences among the three approaches).

Even if the court were inclined to require the state to apply yield capitalization rather than direct capitalization, however, the court would not require it to apply the Schoenwald method of yield capitalization (that is, the expansion model). The Schoenwald method is based on a critical assumption, namely, that  $r$  equals  $k$ . The assumption is problematic at best. It was debated at length during the course of the trial. Needless to say, there was no consensus among the experts (who included several PhDs in finance) about the reasonableness of the assumption. The experts vigorously disputed the issue, predictably aligning themselves according to the party on whose behalf they were called to testify.<sup>33</sup>

32. For example, unlike Messieurs Goodwin and Ifflander, who place much weight—possibly too much—on the company's projections for the coming year gleaned in part from internal company documents not available to the public generally, the state uses the weighted average of the five previous years' income to determine the railroad's projected income in its income approach.

33. The opinions of some of the experts as to whether or not  $r$  is greater than  $k$  appeared to depend to some extent on their opinion about the prospects of the railroad industry. At times it seemed the experts were testifying about two different industries. In Dr. Schoenwald's view, the railroads have been in decline since at least the 1920s and can never expect to earn a rate of return even equal to the cost of capital. In fact, it is a wonder that they are still in business. On

Without deciding the reasonableness of the assumption, the court can at least say that the assumption would appear to be less than self-evident and not wholeheartedly accepted in the finance community, judging from the expert testimony.

Dr Schoenwald attempted to prove the validity of his assumption by showing that historically the railroads have failed to earn a return commensurate with the cost of capital. See *pliffs' ex 95(a)* (Said exhibit is annexed to this opinion as appendix B). In exhibit 95(a) Dr Schoenwald calculated a value for UP using his expansion model based on UP's average NROI for the period 1950-54. Using his expansion model, he valued the railroad at \$581,514,000. He then did a more traditional yield capitalization analysis for the period 1955-84, discounting the actual net cash flows for those years based on the actual discount rates and adding a terminal value based on the average NROI for the period 1980-84, and concluded that the actual total market value of the railroad's net cash flows from 1955 into perpetuity was only \$247,504,000. Thus he concluded, his model actually overvalued UP by more than double, showing the  $r$  did not even equal  $k$  for UP over the last thirty years.

Mister Goodwin and Doctors Ifflander and Pettit criticized Dr Schoenwald for using actual, historical figures. They argued that the value of the railroad as of

January 1, 1955, depended on what investors would have been willing to pay for it, which in turn would have depended on their expectations. They further argue that no one could have accurately predicted the actual numbers, which Dr Schoenwald uses. Implicit in their argument is that investors are overly optimistic and would have projected much higher cash flows and lower discount rates than actually occurred. All Dr Schoenwald tried to show was that, had the investors had perfect foresight and applied his model, they still would have overvalued the railroad. From this he concludes that his assumption that  $r$  equals  $k$  is a generous assumption.

Nevertheless, it appears to the court's untrained eye that exhibit 95(a) is flawed. It suffers from one of those classic "mis-matches" that Dr Schoenwald is fond of talking about. Dr Schoenwald's expansion value is based on a discounted average NROI, yet the yield capitalization approach he compares it to is based on discounted net cash flows. It is apparent from exhibit 95(a) that NROI is substantially higher than net cash flows, especially for the early years of the study. For example, for the period 1955-59, the first five-year period for which complete data are available, the average NROI is over four times greater than the average net cash flow. Of course, under Dr Schoenwald's expansion model, a

the other hand, in the opinion of Messieurs Goodwin and Ifflander the Staggers Act which was passed in 1980 ushered in a new Golden Age of railroading.

Perhaps there is more than one railroad industry. At least the railroad industry of the late 1800s was a far different industry from the railroad industry of the mid 1900s. Thus Chesterton could write:

[W]hen I was a boy which was just before the motor-car burst upon the world I never dreamed of doubting that the railway train dominated the whole future of the world. It was the latest great locomotive that man had invented. To talk as some people are now talking of whether railways will become obsolete or whether steam can be superseded of whether railway stock will always be as safe as it was—all this would have been to me a prophecy as unintelligible as some of those Old Testament visions that seem a medley of wheels and wings and clouds. Railways had been firmly established before I was born. I

never dreamed of doubting that they would remain exactly the same after I died.

G.K. Chesterton *Come to Think of It* 16-17 (1931). Yet the railroads did change. Chesterton lived to see their economic power decline. Messieurs Goodwin and Ifflander would have the court believe that if Chesterton had lived another fifty years he would have seen the rebirth of the railroad industry. The railroads experts on the other hand talk as though the railroads will never recover. But if they've changed once they may change again.

There was testimony that the railroad industry is a cyclical industry. According to Messieurs Goodwin and Ifflander the industry has come full circle. Perhaps only time will tell whether or not they are right. In any event the court does not have to choose between the competing prognostications. The market makes its own choice. And the state's valuation methods, based on the market as they are, should reflect the market's outlook.

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higher NROI translates into a proportionately higher final value. Thus, by using NROI for the period 1950-54 to value the railroad, Dr Schoenwald arrives at a higher value than he would have reached had he used net cash flows for the same period. In other words, Dr Schoenwald concludes that his model overvalues the railroad based on a comparison of an expansion value derived from high NROIs to a yield capitalization value derived from relatively low net cash flows.

Had Dr Schoenwald compared values that were both based on net cash flows or both based on NROI, he may have reached very different results. For example, if one were to estimate the average net cash flow for the period 1950-54 by dividing NROI (Dr Schoenwald's capitalized income stream) by four, it would reduce his expansion value accordingly and might turn out that his model actually undervalued the railroad significantly. Unfortunately, exhibit 95(a) omits all the data the court needs to make the proper comparison. At best, however, the court concludes that exhibit 95(a) only supports Dr Schoenwald's second assumption—that NROI is a generous estimate of net cash flow<sup>34</sup>—and not his primary assumption, namely that  $r$  is no greater than  $k$ .

Dr Schoenwald also tried to prove his assumption that  $r$  is no greater than  $k$  by calculating expected growth rates and comparing them to the expected growth that the investment publication *Value Line*, the defendants' Bible, projected for the same

time period. Using the basic formula that growth ( $g$ ) equals retained earnings ( $b$ ) times the rate of return ( $r$ ) and using the ICC's cost of capital for the rate of return (based on his assumption that  $r$  equals  $k$ ), Dr Schoenwald concluded that not even *Value Line* expected the railroads to grow at even an expansionary growth rate. See Tr at 2059-64, 2117-19, *pliffs' exs 464 & 465*. However Dr Ifflander testified that the calculated growth rate ( $b \times r$ ) showed growth in earnings, and if one used return on equity (ROE) for  $r$  and compared the calculated growth rate with *Value Line's* projected growth rate for earnings, the railroads as a whole were projected to grow at a rate faster than Dr Schoenwald's expansionary model allows for.<sup>35</sup> See Tr at 2230-32, *defts' ex 236*.

Rather than assuming that  $r$  equals  $k$ , the state lets the market decide the values of  $r$  and  $k$ . Implicit in the market price of a security are the market participants' determinations of the alphabet soup of economic variables for the company— $r$ ,  $k$ ,  $g$ , and  $b$ . It appears that at least some investors believed that  $r$  would be greater than  $k$  for the plaintiff railroads during the assessment years. See, e.g., Tr at 1504-06, *intervenor's ex 8*. Philip Anschutz bought the D & RG (or more precisely, its holding company, Rio Grande Industries) in 1984, one of the assessment years, and in fact paid a premium for the company's stock,<sup>36</sup> suggesting that he viewed the railroad as a good investment that could return a rate greater than the cost of capital.<sup>37</sup>

value. Given that Dr Schoenwald's stock and debt approach consistently valued the plaintiffs higher than his income approach and that Mr Anschutz was willing to pay a premium over the company's stock market price the plaintiffs may be right. The stock market may undervalue railroads.

37 The plaintiffs point out that both Union Pacific and Southern Pacific also had the opportunity to buy the D & RG but turned it down. Of course the fact that some investors or potential buyers may see the value of a company differently than others does not necessarily mean that there is no market for the company or that it is overvalued. In fact differences of opinion as to value are what make for a market in the first place.

34 In fact exhibit 95(a) casts doubt on Dr Schoenwald's second assumption as well. Dr Schoenwald justified his use of NROI as opposed to net cash flow on the grounds that NROI is a "generous" estimate of net cash flow. However at least for the years from 1980 to 1984 the years that Dr Schoenwald averaged for his 1985 income estimate net cash flow was greater than NROI for UP despite a negative net cash flow for 1980.

35 Even Dr Ifflander conceded that no matter how one compares projections with implied growth rates the D & RG was not expected to achieve even expansionary growth for 1984. So the assumption that  $r$  is no greater than  $k$  may have been true for the D & RG for 1984.

36 The plaintiffs suggest that the stock market may not be the best indicator of a railroad's



Assuming for the moment that Dr Schoenwald's conclusion as to historical facts is correct, that does not necessarily mean that his model correctly values the railroad. Looking at history, the willing seller may conclude that  $r$  is no greater than  $k$ . In deed, that may be why he wants to sell—because he cannot earn even his cost of capital. Nevertheless, regardless of  $r$  performance, it seems somewhat counterintuitive to suggest that in valuing a prospective investment willing buyers assume that they will not be able to earn a return at least equal to their cost of capital. Otherwise, one would think that they would look elsewhere to invest their money. Since the elusive true market value depends on both a willing buyer and a willing seller, the assumption that  $r$  is no greater than  $k$  may at best be half true, and, as Justice Frankfurter used to observe, a half truth is often a whole lie. See P. Elman, *Response*, 100 Harv L. Rev. 1949, 1952 (1987).

The court does not have to decide the reasonableness of the assumption, however, because the Schoenwald valuation method suffers from a more serious defect. There is no evidence that those in the business of valuing railroads for buyers and sellers actually use Dr Schoenwald's expansion model.<sup>38</sup> For example, when the board of directors of Rio Grande Industries (the holding company for D & RG) was deciding whether to accept Mr. Anschutz's offer to buy the company, it did not ask Dr Schoenwald to value the railroad. Rather, it commissioned a study by the investment

firm of Morgan Stanley, and Morgan Stanley did not value the railroad using Dr Schoenwald's expansion model. See Tr. at 1241, *defts' ex 155*. Its study used a discounted cash flow model similar to the method Messieurs Goodwin and Ifflander used in the 1984 appraisal of UP and also, as a check, applied various price multiples in a fashion similar to the state's appraisal and, incidentally, with results closer to the state's appraisal than to Dr Schoenwald's.<sup>39</sup>

On the other hand, it is undisputed that the state's methods are used by other professional appraisers and by market analysts. See, e.g., Tr. at 1682 (testimony of Mr. Voytko that P/E ratios are widely used by security analysts). Dr Schoenwald himself used price-earnings multiples to value the nonrailroad subsidiaries of the railroad holding companies in his stock and debt approach.<sup>40</sup> The state's direct capitalization approach may not be the preferred approach of the more sophisticated analysts, but at least analysts generally use price earnings multiples as a check on their yield capitalization results. Moreover, the ICC used a direct capitalization method in analyzing the offers of competing railroads<sup>41</sup> to buy the core lines of the Milwaukee Railroad and concluded that, of the three methods it used to evaluate the offers, "the price-to-earnings (P/E) ratio is a more reliable basis to make an evaluation, since it is less susceptible to outside influences or to speculative considerations." *Defts' ex 17*

\$389 million for the railroad's stock and debt. See common ex. 41 at S-1. To the stock and debt value must be added another \$6 million or so for operating leases to arrive at a total stock and debt indicator of value. In comparison Dr Schoenwald's total value for the railroad for the same assessment year was less than \$280 million.

<sup>40</sup> If the use of price earnings multiples in fact overvalues properties as Dr Schoenwald suggested in critiquing the appraisals of Messieurs Goodwin, Ifflander and Prawitt then Dr Schoenwald overvalued the holding companies, non-railroad subsidiaries and under his stock and debt methodology any overvaluation of the nonrailroad subsidiaries attributable to Dr Schoenwald's use of price earnings ratios would produce a commensurate undervaluation of the railroad. See *infra* p. 561.

<sup>38</sup> Mr. Fitzgerald of First Boston Corporation testified that in his yield capitalization method he uses a method similar to Dr Schoenwald's to arrive at a terminal value that is a value for the cash flows after the last year of his analysis. However, his basic analysis is the traditional yield capitalization approach, similar to Messieurs Goodwin and Ifflander's, by which he forecasts future cash flows for a period of time—in his case, over a ten year period. The terminal value in such an approach is only a small fraction of the total value.

<sup>39</sup> Morgan Stanley concluded that the railroad's equity value was roughly \$280 million. See *defts' ex 155* at ex. 1 p. 1. When the debt value is added to the equity value, the value becomes approximately \$360 million. See Tr. at 1176 compared to the state's estimated value of about

at 54, see also Tr. at 560-63. The ICC also used a direct capitalization approach when it decided the question of compensation for the trackage rights the D & RG was awarded as a result of the Union Pacific—Missouri Pacific merger. See *defts' ex 18* at 4. Perhaps most telling, the D & RG itself argued that the interest rental portion of the compensation should be calculated using a price earnings multiple, *id.* at 7, and UP agreed, *id.* at 8. Thus, the plaintiffs themselves have used a form of direct capitalization to determine value.

The plaintiffs argue that the state's appraisals are flawed because the state looks to the stock market for both its income and its stock and debt approaches. Because both approaches depend on the same source, they argue, they cannot produce independent and hence accurate results. Dr Schoenwald's income approach has an advantage over the state's, they suggest, in that it does not depend on market data for its conclusions. Thus, it provides an independent indicator to compare to the stock and debt indicator of value and is therefore the better method.

Of course, nothing in the 4R Act requires a state to use three separate and independent indicators of value. Dr Schoenwald himself uses at most only two indicators of value. See *supra* note 10.<sup>41</sup> The fact that the state looks to the stock market for the data for two of its approaches does not mean that its appraisals are flawed. Rather, it merely reflects the state's underlying assumption, namely, that the stock market is the best indicator of a company's value. Given all the evidence, the court cannot say that that assumption is any less reasonable than Dr Schoenwald's—namely, that  $r$  equals  $k$ .<sup>42</sup> Consequently, the court believes that the state's income indicator of value is a proper estimate of true market value.

While the choice between the parties' income approaches may present a choice between equally reasonable alternatives, the court believes that the defendants'

stock and debt approach is more reasonable than Dr Schoenwald's and arrives at a more accurate indicator of value. Dr Schoenwald assumes that the value of the railroad is whatever is left over after valuing the other components of the holding company. While that assumption is theoretically sound, as the state's experts pointed out, it makes the railroad bear the burden of any measurement errors. A number of small errors valuing the other properties would create a large error in the value of the railroad. For example, Dr Ifflander suggested that Dr Schoenwald may have overvalued Champlin Petroleum, a subsidiary of Union Pacific Corporation, the holding company, by as much as a billion dollars. Using the Schoenwald method, that error alone would translate into a billion dollar error in the railroad's value. The plaintiffs' own witness, Mr. Fitzgerald, called Dr Schoenwald's stock and debt method "a discredited activity which I place very little judgment on." Tr. at 2104, one which could result in "a cascade of capricious error" in the railroad's value, *id.* at 2106. The court believes that the state's allocation method arrives at a more accurate figure by allocating not only the stock price but also the risk of error.

In short the court concludes that the plaintiffs have not shown that Dr Schoenwald's methodology produces a better result. There is thus no reason to disturb the state's choice of method.

### C. The State's Valuation

[41] Ordinarily, the court's conclusion in part I-B that the state's valuation methods are reasonable and acceptable would end the dispute. The railroads could appeal any alleged error in applying the state's methods to the state tax commission. Once the tax commission (and the state courts if necessary) had corrected any errors in applying the method, this court could then simply plug the state's final valuation figure into the equation and de-

<sup>41</sup> In fact for his 1985 appraisal of D & RG Dr Schoenwald used only one indicator. See appendix A p. 67 n. 2.

<sup>42</sup> The state's assumption was even supported by one of the plaintiffs' own witnesses. See Tr. at 1717 (testimony of James Voytko).

termine whether the 4R Act had been violated. However, because the state in this case relies on appraisals that were newly prepared for this proceeding, the plaintiffs have not had a chance to challenge the application of the state's chosen methods before the tax commission. Therefore, the court will consider the plaintiffs' major claims of error in the state's application of its methods.

The plaintiffs first claim the state erred in applying its direct capitalization method under its income approach. The state's direct capitalization rates or earnings price ratios are not simply the E/Ps for the subject companies but are composites for the railroad industry derived from comparing the E/Ps and other financial data of a number of railroads. Everyone agrees that, to be useful, the companies compared must in fact be comparable to the subject railroad. The parties dispute which other railroads are truly comparable to UP and D & RG. The plaintiffs claim that there are no true comparables. That is just another way of arguing that the state should not have used a direct capitalization approach in valuing the railroads. For the reasons discussed in part I-B, the court concludes that the state's approach is acceptable. There may be no perfect comparable, but the evidence suggests that that fact does not prevent appraisers and other analysts from comparing railroads and valuing them based on their comparisons. The state's

approach has an advantage over Mr. Goodwin's and Dr. Ifflander's in that it at least tries to select the most comparable companies and eliminates the so-called outliers. The state has offered plausible reasons for its choice of comparables. Moreover, at least in the case of the UP for assessment year 1984, the state's choice coincides with those companies Mr. Voytko, the plaintiffs' witness, said he considered the most comparable. Compare Tr. at 1655-61 (Mr. Voytko's testimony), with common ex. 32 at S/2. In the ultimate analysis, the choice of comparables is a judgment call by the particular appraiser. This court cannot say that the railroads the state chose are not comparable or even that they are not the most comparable. It therefore declines to disturb the state's choices.

The plaintiffs next argue that the state erred by applying its E/P ratios to the wrong earnings figure. It claims that the state has created a mismatch by using a current E/P and applying it to projected earnings. The court concludes that the mismatch, if any, is insignificant.

The state bases its E/Ps on *Value Line's* so-called trailing P/Es, which in turn relate a current price to the last twelve months' earnings. See Tr. at 956, defa' ex. 28 at B/2. Thus, trailing P/Es are based on historical data.<sup>43</sup> The state applies this trailing ratio to an earnings figure that, although a projection, is also based on historical data.<sup>44</sup> Although the

enable the appraiser to look at history in terms of constant dollars. It may be as Dr. Schoenwald suggests that any adjustment for inflation is improper since the question is not buying power but actual normalized earnings. The court cannot say from the evidence, however, that inflation has no positive effect on rail transportation property and any error in the state's adjustment is partially offset by its weighting process in which revenues from the oldest years (those most influenced by inflation) receive the least weight. Had the state based its projections on a straight five year average as Dr. Schoenwald did instead of a weighted five year average adjusted for inflation its income figures would have been higher resulting in higher overall values. Thus any error in the state's use of an inflation factor is more than offset by its allegedly improper use of a weighted average.

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two historical periods do not correspond completely, because the state weights the earnings figures to arrive at its five-year average, the earnings for the last twelve months receive the greatest weight. Because those earnings relate directly to the trailing ratio, there is a match, though perhaps an imperfect match. The price is at least roughly matched to the earnings that produced it.

The state's approach tries to establish a relationship between price and earnings based on so-called normalized data, that is, data that reflects historical trends, at the same time minimizing the effect of anomalous data. It does this by a five year weighted average of earnings and by using an E/P derived from the industry and not merely from the subject railroad. It is, in effect, not the E/P for any one railroad but for a hypothetical, composite railroad. The court does not believe that Dr. Schoenwald's proposed alternatives would necessarily produce a better result. For example, to increase the E/P, as Dr. Schoenwald does, see, e.g., pliffs' ex. 475, based on a projected "increase" in earnings (which is really just a normalized earning figure) in effect begs the question by assuming what effect such an increase in earnings will have on price (namely, none). Similarly, to apply the trailing E/P to actual earnings for the year, as Dr. Schoenwald also does, see, e.g., pliffs' ex. 476, does not establish the relationship between price and projected income and may produce a skewed result if the earnings for that particular year were atypical for any reason, for example, because of unusual capital expenditures undertaken during the year.<sup>45</sup>

The plaintiffs next argue that the state appraisals err in their treatment of intra-

company debt in the stock and debt approach because the stock market does not look at intracompany debt in valuing a company. However, Mr. Prawitt testified that he prepared his stock and debt analysis based on the railroad's balance sheet and that debts among the railroad and affiliated entities in effect offset each other on the balance sheet. The court believes there was nothing improper about the state's treatment of intracompany debt.

The court has considered the plaintiffs' other criticisms of the state appraisals and has rejected them.<sup>46</sup> In short, the court accepts the state appraisals prepared by Mr. Prawitt as the best evidence of the plaintiffs' true market value as of the assessment dates.

#### D. Conclusions

The court holds that, for purposes of applying the 4R Act to the state's assessments of the plaintiff railroads, the true market value of the plaintiffs for the assessment years in question was as follows:

	1984	1985
UP	\$3.7 billion	\$3.4 billion
D & RG	\$320 million	\$320 million

The court finds that the portion of the railroads' true market value that should be allocated to Utah for the assessment years is as follows:<sup>47</sup>

	1984	1985
UP	4.99%	4.97%
D & RG	28.39%	26.81%

Thus, the true market value of the railroads' rail transportation property in Utah for the assessment years was:

	1984	1985
UP	\$184,630,000	\$168,980,000
D & RG	\$90,848,000	\$85,760,000

The court's conclusion is not meant in any way to preclude the plaintiffs from challenging the state's application of its chosen methodology for other assessment years through the appropriate state procedures.

The parties basically agree on these percentages. The figures are conveniently summarized in Plaintiffs' Supplemental and Amended Proposed Findings of Fact and Conclusions of Law at ¶¶ 13, 15, 19 (UP for 1984), 20, 22, 25 (UP for 1985), 27, 29, 32 (D & RG for 1984), 33, 35, 38 (D & RG for 1985).

<sup>43</sup> Messieurs Goodwin and Ifflander on the other hand use *Value Line's* "straddle" P/Es. The straddle P/E is based on the last one or two quarters' actual earnings and two or three quarters' projected earnings. The court believes that the use of trailing ratios produces a more objective and hence better result.

<sup>44</sup> The state's projections, like Dr. Schoenwald's are backwards looking in that they project future income based on past performance. The primary difference between the two is that the state weights previous years' NROI so as to put greater emphasis on more recent history.

The state also adjusts previous years' figures for inflation so that all the figures are in current dollars. The plaintiffs argue that such an adjustment is improper absent any evidence that inflation actually benefits rail assets and they claim it does not. However, the state's inflation adjustment is not meant to indicate the effect of inflation on the assets but merely to

<sup>45</sup> The plaintiffs might argue that if the earnings for the year were atypical the price earnings ratio should also be atypical and applying the actual P/E to the actual earnings will still produce a correct result. However, the E/P that the state applies is not the E/P for any particular company but supposedly an E/P for the industry. An atypical year for one railroad may not have much effect on the industry E/P and applying that E/P to abnormal earnings may produce an abnormal result.

The assessed value of the plaintiffs' rail transportation property in Utah was as follows:

	1984	1985
UP	\$35,928,000	\$39,760,000
D & RG	\$19,305,200	\$20,048,565

Thus, the ratio of assessed value to true market value was as follows:

	1984	1985
UP	19.46%	23.53%
D & RG	21.25%	23.38%

### III

#### THE PLAINTIFFS' EQUALIZATION CLAIMS

[5] The court's conclusions in part II-D of this opinion give the left half of the equation required by the 4R Act, namely, the ratio of assessed value to true market value of rail transportation property within the state. See *supra* note 3. The parties have stipulated to the right half of the equation, namely, the ratio of assessed value to true market value for all other commercial and industrial property in the state. The stipulation presents the court with two scenarios, depending on whether or not the

48. See pliffs' exs. 391 at 4, 392 at 2, 394 at 2 and 396 at 2.

49. The stipulation also resolves by agreement the question of what constitutes "all other commercial and industrial property" in Utah for purposes of the 4R Act. The stipulation specifies four categories of other commercial and industrial properties—certain mining and oil and gas properties, utilities, locally assessed personal property and locally assessed real property. The parties have agreed on the true market value and assessment rates for three of the four categories. See pliffs' exs. 496 & 497. The only dispute is over the true market value and assessment rate for locally assessed real property, and the only disagreement between the parties there is whether or not the court should apply the 20 percent discount statute in determining true market value.

50. A revised version of the statute was enacted in 1987 and is codified at section 59-2-304 of the Utah Code.

The statute further required the State Tax Commission to "develop and implement comparable sales or cost appraisal methods in valuing taxable property" that exclude the various fees, services, closing costs and other expenses related to the sales transaction and other intangible values. Utah Code Ann. § 59-54.5(2) (Supp. 1986). The timetable for the State Tax Commission to develop and implement such methods has been pushed back to January 1, 1990. See

court upholds a state statutory scheme that discounts the assessed value of real property in the state an additional twenty percent."

Section 59-5-4.5 of the Utah Code stated: "When the county assessor uses the comparable sales or cost appraisal method in valuing taxable property for assessment purposes, the assessor is required to recognize that various fees, services, closing costs, and other expenses related to the transaction lessen the actual amount that may be received in the transaction. The county assessor shall, therefore, take 80% of the value based on comparable sales or cost appraisal of the property as its reasonable fair cash value for purposes of assessment."

Utah Code Ann. § 59-5-4.5(1) (Supp. 1986).<sup>48</sup>

Two county assessors testified that local assessments of commercial and industrial real property are generally based on the cost appraisal method. See Tr. at 2344, 2351, 2374.<sup>49</sup> The defendants therefore ar-

gued that, for purposes of the 4R Act, the true market value of locally assessed commercial and industrial property should be 80 percent of the appraised value, as required by the statute.

The state's intent in passing the discount statute appears to have been to tax real property owners only on what they might expect to receive from a sale of their property and not on a hypothetical gross sales price.<sup>50</sup> That intent may be admirable. Moreover, the statute may pass constitutional muster.<sup>51</sup> Nevertheless, the court concludes that applying the statute to determine assessment ratios under the 4R Act discriminates against the railroads by artificially increasing the ratio for other commercial and industrial property.

The 4R Act requires a comparison between two ratios, and, as all the experts in this case agreed, for comparisons to be valid the items compared must be comparable. That which is compared under the 4R Act is "true market value." Although the statute does not define "true market value," the experts all basically agreed that true market value (or its various synonyms) is the price that a willing and knowledgeable seller and a willing and knowledgeable buyer would agree on in an arm's length transaction. See, e.g., Tr. at 12 (Dr.

id. § 59-2-304(2) (Supp. 1986). County assessors are required to use the methods the State Tax Commission develops for assessments beginning January 1, 1990. *Id.*

51. The assessors also testified that of the three approaches commonly used, namely, the cost, income and market comparable approaches to value, the cost approach generally results in the highest values. See Tr. at 2343-44, 2374. The intervenors suggest that the discount statute simply brings the assessed values of locally assessed real property more in line with the values of state assessed properties, which give more weight to the income approach—in other words, that one should discount cost indicators of value by 20 percent to get a value that is comparable to values based on an income indicator. A similar argument was rejected in *Louisville & Nashville Railroad Company v. Louisiana Tax Commission*, 498 F. Supp. 418, 421 (M.D.La. 1980). This court similarly finds the argument unpersuasive. It also ignores the evidence. The evidence showed that Mr. Prawitt gives some weight to the cost indicator of value for the railroads. Moreover, Mr. Bexell, the Weber County Assessor, testified that the cost approach for real property results in values about 20 percent less than those determined under sales assessment ratio studies, the statutorily authorized method of valuing other commercial and industrial property under the 4R Act. See Pub. L. No. 94-210 § 306(2)(c), 90 Stat.

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at 55. Yet the state still reduces the values determined under the cost approach by 20 percent.

52. The legislative history of the statute suggests that the act may also have been meant to reduce the relative burden on locally assessed taxpayers that arose out of [a] statewide reappraisal program which had the effect of immediately injecting a high degree of inflation into residential values. *Rio Algom Corp. v. San Juan County*, 681 P.2d 184, 193 (Utah 1984). The legislature apparently felt that the reappraisal program placed an unfair burden on locally assessed properties because the formulae used to assess state assessed properties did not tend to factor the effects of inflation into the state assessed properties or if they did they did so at a much more modest and less abrupt pace. *Id.* The evidence in this case makes the legislature's assumptions suspect. Dr. Schoenwald testified that the state's appraisal methods do factor in the effects of inflation and if they do so at a much more modest pace it may be because inflation affects the value of rail assets less dramatically than it affects the value of real

Schoenwald's definition of fair market value). The fact that the seller might not net the sale price does not mean that that price is not true market value.<sup>54</sup>

The evidence in this case was that the figures arrived at using the comparable sales and cost appraisal methods of valuation—before applying any discount—are considered true market value. See, e.g., Tr. at 2302 (testimony of Max Arnold), 2361-62 (testimony of Steven C. Bexell), common ex. 11 (Utah State Tax Commission Assessment Sales Ratio Study for 1984) at 2 (referring to the undiscounted values as "fair market value").<sup>55</sup> In arriving at the railroads' true market value, the state relies in part on a cost appraisal method yet it does not reduce its final cost indicator of value by 20 percent. Similarly, its stock and debt approach is a form of comparable sales appraisal method, yet the state does not reduce its stock and debt indicator of value by 20 percent nor does it deduct so-called transaction costs, such as brokerage commissions, in arriving at its final stock and debt indicator of value. Thus, if the court is to compare true market value to true market value, it should compare values before any adjustments for transaction costs or other so-called intangibles are made.

property. In trying to adjust taxpayers' relative burdens, the legislature would do well to bear in mind Sir Hermann Black's warning: "Oh what a tangled web we weave when [first] we practice to relieve." Sayings of the Week, *Sydney Morning Herald*, July 6, 1985, quoted in *A Dictionary of Legal Quotations* 163 (S. James & C. Stebbings Comp. 1987).

53. In the *Rio Algom* case, 681 P.2d 184 (Utah 1984), the Utah Supreme Court held that section 59-5-4.5 did not violate article XIII of the Utah Constitution or the equal protection provisions of either the state or federal constitutions. See 681 P.2d at 194.

54. Indeed, the parties would generally consider the transaction costs associated with the sale in arriving at true market value.

55. The parties' stipulation itself indicates that the true market value of locally assessed real property is the value determined by the assessment sales ratio study before the 20 percent reduction is applied. See Settlement Stipulation § 13(3)(b)(v).



[6] In short, the court concludes that, for purposes of the 4R Act, the true market value of "all other commercial and industrial property" in the state of Utah must be determined before the 20 percent discount statute is applied. *Cf. Louisville & Nashville R.R. Co. v. Department of Revenue*, 736 F.2d 1495 (11th Cir.1984) (an across-the-board reduction in assessed values of commercial and industrial properties under a state statute authorizing reductions in values to reflect costs of sale constituted discrimination in violation of the 4R Act because it "hand[ed] non-selling local property owners a windfall ... that was not bestowed on railroads").<sup>56</sup> This does not mean that the state cannot continue to give the 20 percent discount to locally assessed real property. It simply means that, in determining whether the state's assessments of railroads discriminates against the railroads in violation of the 4R Act, the court must consider the value of locally assessed real property before the statutory discount is applied. The state may still be free to choose to tax real property on the basis of the net amount the property owner could expect to receive from a sale of his property. But that net amount is not "true market value" as that term is used by appraisers and in the 4R Act.

Based on the stipulation of the parties, the court finds that the ratio of assessed value to true market value for all other commercial and industrial property within the state for assessment year 1984 was 15.4 percent and for assessment year 1985 was 16.13 percent.

#### IV.

#### CONCLUSION

[7] Based on the court's conclusions in part II-D and part III of this opinion, it is clear that the state of Utah has discriminated against the plaintiff railroads in its

56. The Eleventh Circuit left open the question of whether the state would violate the 4R Act if, in determining the just value of commercial and industrial property it deducted the actual costs of sale for those properties that actually sold during the year.

tax assessments of the plaintiffs for the years 1984 and 1985 in that it has assessed them at a higher rate than it assessed all other commercial and industrial property within the state for the same period. However, the 4R Act only authorizes relief if the ratio of assessed value to true market value for rail transportation property exceeds the ratio for all other commercial and industrial property "by at least 5 per centum." Pub.L. No. 94-210 § 306(2)(c), 90 Stat. at 54. The court must therefore compare the various assessment ratios for each of the plaintiffs and for "all other commercial and industrial property" in the state for each assessment year to determine whether the plaintiffs are entitled to relief. The percentage by which UP and the D & RG were overvalued for each of the assessment years is as follows:

	1984	1985
UP	26%	46%
D & RG	38%	46%

Thus, the plaintiffs are entitled to relief under the 4R Act.<sup>57</sup>

The defendants are hereby ORDERED to assess the plaintiffs as follows: For assessment year 1984, the defendants are ORDERED to assess the plaintiffs based on an assessed value that is 15.4 percent of their true market value as determined by the court or stipulated to by the parties. For assessment year 1985, the defendants are ORDERED to assess the plaintiffs based on an assessed value that is 16.13 percent of their true market value as determined by the court or stipulated to by the parties. The defendants are hereby ENJOINED from collecting property taxes from the plaintiffs for assessment years 1984 and 1985 based on assessed values that bear a greater ratio to true market value than 15.4 percent and 16.13 percent respectively.

IT IS SO ORDERED.

57. The state concedes that, if UP and D & RG are entitled to equalization relief under the 4R Act, SP is entitled to relief as well.

#### Comparison of Appraisals<sup>1</sup>

UNION PACIFIC 1984			
	Schoenwald (ex. C-30)	State (ex. C-32)	Goodwin & Ifflander (ex. C-31)
<u>Cost Approach</u>			
Net book value	5,555,803	6,205,607	6,200,299
Obsolescence	(2,815,681)	(1,828,350)	(1,942,554)
Cost indicator	2,740,122	4,377,259	4,257,746
<u>Income Approach</u>			
Income estimate		320,000	356,910
Capitalization rate (direct cap)		9.77%	8.90%
Capitalized value of income		3,275,333	4,010,229
Construction in progress		81,972	
Capitalized value, operating leases		92,118	
Income indicator (direct cap)		3,449,423	4,010,229
Income estimate (NROI + net lease rentals)	338,643		N/A
Capitalization rate (yield cap)	15.40%		15.11%
Income indicator (yield cap)	2,198,981		4,577,513
<u>Stock and Debt Approach</u>			
Market value, R.R. stock		3,074,843	3,000,000
R.R. long-term debt		1,491,073	1,414,415
R.R. net current assets & liabilities		(115,622)	
R.R. value		4,450,294	4,414,415
Allocation factor (applied only to stock value by G & I)		83.98%	89.39%
Market value, R.R. operating property		3,737,350	4,096,115
Leased equipment		106,017	34,246
Stock and debt indicator		3,843,367	4,130,361
Total value, parent's stock & debt	10,549,892		
Total value, non-railroad & non-operating property	(7,531,760)		
Stock and debt indicator	3,018,132		
<u>Correlated Values</u>			
Cost indicator	2,740,122	4,377,259	4,257,746
Income indicator (direct cap)		3,449,423	4,010,229
Income indicator (yield cap)	2,198,981		4,577,513
Stock and debt indicator	3,018,132	3,843,367	4,130,361
Correlated market value	2,608,557	3,700,000	4,100,000

1. All dollars are expressed in thousands. Final indicators may vary slightly from column totals due to rounding.

## APPENDIX A—Continued

UNION PACIFIC 1985			
	Schoenwald (ex. C-33)	State (ex. C-35)	Goodwin & Ifflander (ex. C-34)
<b>Cost Approach</b>			
Net book value	5,671,608	6,475,611	6,467,163
Obsolescence	(3,187,444)	(2,076,376)	(2,661,884)
Cost indicator	2,484,164	4,399,234	3,805,279
<b>Income Approach</b>			
Income estimate		310,000	366,887
Capitalization rate (direct cap)		11.98%	10.30%
Capitalized value of income		2,587,646	3,562,010
Construction in progress		85,752	
Capitalized value, operating leases		87,113	
Income indicator (direct cap)		2,760,511	3,562,010
Income estimate (NROI + net lease rentals)	310,815		
Capitalization rate (yield cap)	16.00%		
Income indicator (yield cap)	1,942,594		
<b>Stock and Debt Approach</b>			
Market value, R.R. stock		2,674,843	2,600,000
R.R. long-term debt		1,427,374	1,322,267
R.R. net current assets & liabilities		92,464	
R.R. value		4,134,671	3,922,267
Allocation factor (applied only to stock value by G & I)		81.77%	86.69%
Market value, R.R. operating property		3,380,866	3,567,207
Leased equipment		93,256	28,640
Stock and debt indicator		3,474,122	3,604,847
Total value, parent's stock & debt	8,881,003		
Total value, non-railroad & non-operating property	(6,290,824)		
Stock and debt indicator	2,590,179		
<b>Correlated Values</b>			
Cost indicator	2,484,164	4,399,234	3,805,279
Income indicator (direct cap)		2,760,511	3,562,011
Income indicator (yield cap)	1,942,594		
Stock and debt indicator	2,590,179	3,474,122	3,604,847
Correlated market value	2,266,387	3,400,000	3,600,000
DENVER & RIO GRANDE 1984			
	Schoenwald (ex. C-36)	State (ex. C-38)	Goodwin & Ifflander (ex. C-37)
<b>Cost Approach</b>			
Net book value	467,739	541,000	537,697
Obsolescence	(286,022)	(197,962)	(207,282)
Cost indicator	181,717	343,039	330,415
<b>Income Approach</b>			
Income estimate		23,000	25,851
Capitalization rate (direct cap)		8.28%	8.30%
Capitalized value of income		277,778	311,453

## APPENDIX A—Continued

	Schoenwald (ex. C-36)	State (ex. C-38)	Goodwin & Ifflander (ex. C-37)
Construction in progress		8,163	
Capitalized value, operating leases		5,954	
Income indicator (direct cap)		291,894	311,453
Income estimate (NROI + net lease rentals)	25,183		
Capitalization rate (yield cap)	15.40%		
Income indicator (yield cap)	163,526		
<b>Stock and Debt Approach</b>			
Market value, R.R. stock		350,000	300,000
R.R. long-term debt		87,657	75,757
R.R. net current assets & liabilities		(5,025)	
R.R. value		432,632	375,757
Allocation factor (applied only to stock value by G & I)		81.87%	89.43%
Market value, R.R. operating property		354,187	344,047
Leased equipment		8,946	6,771
Stock and debt indicator		363,133	350,817
Total value, parent's stock & debt	677,366		
Total value, non-railroad & non-operating property	(331,531)		
Stock and debt indicator	345,835		
<b>Correlated Values</b>			
Cost indicator	181,717	343,039	330,415
Income indicator (direct cap)		291,894	311,453
Income indicator (yield cap)	163,526		
Stock and debt indicator	345,835	363,133	350,817
Correlated market value	254,681	320,000	330,000

## DENVER &amp; RIO GRANDE

1985

	Schoenwald (ex. C-39)	State (ex. C-41)	Goodwin & Ifflander (ex. C-40)
<b>Cost Approach</b>			
Net book value		598,509	585,883
Obsolescence		(159,082)	(198,380)
Cost indicator		439,428	387,503
<b>Income Approach</b>			
Income estimate		27,000	30,727
Capitalization rate (direct cap)		11.00%	10.10%
Capitalized value of income		245,455	304,232
Construction in progress		1,582	
Capitalized value, operating leases		5,038	
Income indicator (direct cap)		252,075	304,232
Income estimate (NROI + net lease rentals)			
Capitalization rate (yield cap)			
Income indicator (yield cap)			
<b>Stock and Debt Approach</b>			
Market value, R.R. stock		350,000	275,000
R.R. long-term debt		79,394	82,405



## APPENDIX A—Continued

	Schoenwald (ex C-39)	State (ex C-41)	Goodwin & Ifflander (ex C-40)
R R net current assets & liabilities		13,999	
R R value		443,393	357,405
Allocation factor (applied only to stock value by G & I)		87 67%	93 22%
Market value, R R operating property		388,729	338,760
Leased equipment		6,181	8,132
Stock and debt indicator		394,910	346,892
Total value, parent's stock & debt	491,129		
Total value, non railroad & non-operating property	(212,393)		
Stock and debt indicator	278,736		
<u>Correlated Values</u>			
Cost indicator		439,428	387,503
Income indicator (direct cap)		252,075	304,232
Income indicator (yield cap)			
Stock and debt indicator	278,736	394,910	346,892
Correlated market value	278,736 <sup>2</sup>	320,000	325,000

## APPENDIX B

1955-1984  
SCHOENWALD'S 5 YEAR VALUE FROM 1950-1954 FOR 1955 AY  
(ADJUSTED DISCOUNT RATE)  
(000)

1950-1954 5 YR NROI AVG. -					334 193			
DISCOUNT RATE					5.88%			
PRESENT VALUE					\$581 514			
YEAR	NROI	DEPRECIATION EXPENSE	DEFERRED TAXES	CAPITAL EXPENDITURES	NET CASH FLOW	DISCOUNT RATE	PV DISCOUNT RATE FACTOR	PRESENT VALUE
1955	43 739	25 007	0	81 914	6 832	5.88%	0.9445	6 458
1956	42 137	25 898	0	47 812	20 213	5.91%	0.8918	18 028
1957	38 818	26 847	0	60 239	5 428	6.20%	0.8397	4 554
1958	43 461	29 424	0	54 310	17 574	6.91%	0.7854	18 803
1959	36 957	32 746	0	70 993	(390)	6.88%	0.7842	(287)
1960	32 385	35 536	0	56 429	12 042	7.25%	0.6864	8 266
1961	31 914	38 032	0	49 698	19 848	7.40%	0.6391	12 749
1962	46 775	39 103	0	64 404	21 474	7.84%	0.5954	12 768
1963	51 112	41 428	0	75 803	16 737	7.35%	0.5646	9 232
1964	53 468	42 938	0	107 876	(11 470)	7.16%	0.5175	(5 936)
1965	66 944	45 942	0	121 323	(8 437)	7.20%	0.4827	(4 078)
1966	86 256	50 806	0	207 929	(70 867)	7.40%	0.4494	(31 848)
1967	81 458	54 572	0	147 546	(11 516)	7.99%	0.4161	(4 792)
1968	80 219	54 962	0	82 087	53 114	8.45%	0.3837	20 880
1969	81 563	56 828	0	144 169	(6 788)	9.17%	0.3516	(2 386)
1970	114 416	59 506	0	163 897	10 225	10.01%	0.3195	8 267
1971	108 234	61 801	0	147 239	22 296	12.57%	0.2838	6 328
1972	142 085	63 290	0	116 483	78 802	11.61%	0.2543	20 065
1973	151 342	65 633	0	137 610	79 565	10.95%	0.2292	18 298
1974	124 691	68 179	30 143	197 844	24 369	11.56%	0.2055	5 008
1975	112 872	73 848	31 758	205 527	12 941	12.96%	0.1819	2 354
1976	135 740	78 019	15 719	179 948	43 620	12.57%	0.1616	8 019

2 Dr. Schoenwald's appraisal of D & RG for assessment year 1985 is based solely on his analysis of the purchase of Rio Grande Indus-

tries, Inc. by the Anschutz Corporation in the fall of 1984

## SANDLIN v. IRON WORKERS DIST COUNCIL PENSION PLAN

Cite as 716 F.Supp. 571 (N.D.Ala. 1988)

## APPENDIX B—Continued

YEAR	NROI	DEPRECIATION EXPENSE	DEFERRED TAXES	CAPITAL EXPENDITURES	NET CASH FLOW	DISCOUNT RATE	PV DISCOUNT RATE FACTOR	PRESENT VALUE
1977	149 764	82 891	39 697	203 837	68 505	11.96%	0.1444	9 892
1978	179 842	86 441	16 315	250 076	32 522	11.68%	0.1294	4 206
1979	190 818	93 698	42 980	308 504	18 872	12.58%	0.1149	2 168
1980	214 851	105 279	44 920	379 586	(15 036)	15.11%	0.0990	(1 501)
1981	214 407	109 989	118 790	186 779	306 407	17.50%	0.0849	26 014
1982	127 783	110 143	9 513	102 851	144 528	18.25%	0.0710	10 877
1983	131 956	109 343	68 538	61 118	248 719	16.50%	0.0616	15 321
1984	118 168	104 724	30 128	112 088	135 982	15.40%	0.0584	7 281
1985						16.00%		
<hr/>								
5 YEAR NROI AVERAGE 1980-1984 =				\$160 528	DIVIDED BY	16.00% = \$1 002 019	0.0584	58 508
<hr/>								
TOTAL MARKET VALUE OF NET CASH FLOW FROM 1955-1984 PLUS OUT YEAR INTO PERPETUITY								\$247 504
<hr/>								
SCHOENWALD 5 YR NROI AVG. 1950-1954 =				\$34 193	DIVIDED BY	5.88% = \$581 514	1	\$581 514
<hr/>								
SCHOENWALD OVER VALUATION (UNDER VALUATION)								\$234 010



Eugene SANDLIN, Plaintiff,

v

IRON WORKERS DISTRICT COUNCIL  
OF TENNESSEE VALLEY AND VI-  
CINITY PENSION PLAN, Defendant.

Civ. A. No. 88-AR-5135-NW.

United States District Court,  
N D Alabama,  
Northwestern Division

Dec 15, 1988

Pensioner sued the administrator of an ERISA pension fund for fund's alleged failure to respond reasonably to pensioner's request for information. The District Court, Acker, J., held that the fund's 402-day failure to supply information warranted a penalty of \$15,000.

So ordered

## Pensions ¶87

ERISA administrator's refusal to supply information requested by pensioner whose benefits were cut off warranted penalty of \$15,000 for 402-day failure to an-

swer, trustees and their agents deliberately and intentionally withheld information from pensioner, understandably causing him frustration and distress, if not ultimate monetary loss. Employee Retirement Income Security Act of 1974, § 502(c), 29 U.S.C.A. § 1132(c).

John B. Baugh, Gonce, Young & Westbrook, Florence, Ala., for plaintiff

Norman J. Slawsky, Jacobs and Langford, P.A., Atlanta, Ga., pro hac vice, and Thomas N. Crawford, Jr., Cooper, Mitch, Crawford, Kuykendall & Whitley, Birmingham, Ala., for defendant

## MEMORANDUM OPINION

ACKER, District Judge

The court tried the above-entitled cause without a jury in Florence, Alabama, on November 15, 1988. Plaintiff, Eugene Sandlin, framed his complaint under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001, *et seq.*, against the Ironworkers District Council of Tennessee Valley and Vicinity Pension Plan, an ERISA governed pension plan as to which Sandlin was and is a pensioner. Sandlin sought both pension benefits which he

## Tab F

**RIO ALGOM CORPORATION, a  
Delaware corporation, et al.,  
Plaintiffs and Appellants,**

**v.**

**SAN JUAN COUNTY, et al., Defendants  
and Respondents.**

No. 18782.

Supreme Court of Utah.

March 13, 1984.

Owners of state-assessed properties challenged tax statutes as unlawfully increasing their ad valorem property taxes by requiring them to pay greater taxes to compensate for reduced taxes paid by owners of county-assessed properties. The Seventh District Court, San Juan County, Boyd Bunnell, J., ruled against taxpayers on their motion for partial summary judgment and held statute constitutional, and taxpayers appealed. The Supreme Court, Stewart, J., held that: (1) statute reducing by 20 percent the value of county-assessed property appraised by comparable sales or costs methods was not violative of constitutional tax uniformity requirement as requiring owners of state-assessed properties to pay greater taxes to compensate for reduced taxes paid by owners of county-assessed properties in absence of evidence that state properties were assessed at market value or that they bore a tax burden greater than their pro rata share of property taxes or that deduction of transaction costs from comparable sales of figures or estimates of cost defeated constitutional objective of establishing a valuation that was fair and equitable in comparison with and commensurate with valuation of other kinds of property, and (2) statute which rolled back the value of county-assessed real property to reach 1978 levels produced valuations that were not based on market value and, as such, was violative of constitutional tax uniformity requirement.

Affirmed in part, reversed in part and remanded.

Howe, J., concurred and filed opinion.

Hall, C.J., concurred in part and dissented in part filed opinion.

#### 1. Taxation $\S$ 49

Constitutional provisions requiring that all tangible property "be taxed in proportion to its value" and that property be valued "according to its value in money" must be construed as requiring that the valuation for assessment and taxation be, as near as reasonably practicable, a specific cash value for which the property value would sell in the open market. U.C.A.1953, 59-5-4.5 (Repealed).

#### 2. Constitutional Law $\S$ 48(1)

Acts of the legislature are presumed constitutional especially when dealing with economic matters based on factual assumptions.

#### 3. Constitutional Law $\S$ 48(1)

A party attacking the constitutionality of a statute must affirmatively demonstrate its unconstitutionality.

#### 4. Constitutional Law $\S$ 48(4)

Presumption of constitutionality applies with particular force to tax statute.

#### 5. Taxation $\S$ 40(8)

Because of the lack of a more precise common denominator than "market value" for use in achieving uniformity and in deference to the inherent difficulties in assessing value, in dealing with assessments of prices of property, constitutional requirement of tax uniformity must be construed as permitting a necessary latitude in defining "market value." Const. Art. 13,  $\S$  3.

#### 6. Taxation $\S$ 40(8)

Constitutional authority vested in the legislature to adopt means to achieve that degree of uniformity of valuation that is practicably attainable within the general confines of the term "market value" is intended to assure that the taxes that are levied in a given county will result in each property's being accountable for its pro rata share of the burden of local government. U.C.A.1953, 59-5-4.5 (Repealed).

Cite as 681 P.2d 184 (Utah 1984)

#### 7. Taxation $\S$ 40(8)

Statute reducing by 20 percent the value of county-assessed property appraised by comparable sales or costs methods was not violative of constitutional tax uniformity requirement as requiring owners of state-assessed properties to pay greater taxes to compensate for reduced taxes paid by owners of county-assessed properties in absence of evidence that state properties were assessed at market value or that they bore a tax burden greater than their pro rata share of property taxes or that deduction of transaction costs from comparable sales of figures or estimates of cost defeated constitutional objective of establishing a valuation that was fair and equitable in comparison with and commensurate with valuation of other kinds of property. U.C.A.1953, 59-5-109; Const. Art. 13,  $\S$  2, 3.

#### 8. Taxation $\S$ 40(8)

Since "market value" is not a term having a wholly fixed and precise meaning, it is reasonable and constitutionally permissible for the legislature to recognize that transaction costs can and do influence values computed on actual sales prices, as well as other valuation formulae, to provide that they may be taken into account in determining "market value." U.C.A.1953, 59-5-109; Const. Art. 13,  $\S$  2, 3.

See publication Words and Phrases for other judicial constructions and definitions.

#### 9. Taxation $\S$ 40(8)

When inflation has a significant and different effect on the value of properties, the legislature may readress the imbalances and inequities created. U.C.A.1953, 59-5-109; Const. Art. 13,  $\S$  2, 3.

#### 10. Taxation $\S$ 42(1)

The legislature may not establish formal classifications of property that result in nonuniform or disproportionate tax burdens, but it may seek to enforce the constitutional uniformity requirement by attempting to equalize the tax burden borne by those taxpayers who pay a greater tax in proportion to the value of their property than others. U.C.A.1953, 59-5-109; Const. Art. 13,  $\S$  2, 3.

#### 11. Constitutional Law $\S$ 228.5

##### Taxation $\S$ 42(1)

Equal protection provisions of the Federal and State Constitutions accord particularly wide latitude to legislative classifications in tax statute. Const. Art. 1,  $\S$  2; U.S.C.A. Const.Amend. 14.

#### 12. Constitutional Law $\S$ 229(3)

##### Taxation $\S$ 40(8)

Statute reducing by 20 percent the value of county-assessed property appraised by comparable sales or costs methods is not violative of the equal protection provisions under the State and Federal Constitutions as requiring owners of state-assessed property to pay greater taxes to compensate for reduced taxes paid by owners of county-assessed property. U.C.A.1953, 59-5-4.5(Repealed); Const. Art. 1,  $\S$  2; U.S.C.A. Const.Amend. 14.

#### 13. Taxation $\S$ 40(8)

An ad valorem tax system must be based on periodic reassessments that take into consideration the fluctuating factors that affect value. Const. Art. 13,  $\S$  3.

#### 14. Taxation $\S$ 40(8)

An indefinite, partial freeze on the evaluation of some properties in the state is inherently inconsistent with the basic concept of an ad valorem tax system. Const. Art. 13,  $\S$  3.

#### 15. Constitutional Law $\S$ 5

If the Constitution is to be changed for some inequity, the people must make that change by constitutional amendment.

#### 16. Taxation $\S$ 49

Statute which rolled back the value of county-assessed real property to reach 1978 levels produced valuations that were not based on market value and, as such, was violative of constitutional tax uniformity requirement. U.C.A.1953, 59-5-109; Const. Art. 13,  $\S$  2, 3.

#### 17. Courts $\S$ 100(1)

Decision determining that the statute which rolled back the value of all county-assessed real property to its 1978 level was

violative of the constitutional tax uniformity requirement was prospective and effective only from and after January 1, 1984, but as to the six taxpayers who were parties to the appeal, it was retroactive for the year for which the suit for refund was brought. UCA 1953, § 59-5-109; Const. Art. 13, §§ 2, 3.

#### 18. Taxation — 543(7)

Owners of state assessed property seeking to recover an alleged overpayment of taxes under protest on ground that statute declared unconstitutional caused a shift in tax burden to their properties must demonstrate that county assessed properties were appraised at less than their 1981 true values, and, in addition, must establish the true value of their own properties by independent evidence, and the court must give due effect to the same economic factors as the formulae used to value the county assessed properties. UCA 1953, § 59-5-109.

#### 19. Taxation — 485(1)

Although there usually is a presumption that property assessed by a state or county assessor has been appraised at full value, the presumption applies only when a taxpayer challenges the valuation of his own property and not when he challenges the appraised value of another's property. UCA 1953, § 59-5-109.

#### 20. Taxation — 543(7, 8)

If the taxpayers demonstrated that the county-assessed properties were appraised at less than their 1981 true values and established the true value of their state-assessed properties by independent evidence, the taxpayers could recover the difference between the amount of taxes they paid and the amount they would have paid had the statute not been in effect, and if the taxpayers' state-assessed properties were appraised at less than full value, the taxpayers would be entitled to what they would have paid had the statute not been in effect, less the amount they underpaid their taxes because the properties were underassessed. UCA 1953, § 59-5-109.

James B. Lee, James M. Elegante, Salt Lake City, for plaintiffs and appellants.

Bruce K. Halliday, Monticello, Bill Tomas Peters, Salt Lake City, for defendants and respondents.

#### STEWART, Justice

This is an action brought by plaintiffs Rio Algom Corporation, Utah Power and Light Company, Atlas Corporation, Energy Fuels Nuclear, Inc., Consolidated Oil and Gas, Inc., and Northwest Pipeline Corporation against San Juan County and various of its officials, the San Juan School District and various of its employees, and the State Tax Commission and its commissioners for a refund of a part of the property taxes the plaintiffs paid, over protest, to San Juan County for the year 1981.

The plaintiff taxpayers are owners of state-assessed properties located in San Juan County. On this appeal, they challenge the constitutionality of two statutes: (1) UCA, 1953, § 59-5-4.5 (Supp. 1981), which reduces by 20 percent the value of county-assessed property appraised by comparable sales or cost methods, and (2) UCA, 1953, § 59-5-109 (Supp. 1981), which rolls back the value of all county-assessed real property to its 1978 level. Plaintiffs contend that the reduction of the assessed value of county-assessed properties, but not state-assessed properties, has unlawfully increased their ad valorem property taxes by requiring them to pay greater taxes to compensate for the reduced taxes that owners of county-assessed properties pay. The plaintiffs' contention is that the two challenged statutory provisions violate, on their face, the tax uniformity and equal protection provisions of the Utah Constitution and the Equal Protection Clause of the Fourteenth Amendment.

#### AD VALOREM PROPERTY TAXES GENERALLY

UCA, 1953, § 59-5-4.5 (Supp. 1981) and § 59-5-109 (Supp. 1981) were enacted in

Cite as 681 P.2d 186 (Utah 1984)

1981, Laws of Utah 1981, ch. 231, § 1. Section 59-5-4.5 provides:

Assessor to recognize certain expenses in valuing property—percentage limitation. When the county assessor uses the comparable sales or cost appraisal method in valuing taxable property for assessment purposes, the assessor is required to recognize that various fees, services, closing costs, and other expenses related to the transaction lessen the actual amount that may be received in the transaction. The county assessor, shall, therefore, take 80% of the value based on comparable sales or cost appraisal of the property as its reasonable fair cash value for purposes of assessment.

Section 59-5-109 provides:

All locally assessed taxable real property shall be appraised at current fair market value and the value of such property rolled back to its January 1, 1978, level as such level is determined by the state tax commission.

In the trial court, the plaintiffs sued for a refund of that portion of their 1981 property taxes which they contend should have been paid by county-assessed property owners in San Juan County who were underassessed pursuant to the above statutes. On a motion for partial summary judgment, §§ 59-5-4.5 and 59-5-109 were attacked as being facially unconstitutional. Plaintiffs adduced no evidence of actual nonuniformity in the tax assessments of state-assessed properties as compared with county-assessed properties. Plaintiffs' argument was that county-assessed properties were not assessed at current market value, and therefore the assessments were unconstitutional as a matter of law. Defendants opposed the motion in part on the ground that the issues could not be adjudicated by summary judgment because of the existence of issues of fact. Defendants submitted evidence indicating that state-assessed properties were undervalued and that the statutes in question were intended by the Legislature to redress a substantial and discriminatory shift of property taxes from state-assessed properties to county-assessed properties. The trial court ruled against the plaintiffs on the motion and held the statutes constitutional. The court held that the statutes were enacted pursuant to the state's constitutional authority to classify property and to establish different methods for valuing different types of property.

The constitutional attack on §§ 59-5-4.5 and 59-5-109 focuses primarily on §§ 2 and 3 of Article XIII of the Utah Constitution. Section 2 of that article as it read in 1981 provided:

All tangible property in the state shall be taxed in proportion to its value, to be ascertained as provided by law. [Emphasis added.]

Section 3 of Article XIII provides:

The legislature shall provide by law a uniform and equal rate of assessment and taxation on all tangible property in the state, according to its value in money, and shall prescribe by law such regulations as shall secure a just valuation for taxation of such property so that every person and corporation shall pay a tax in proportion to the value of his, her, or its tangible property. [Emphasis added.]

Two other constitutional provisions also deal with the assessment of ad valorem property taxes and are pertinent to this case. Section 4 of Article XIII deals with the taxation of mines and mining claims.

In Section 2 of this Article. [Emphasis added to show alteration.]

Section 2 was simultaneously amended to allow the Legislature to exempt up to 45 percent of the fair market value of residential property. Article XIII, § 2(8).

The Legislature also repealed § 59-5-4.5 effective as of the same date the constitutional amendment became effective. Laws of Utah 1981, ch. 231, § 1.

1. In its 1982 budget session the Legislature passed a proposed constitutional amendment that was ratified by the voters in the November 1982 general election and became effective January 1, 1983. The amendment alters Article XIII, § 3 to read:

(1) The legislature shall provide by law a uniform and equal rate of assessment on all tangible property in the state according to its value in money, except as otherwise provided.

All metalliferous mines or mining claims, both placer and rock in place, shall be assessed as the Legislature shall provide; provided, the basis and multiple now used in determining the value of metalliferous mines for taxation purposes and the additional assessed value of \$5.00 per acre thereof shall not be changed before January 1, 1935, nor thereafter until otherwise provided by law. All other mines or mining claims and other valuable mineral deposits, including lands containing coal or hydrocarbons and all machinery used in mining and all property or surface improvements upon or appurtenant to mines or mining claims, and the value of any surface use made of mining claims, or mining property for other than mining purposes, shall be assessed as other tangible property.

Section 11 of Article XIII provides that the "State Tax Commission shall administer and supervise the tax laws of the state. It shall assess mines and public utilities .... It shall have such other powers of original assessment as the Legislature may provide."

Pursuant to § 59-5-3 (Supp.1983), the Legislature has directed the Commission to assess the following properties:

Pipelines, power lines and plants, canals and irrigation works, bridges and ferries, and the property of car and transportation companies, when they are operated as a unit in more than one county; all property of public utilities whether operated within one county or more; all mines and mining claims, and the value of metalliferous mines based on two times the annual net proceeds thereof as provided in section 59-5-57, and all other mines and mining claims and other valuable deposits, including lands containing coal or hydrocarbons, nonmetalliferous minerals underlying land the surface of which is owned by a person other than the owner of such minerals, all machinery used in mining and all property or surface improvements upon or appurtenant to mines or

mining claims and the value of any surface use made of nonmetalliferous mining claims or mining property for other than mining purposes; must be assessed by the state tax commission as herein-after provided; except that property assessed by the unitary method, not necessary to the conduct and which does not contribute to the income of the business shall be assessed separately. All taxable property not required by the Constitution or by law to be assessed by the state tax commission must be assessed by the county assessor of the several counties in which the same is situated. For the purposes of taxation all mills, reduction works and smelters used exclusively for the purpose of reducing or smelting the ores from a mine or mining claim by the owner thereof shall be deemed to be appurtenant to such mine or mining claim though the same is not upon such mine or mining claim.

Under this section and its antecedent, the State Tax Commission has assessed the tangible properties of the plaintiffs in this action.

Under Article XIII, § 3, the property taxes paid on each property are required to have a uniform proportion to the value of the property. Although the objective is easily stated, its attainment is more difficult. Because of the many different kinds of property and the various factors that affect their values, the determination of what constitutes equal "in proportion to the value of his, her or its tangible property," under Article XIII, § 3, cannot be made by application of any single formula.

Of primary importance is the determination of what valuation methods should be utilized, and that depends on the nature of the properties to be taxed. Residential, commercial, transportation, mining, and public utilities, etc., must be treated differently because of the economic conditions that give value to such properties. Some properties are income producing; some are not. Some types of property sell frequently in an open market and have a market value that may be determined by the

basis of comparable market sales; some types of property are rarely sold and have no ascertainable market value based on comparable sales. The value of some properties may be strongly influenced by general economic or market conditions, while others are not. Some may be "wasting asset" type properties (such as mines and oil and gas properties), while most are not. Indeed, some properties may have a value that is peculiar to the owner and to no one else. See *Kennecott Copper Corp. v. Salt Lake County*, 122 Utah 431, 250 P.2d 938 (1952) (where the issue was the valuation of a mine dump).

The constitution and laws of the state divide the responsibility for valuation of tangible properties between the State Tax Commission and the county assessors of the respective counties. Article XIII, §§ 5 and 11. County-assessed properties, such as residences and farmland, are assessed on the basis of cost or comparable sales, and commercial enterprises that are county-assessed are usually assessed on a capitalized income method. The Tax Commission utilizes a wide variety of assessment methods and formulae. The basic valuation methods utilized by the Commission are cost, income, and stock and debt. A number of variations of these methods and often substantial discretion are used to modify the basic methods.

The cost method values property on the basis of net book value, which equals original cost less depreciation. That method gives very little effect to the impact of inflation in the assessment process.

Valuations are also made on the income approach. However, its application in a given case may vary. The valuation of large growth companies under this formula, for example, is generally done on the basis of a five-year average of the ratio of the value of assets to net income. The ratios used involve a variety of measures of the value of assets and may include current book value, current net book value, average book value over five years, and average net book value over five years. Different levels of income are used for

other companies, and the number of years utilized in the formula may also vary. The decision as to which ratios and how many years to use is based upon the discretion of the appraiser utilizing the approach or the Commission itself.

The stock and debt method is based on the equity and liabilities of the company as shown on its balance sheet. It is applied to value state-assessed properties that are sold so infrequently that the comparable sales method cannot be used. Again, substantial discretion may be exercised by the appraiser in valuing a company on this basis. In addition, the Commission may use the "correlated value" method, which is mentioned below.

Properties owned by utilities are valued by a weighted average of the three basic methods. For example, the properties owned by Utah Power & Light Company and Mountain Fuel Company thus are valued by a formula using 50 percent cost, 45 percent income, and 5 percent stock and debt. The Commission also uses a variant of this formula called the "correlated value" method, by which each of the above factors is given such weight as the judgment of the Tax Commission dictates.

State appraisers, acting under the general direction of the State Tax Commission or a Commissioner, have considerable discretion in determining which method should be utilized in assessing a particular property and the weight to be given to each indicator of value.

Pursuant to U.C.A., 1953, § 59-5-57, the Legislature has provided that metalliferous mines are to be valued at two times the average net annual proceeds for the preceding three calendar years. Nonmetalliferous mines are presently valued by capitalizing net income, using a five-year average, and negative values are taken into consideration. See Utah Tax Commission Regulation A12-4-12. Under Tax Commission Property Tax Regulation No. A12-4-10, oil and gas properties are valued "in an amount equal to 80% of the gross realization from the sale of oil or gas which was produced from each such property during



the calendar year prior to the date of assessment.

In sum the Tax Commission uses a variety of formulae to value properties. However the formulae used are generally not very sensitive to inflation, especially those formulae based in whole or in part on book value.

Because of the methods used to assess county assessed properties—especially cost of reproduction and comparable sales, which are highly sensitive to inflation—and because of recent high rates of inflation and the statewide reassessment of county assessed properties during the 1970s, the assessed valuation of county assessed properties, especially residential properties, has become disproportionately high to state assessed properties. From 1971 to 1981, the value of county assessed properties increased 245 percent, a multiple of slightly less than 3½. During the same time, the value of state assessed properties increased approximately only 45 percent. Although the total increase in the value of county assessed properties was undoubtedly not entirely attributable to general inflation, it is a fair inference that a significant part of the increase was. The comparatively small increase in the value of state assessed properties was no doubt a reflection in part of valuation formulae that gave little effect to inflation. The differences in the effects accorded inflation by the assessment formulae were no doubt substantial factors in producing the disparity between the increases in the value of county assessed and state assessed properties. That disparity was the basis for the Legislature's enactment of the statutes in question.

In partial support of their position on summary judgment the defendants submitted the un rebutted affidavit of a deputy Salt Lake County auditor which stated: [O]ver the period from 1971 to 1981 there is demonstrated a trend that shows the continuing disparity in the growth in value of locally assessed property as compared to state assessed property. This disparity and trend has continued in spite of the legislative attempt to curb the

trend by enacting Sections 59-5-4-5 and 59-5-109 Utah Code Annotated 1953, as amended 1981. Does the trend result from the regulations, procedures and assessment practices of the Tax Commission? These statistics, on comparison, fail to illustrate any of the contentions put forth by the Plaintiffs as being disadvantaged by the challenged legislation.

## II THE CONSTITUTIONALITY OF § 59-5-4-5

### A Sections 2 and 3 of Article XIII of the Utah Constitution

We first address the plaintiffs' contention that § 59-5-4-5 violates Article XIII of the Utah Constitution, specifically §§ 2 and 3 of that article. The argument is that the statute in permitting a 20 percent reduction from the comparable sales appraisal or a cost appraisal is in conflict with the language in § 2 that requires that all tangible property shall be taxed in proportion to its value, and the language in § 3 that property should be valued according to its value in money.

[1] This language was construed in *State ex rel. Cunningham v. Thomas*, 16 Utah 86, 50 P. 615 (1897), to mean that property should be valued as near as is reasonably practicable at its full cash value, in other words, the valuation for assessment and taxation shall be as near as reasonably practicable equal to the cash value for which the property valued would sell in the open market. *Id.* at 90-50 P. at 615-16. See also *Harmer v. State Tax Commission*, 22 Utah 2d 421, 452 P. 2d 876 (1969); *Kennecott Copper Corp. v. Salt Lake County*, 122 Utah 131, 250 P. 2d 938 (1952). In particular the claim is that § 59-5-4-5 is unconstitutional because it permits assessments at other than market value.

[2, 3] An analysis of the constitutionality of § 59-5-4-5 must begin with the proposition that acts of the Legislature are presumed constitutional, especially when dealing with economic matters based on factual assumptions. *Baker v. Matheson*, Utah

607 P. 2d 233 (1979); *Salt Lake City v. Tax Commission*, 11 Utah 2d 359, 359 P. 2d 397 (1961). A party attacking the constitutionality of a statute must affirmatively demonstrate its unconstitutionality. *F. q. Stone v. Department of Registration*, Utah 567 P. 2d 1115 (1977); *Salt Lake City v. Tax Commission*, *supra*; *Thomas v. Daughters of Utah Pioneers*, 114 Utah 108, 197 P. 2d 477 (1948).

[4] The presumption of constitutionality applies with particular force to tax statutes. Although we are concerned here with the constitutionality of § 59-5-4-5 under Article XIII of the Utah Constitution, what has been stated by the United States Supreme Court with respect to tax statutes challenged under the Equal Protection Clause of the Fourteenth Amendment is relevant to the instant problem. In *San Antonio School District v. Rodriguez*, 411 U.S. 1, 40-93 S.Ct. 1278, 1300, 36 L.Ed. 2d 16 (1973), the Court stated:

No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause. [Footnote omitted.]

See also *Madden v. Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940); *New York Rapid Transit Corp. v. New York*, 303 U.S. 573, 58 S.Ct. 721, 82 L.Ed. 1024 (1938).

Under the Utah Constitution, there is no general constitutional authority for classifying property for assessment purposes. The plain fact is, however, that different types of property cannot be assessed under one formula. Because of the necessity to use different methods for assessing different types of property, a certain degree of de facto classification is unavoidable. Therefore, notwithstanding the basic constitutional objective of uniformity, there are many de facto classifications that re-

sult from the various valuation formulae utilized for estimating market value.

[5, 6] Because of the lack of a more precise common denominator than market value for use in achieving uniformity and in deference to the inherent difficulties in assessing value, § 3 confers on the Legislature the power to provide by law for just valuations. Accordingly, when dealing with assessments of classes of property, § 3 must be read to permit a necessary latitude in defining market value. *State ex rel. Cunningham v. Thomas*, 16 Utah 86, 99, 50 P. 615, 618 (1897), the case upon which the plaintiffs heavily rely, recognized as much.

Because of its dissimilarity, the process by which the judgment [of valuation] is formed must vary, and probably as to all property except money, perfect equality in valuations and assessments is unattainable, owing to the fallibility of the human judgment.

The point was made even more clearly in *United States Smelting, Refining & Mining Co. v. Haynes*, 111 Utah 172, 181, 176 P. 2d 622, 627 (1947):

It will be observed that these provisions [§§ 2 and 3 of Article XIII] require that all tangible property shall be subjected to a uniform and equal rate of assessment according to its value in money. The method or yardstick by which the valuation in money is to be determined shall be prescribed by the legislature. It is not required that the same yardstick or method of determining value shall be used with respect to all kinds of property. But the different formulae which may be applied to different kinds of property must be such that they aim and tend to secure for assessment purposes a valuation fair and equitable in comparison with and commensurate with the valuation of other kinds of property. When the valuation thus secured is such that if the uniform and equal rate of taxation is applied to the valuation, the property is taxed in the same proportion to its value as is all other tangible property, the method of arriving at the is

essed valuation is not subject to constitutional objections as violative of our Article XIII.

Thus, §§ 2 and 3 of Article XIII permit the Legislature to adopt means to achieve that degree of uniformity in valuation that is practically attainable within the general confines of the term "market value." The objective is to assure that the taxes that are levied in a given county will result in each property's being "accountable for its pro rata share of the burden of local government." *Appeal of Johnstown Associates*, 494 Pa. 433, 438, 431 A 2d 932, 934 (1981). *Accord Kenney v Keebler Co.*, 53 Pa. Commw. 507, 419 A 2d 210 (1980).<sup>2</sup>

[7] Plaintiffs contend that a reduction in the value of county assessed properties by 20 percent demonstrates on its face an unconstitutional discrimination in favor of county assessed properties. However, the plaintiffs have not attempted to demonstrate by affidavit or otherwise that their own properties are assessed at market value or that they bear a tax burden greater than their pro rata share of the property taxes in San Juan County. Nor have they demonstrated that the deduction of "transaction costs" from comparable sales figures or estimates of cost as permitted by § 59-5-4.5 defeats the constitutional objective of establishing "a valuation [that is] fair and equitable in comparison with and commensurate with the valuation of other kinds of property." *United States Smelting, Refining & Mining Co. v Haynes*, *supra*, 111 Utah at 181, 176 P 2d at 627.

Nor have the plaintiffs demonstrated that § 59-5-4.5 is not consistent with the constitutional requirement that properties be valued at market value. See *State ex rel Cunningham v Thomas*, *supra*. In

deed, *Thomas* itself recognizes that the term "market value" is a term that cannot be applied in an overly rigid fashion.

The numerous formulae used to determine market value demonstrate that the term is a judgment not subject to mathematical precision that is based on a wide variety of factors.

"Market value," the basis for all assessment valuation, is an attempt to create a fictitious sale of the subject property by assuming an owner willing to sell and a buyer desiring to buy. When, as in the instant case, there is no actual buyer desiring to purchase the property for continuation of its special use, the property's highest and best use as a special purpose property must still be considered for valuation purposes. The very nature of special purpose property is such that market value cannot readily be determined by the existence of an actual market, and therefore other methods of valuation, such as reproduction cost, must be resorted to.

*Matter of McCannel*, Minn., 301 N.W. 2d 910, 924 (1980). *Accord United National Corp. v County of Hennepin*, Minn., 299 N.W. 2d 73, 76 (1980).

Even when there are sales of the type of property to be assessed, it is still the case that the term "market value" is at best an approximation. In *United National Corp. v County of Hennepin*, *supra*, 299 N.W. 2d at 76, n. 4, the court stated:

Market value and sales price are not synonymous. Although recent sales of properties of a similar nature are persuasive in determining market value, factors such as sales and holding prices in the area, location, access, age, use, size,

activity, its utility, its general setting in the economic organization of society, so that every one will be called upon to contribute according to his ability to bear burdens, or as nearly so as may be. [Quotation omitted.]

See also *Apache County v Atchison, Topock & Santa Fe Ry. Ass'n*, 476 P.2d 657 (1970). The Utah Constitution does not permit classifications as such, except to the extent that Article XIII, § 2 permits special treatment of residential properties.

type of construction, method of financing and the arm's length nature of a transaction may render any comparisons invalid.

In *Matter of McCannel*, *supra*, 301 N.W. 2d at 922, the court phrased the point in a somewhat different manner: "Although selling price is usually a good indicator of market value if the sale is an arm's length transaction between parties with equal bargaining power, the terms or conditions of a sale may affect the selling price and make it unrepresentative of the property's actual value." See also *Minnesota Entertainment Enterprises v State*, 306 Minn. 184, 187, 235 N.W. 2d 390, 392-93 (1975), *Deitch Co. v Board of Property Assessment*, 417 Pa. 213, 218, 209 A.2d 397, 402 (1965).

[8] Since "market value" is not a term having a wholly fixed and precise meaning, it is reasonable and constitutionally permissible for the Legislature to recognize that "transaction costs" can and do influence values computed on actual sales prices, as well as other valuation formulae, to provide that they may be taken into account in determining market value. That conclusion is supported by the language in Article XIII, § 2 that gives the Legislature some power to define value. (Since there is no claim in this case that the amount of the transaction costs provided for in § 59-5-4.5 is factually arbitrary, the reasonableness of the amount of those costs is in effect conceded.)

[9] Furthermore, the Legislature was justified in enacting § 59-5-4.5 for another reason. The Legislature acted on the premise that the then existing property tax scheme in the state was discriminatory because it required county assessed taxpayers to shoulder an unfair portion of the taxes and violated the requirement of uniformity. The Legislature was well aware, as the legislative history of both challenged acts unequivocally demonstrates, that there had been a large shift of the property tax burden from state assessed properties to

county assessed properties as a result of inflation. In part, the problem arose out of the statewide reappraisal program, which had the effect of immediately injecting a high degree of inflation into residential values. In contrast, the formulae used to assess state assessed properties did not tend to factor the effects of inflation into the state assessed properties, or if they did, they did so at a much more modest and less abrupt pace. When inflation has a significant and differing effect on the value of properties, the Legislature may redress the imbalances and inequities created. *Northern Natural Gas Co. v Williams*, 208 Kan. 407, 493 P.2d 568 (1972), *Supervisor of Assessments v Otremba*, 50 Md. App. 608, 440 A.2d 403 (1982).

The Legislature's factual premise that state valuation and county valuation were not uniform has not been attacked.<sup>3</sup> Defendants filed affidavits with the Court on the cross motions for summary judgment that lend some support to the factual proposition that there is a significant lack of uniformity. Even without the defendants' evidence, however, we would still be obliged to presume that there is a valid factual basis for the challenged statute. See *Matter of McCannel*, *supra*, 301 N.W. 2d at 916, *Elwell v Hennepin County*, 301 Minn. 63, 221 N.W. 2d 538 (1974).

[10] Certainly the Legislature may not establish formal classifications of property that result in nonuniform or disproportionate tax burdens. But the Legislature may seek to enforce the uniformity requirement of § 3 by attempting to equalize the tax burden borne by those taxpayers who pay a greater tax in proportion to the value of their property than others. In permitting transaction costs to be deducted from appraisals based on comparable sales or cost appraisal method, the Legislature has neither departed from the "cash value" requirement of Article XIII, § 3, nor gone beyond its constitutional duty to "prescribe by law such regulations as shall secure a

its current fair cash value and further denied that the plaintiffs' property was assessed at 100 percent of the current fair cash value.

<sup>2</sup> Property tax schemes that specifically allow classifications are designed in part to spread the tax burden on the ability of property to produce income. In *Yellowstone Pipe Line Co. v State Bd. of Equalization*, 138 Mont. 603, 358 P.2d 55, 64 (1960) the court stated:

The purpose of the classification statute is to shift the burden of taxes from property as such to productivity or, in other words, to impose the burdens of government upon property in proportion to its use, its produc-

<sup>3</sup> In response to the plaintiffs' request for admissions, the Tax Commission denied that all property under its jurisdiction was assessed at

just valuation for taxation." *Id.* Clearly, the statute is not based on a plan or a principle designed to violate equality and uniformity. *Denver v. Lewin*, 106 Colo. 331, 105 P.2d 854 (1940).

The overarching purpose of §§ 2 and 3 of Article XIII is to achieve uniformity in the ad valorem taxing scheme. The definition of value is one element in a formula designed to achieve that end by establishing a common denominator for valuation purposes. The law has long been that where "it is impossible to achieve both the standards of the true value and the uniformity and equality required by law the latter requirement is to be preferred as the just and ultimate purpose of the law." *Dela ware Lackawanna & Western Railroad v. Need*, 23 N.J. 561, 570, 130 A.2d 6, 11 (1957), quoting *Snour City Bridge Co. v. Dakota County*, 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923).

To assess property at its just value is only one of the fundamental requirements of law. The assessment must further represent the owner's equal portion of the burden of taxation. If the assessors have not appraised at full value but only at a fixed percentage of true value then such treatment must be uniform and equal on all real estate and tangible property, so much so that if both cannot be obtained then equality must prevail.

*Kittery Electric Light Co. v. Assessors of the Town of Kittery, Me.*, 219 A.2d 728, 734 (1966).

In the instant case, the Legislature might have dealt with the problem of uniform taxation by requiring adjustments in the formulae used by the State Tax Commission to assess state assessed properties. As a practical matter the Legislature may well have decided not to attempt that approach because of the complexity and difficulty of having to deal with so many different kinds of formulae for assessing market value. By acting as it did, the Legislature acted neither unconstitutionally nor unreasonably.

Accordingly we hold that § 59-5-4.5 was constitutional under Article XIII.

#### B. Equal Protection and Uniform Operation of the Laws

[11] Equal protection provisions of the federal and state constitutions accord particularly wide latitude to legislative classifications in tax statutes. *Apache County v. Atchison, Topeka & Santa Fe Railway*, 106 Ariz. 356, 476 P.2d 657 (1970). No "scheme of taxation," whether property, income or otherwise "has yet been devised which is free of all discriminatory impact." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 41, 93 S.Ct. 1278, 1301, 36 L.Ed.2d 16 (1973). In *Nashville, Chattanooga & St. Louis Railway v. Brouning*, 310 U.S. 362, 368, 60 S.Ct. 968, 971, 84 L.Ed. 1254 (1940) the Supreme Court stated:

This Court has previously had occasion to advert to the narrow and sometimes cramping provision of these state uniformity clauses, and has left no doubt that their inflexible restrictions upon the taxing powers of the state were not to be insinuated into that meritorious conception of equality which alone the Equal Protection Clause was designed to assure.

[12] In sum § 59-5-4.5 does not violate the equal protection provisions of the state and federal constitutions.

#### III. CONSTITUTIONALITY OF § 59-5-109

U.C.A., 1953 § 59-5-109 (Supp. 1981) provides that all "locally assessed real property shall be appraised at current fair market value and the value of such property rolled back to its January 1, 1978 level." Article XIII of the Utah Constitution authorizes ad valorem property taxes. The term "ad valorem tax" means literally "according to its value" and is used to designate an assessment of taxes against property at a certain rate on its value. *Powell v. Gleason*, 50 Ariz. 542, 74 P.2d 47 (1937).

Cite as 681 P.2d 184 (Utah 1984)

[13, 14] A critical factor in establishing assessments that represent reasonably accurate approximations of value is time. Virtually all factors that influence value vary with time. An ad valorem tax system must, therefore, be based on periodic reassessments that take into consideration the fluctuating factors that affect value. To freeze the value of some properties at a given point in time, and not others, must necessarily result in nonuniform assessments. In *Moon Lake Electric Association v. State Tax Commission*, 9 Utah 2d 384, 345 P.2d 612 (1959) this Court held unconstitutional a statutory formula that fixed the assessment of a property for ad valorem tax purposes. The Court stated: "The effect of these [statutory] sections is nothing unless it prevents the accurate assessment of property in a given case to its full value. The conflict with the constitution is clear." *Id.* at 387, 345 P.2d at 614. That is precisely the difficulty with the roll back statute. "It necessarily follows that an indefinite partial freeze on the valuation of some properties in the state is inherently inconsistent with the basic concept of an ad valorem tax system. Inevitably, the statute would produce valuations that are not based on market value and that are in violation of the principle of uniformity."

[15] We recognize that § 59-5-109 was enacted to redress a disparity between assessments of state assessed and county assessed properties. But if the constitution is to be changed to adjust for some inequality, the people must make that change by constitutional amendment.

[16] In sum, the fixing of base line assessments of county assessed real properties as of a given year in the past, see *Utah Hotel Co. v. Yorgason*, Utah, 659 P.2d 1046 (1983), is a violation of Article XIII §§ 2 and 3 and is unconstitutional.

#### IV. PROSPECTIVE AND RETROACTIVE EFFECTS

Defendants argue that if either of these statutes is found unconstitutional then the

Court should make its ruling prospective only as we did in overruling prior decisions in *Loyal Order of Moose No. 259 v. County Board*, Utah, 657 P.2d 257 (1982). Otherwise, defendants maintain, local governments will be subject to enormous financial and administrative burdens. Taxing districts throughout the state have relied on the provisions of these statutes in setting their mill levies for 1981 through 1983. Local governments operate on very precise and often strained budgets that are carefully tied to these levies. Since 1981 a number of owners of state assessed properties have paid their taxes under protest or have filed formal complaints with the Tax Commission. Retroactive effect to a decision altering the relative tax burdens between locally assessed and state assessed properties would require reopening the assessment process as to tax obligations not yet final. To the extent that this might result in refunds of taxes paid on state assessed properties, it would impose indebtedness for future repayments from locally assessed properties. Such indebtedness could be huge in counties that derive high proportions of their budgets from state assessed properties.

The purely prospective application of a state court decision overruling prior authority in a civil case violates no right under the United States Constitution. *Great Northern Railway v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932). (The prospective or retroactive effect of decisions in criminal cases involves a different range of consideration and is neither precedent for nor should be deemed influenced by what is done in civil cases. Compare *State v. Norton*, 675 P.2d 577 (1983).) In recent years the United States Supreme Court has on several occasions held civil legislation unconstitutional and then given only prospective effect to its holding in order to avoid imposing undue administrative or financial burdens on agencies of local government. *E.g. Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973); *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 90



S.Ct. 1990, 26 L.Ed.2d 523 (1970), *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969). The prospective effect the Court gave to its holding on the unconstitutionality of the broad jurisdiction of bankruptcy courts is another example. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982).

Similarly, in cases holding that state taxes or assessment procedures were unconstitutional, numerous state courts have directed that their holdings should have only prospective effect. *E.g.*, *Southern Pacific Co. v. Cochise County*, 92 Ariz. 395, 377 P.2d 770 (1963), *Deltona Corp. v. Bailey*, Fla., 336 So.2d 1163 (1976), *Strickland v. Newton County*, 244 Ga. 54, 258 S.E.2d 132 (1979), *Kansas City Millwright Co. v. Kalb*, 221 Kan. 658, 562 P.2d 65 (1977), *Jacobs v. Lexington Fayette Urban County Government*, Ky., 560 S.W.2d 10 (1977), *Salorio v. Glaser*, 93 N.J. 447, 461 A.2d 1100 (1983), *Soo Line Railroad v. State*, N.D., 286 N.W.2d 459 (1979), *Perkins v. County of Albermarle*, 214 Va. 416, 200 S.E.2d 566 (1973), *Gottlieb v. City of Milwaukee*, 33 Wis.2d 408, 147 N.W.2d 633 (1967).

These state decisions rely on the need to preserve the financial solvency of local government units, the great financial and administrative hardship that would be entailed if general retroactive effect were allowed, and the tax authorities' justifiable reliance on the statute, which is presumptively constitutional. To the objection that an unconstitutional act is void from its inception so that everything done thereunder must be undone, the New Jersey Supreme Court cited the importance of recognizing "that we are acting within the framework of appropriate equitable relief with respect to an unconstitutional taxation statute." *Salorio v. Glaser*, 93 N.J. at 563, 461 A.2d at 1108. In fashioning an equitable remedy, reliance interests weigh heavily, and the court should seek a blend of what is necessary, what is fair, and what is workable. *Id.* at 564, 461 A.2d at 1109, relying on the opinion of Chief Justice

Burger in *Lemon v. Kurtzman*, *supra*. We relied on these same considerations in directing purely prospective effect (from a future date) to our overruling decision in *Loyal Order of Moose No. 259*, *supra*.

On the basis of the circumstances of this case, the foregoing considerations and authorities persuade us of the appropriateness of prospective effect to our holding that § 59-5-109 is unconstitutional.

One of the criticisms of giving only prospective effect to a decision is that it turns the court's opinion into an advisory opinion or dicta. It also deprives the litigants, who have sustained the burden of attacking an unconstitutional statute, of the fruits of their victory. For this reason, prospective effect may even discourage challenges to statutes of questionable validity. In response to these considerations, some decisions that give only prospective effect to a holding of unconstitutionality as to all other parties give the holding retroactive effect as to the litigants or others who have litigation pending. *Strickland v. Newton County*, *supra* (Ga. parties only); *Kansas City Millwright Co. v. Kalb*, *supra* (Kan.—parties and others with action pending); *Perkins v. County of Albermarle*, *supra* (Va.—parties only). See generally Schaefer, "Prospective Rulings: Two Perspectives," 1982 *Supreme Court Review* 1, 6; Schaefer, "The Control of 'Sunbursts': Techniques of Prospective Overruling," 42 *NYUL Rev.* 631, 638-40 (1967). We gave this kind of limited retroactive effect to a decision that local government legislation was unconstitutional, a decision that was otherwise prospective only. *Carter v. Beaver County Service Area No. One*, 16 Utah 2d 280, 283, 399 P.2d 410, 412 (1965).

[17] For the same reasons that motivated the foregoing decisions, we direct that our holding of unconstitutionality be prospective and effective only from and after January 1, 1984. As to the six plaintiff-taxpayers who are parties to this appeal, however, this decision shall be retroactive for the year for which this suit for refund was brought.

## RIO ALGOM CORP. v. SAN JUAN COUNTY

Utah 197

Cite as 681 P.2d 184 (Utah 1984)

### V PROCEEDINGS ON REMAND

Having concluded that § 59-5-109 is unconstitutional, it is appropriate to state the guidelines that should be applied in determining what relief may be granted on remand.

[18] For the plaintiffs to recover an alleged overpayment of taxes paid under protest on the ground that § 59-5-109 caused a shift in the tax burden to their properties, plaintiffs must prove two elements. First, the plaintiffs must demonstrate that the county assessed properties were appraised at less than their 1981 true values. Second, the plaintiffs must establish by independent evidence the true value of their own properties, and the appraisal used must give due effect to the same economic factors as the formulae used to value the county assessed properties. *Reading Co. v. Woodbridge*, 45 N.J. 407, 426, 212 A.2d 649, 659-60 (1965), *In re Appeals of Kents*, 34 N.J. 21, 33, 166 A.2d 763, 769-70 (1961), *Tri Terminal Corp. v. Edgewater*, 68 N.J. 405, 412, 346 A.2d 396, 400 (1975), *Fort Lee v. Hudson Terrace Apartments*, 175 N.J. Super. 221, 236, 417 A.2d 1124, 1132 (1980), *Anaconda Co. v. Perth Amboy*, 157 N.J. Super. 42, 53-54, 384 A.2d 531, 536-37 (1978).

[19] Although there usually is a presumption that property assessed by a state or county assessor has been appraised at full value, the presumption applies only when a taxpayer challenges the valuation of his own property and not when he challenges the appraised value of another's property. *E.g.*, *State ex rel Stephan v. Martin*, 227 Kan. 458, 463, 608 P.2d 880, 887 (1980), *Reading Co. v. Woodbridge*, 45 N.J. at 429, 212 A.2d at 661. To extend this presumption to plaintiffs' properties in this case would conflict with the implied legislative finding that state assessed properties were under assessed. It would also conflict with the Tax Commission's admission that plaintiffs' properties are not valued at full value.<sup>4</sup> To presume that plaintiffs' properties are assessed at full value

under these circumstances could well be contrary to fact and could result in enhancing the inequality the Legislature sought to redress. See *Reading Co. v. Woodbridge*, *supra*, 212 A.2d at 660.

[20] If plaintiffs prove both elements, they may recover the difference between the amount of taxes they paid and the amount they would have paid if § 59-5-109 had not been in effect. See *First National Bank v. Christensen*, 39 Utah 568, 577-78, 118 P. 778, 781 (1911), *Continental National Bank v. Naylor*, 54 Utah 49, 58, 179 P. 67, 71 (1919). If the plaintiffs' properties were appraised at less than full value, they will be entitled to what they would have paid had § 59-5-109 not been in effect, less the amount they underpaid their taxes because their properties were under assessed.

The case is affirmed in part, reversed in part, and remanded for further proceedings. No costs.

OAKS and DURHAM, JJ., concur.

HOWE, Justice (concurring).

I concur except in the application in part II(A) of the principle that "where it is impossible to achieve both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law." That principle apparently originated in *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923), where that Court relied upon it to justify its departure from a statute requiring property to be valued at its fair market value in order to comply with a constitutional mandate that there be uniformity and equality of taxation. By applying the principle, the Court was able to afford relief to a taxpayer whose property had been assessed at full fair market value while other properties in the county had been assessed at only 55%. The principle was applied under similar circumstances in *Delaware, Lackawanna & Western Railroad v. Neeld*, 23 N.J.

561, 130 A 2d 6 (1957) cited in the main opinion.

In the instant case, however, valuation at fair market value is mandated by article XIII, sections 2 and 3 of the Utah Constitution, and its requirements cannot be relaxed in an effort to obtain uniformity and equality also mandated by section 3. In the context of this case, the principle can have no application.

HALL, Chief Justice (concurring and dissenting)

I join the Court in declaring the roll back provisions of U.C.A., 1953, § 59-5-109 (Supp. 1981) unconstitutional on their face. However, for the same reasons, I also view as unconstitutional on their face the provisions of U.C.A., 1953, § 59-5-4.5 (Supp. 1981), which reduce the value of taxable real property assessed by the counties by 20%.

Article XIII, sections 2 and 3 of the Constitution of Utah in unequivocal language require that all non-exempt tangible property, both real and personal, be assessed at a "uniform and equal rate," and that it be assessed and taxed "according to its value in money."

This Court has long heretofore interpreted the term "according to its value in money" as the full cash value of the property.<sup>1</sup> Also, the term "full cash value" has been determined to be synonymous with the terms "actual cash value," "market value," "reasonable fair cash value" and "value in money."<sup>2</sup>

It is thus to be seen that § 59-5-4.5 is unconstitutional on its face in that it directs the county assessor to assess and tax county assessed property at 80% of its "reasonable fair cash value" rather than at 100% of its value. This is precisely the sort of inequality and lack of uniformity that violates the express provisions of article XIII, sections 2 and 3, *supra*.

<sup>1</sup> *State v. Thomas*, 16 Utah 86, 50 P. 615 (1897).

<sup>2</sup> *Kennecott Copper Corp. v. Salt Lake County*, 122 Utah 431, 250 P.2d 938 (1952).

The defendants recite the legislative history of the subject statute, which reflects that a disparity was found to exist in the valuation of county assessed and state assessed property. The disparity was apparently occasioned by the different valuation methods employed by the state and the counties. The counties generally utilized a comparable sales method that readily reflected the effect of inflation upon market value. However, the state continued to inflexibly follow its usual cost, income, stock and debt approaches to market value and failed to in any way compensate for the effects of inflation. This caused considerable consternation on the part of county assessors who were compelled to assess the property of their constituents at sharply increasing values while state assessments lagged far behind. It was to relieve this inequity in assessment that the Legislature enacted the subject statutes. However well intentioned the legislative enactments were, they nevertheless do not meet constitutional muster.

Article XIII, section 3, *supra*, confers upon the Legislature the obligation and duty to "provide by law a uniform and equal rate of assessment and taxation" and to "prescribe by law such regulations as shall secure a just valuation for taxation of such property." However, that authority must be read in light of the overriding concept espoused by the constitution, i.e., that all property be assessed at a "uniform and equal rate," and that it be taxed "according to its value in money." The case of *United States Smelting, Refining & Mining Co. v. Haynes*,<sup>3</sup> relied upon by the defendants does not hold to the contrary. Rather, it is supportive of this basic proposition. This is to be seen in that no matter which method or yardstick the Legislature chooses to determine the valuation of property in money, the end result that must be achieved is just that, i.e., "according to its value in money."

<sup>3</sup> 111 Utah 172, 176 P.2d 622 (1947).

Viewed in light of what has just been said, the subject legislation causes state assessed and county assessed property to be assessed at *unequal* rates and at values other than *actual market value*. Furthermore, the legislation tends to compound rather than alleviate the problem of disparity in assessed valuation. Thus it does by leaving in place and thereby sanctioning the erroneous assessment practices of the state that fail to assess property according to its actual value. Rather than legislating so as to insure that the assessment practices of the state be revamped so as to bring them in conformity with constitutional mandate, the legislation directs the county assessor to also violate the constitution by assessing property at a rate 20% less than *actual value*.

I would reverse the decision of the trial court in its entirety.



Gladys Fay WELLS, Guardian ad litem for Dennis Edgar Wells, Jr., a minor over the age of 14 years, Plaintiffs and Respondents,

v.

CHILDREN'S AID SOCIETY OF UTAH, Successor in Custody of K.B., Mother of Infant B., and K.B., Defendants and Appellants,

v.

John DOE and Mary Doe and Robert D. Mauck, Esq., Guardian ad litem for Infant B., Intervenor and Appellants

No. 18537.

Supreme Court of Utah

March 23, 1984

Unwed minor father brought action through guardian ad litem seeking custody of newborn child that had been released to state adoption agency and subsequently to adoptive parents, after father failed to make timely filing of his acknowledgment of paternity as required by statute. The Seventh District Court, Grand County,

Boyd Bunnell, J., granted custody of child to father on grounds that statute could not constitutionally be applied to him, and mother, agency, and adoptive parents appealed. The Supreme Court, Oaks, J., held that (1) statute specifying procedure for terminating parental rights of unwed father is constitutional under due process clause of United States Constitution, (2) such procedure is consistent with due process requirements of Utah Constitution, and (3) agency correctly applied statute on facts of case and did not violate father's federal or state due process rights.

Judgment reversed, case remanded with directions.

#### 1. Children Out-of-Wedlock ≈20

##### Parent and Child ≈2(1)

The relationship between parent and child is protected by Federal and State Constitutions, these protections include the father of an illegitimate child.

#### 2. Infants ≈155, 156, 157

Constitutionally protected parental rights can be lost, they can be surrendered pursuant to statute, they can be lost through abandonment of the child by action or course of conduct for which parent is personally responsible, such rights can also be terminated through parental unfitness or substantial neglect. U.C.A. 1953, 78-30-4(1), 2, 78-30-5.

#### 3. Adoption ≈14

To serve its purpose for welfare of child, determination that newborn child can be adopted must be final as well as immediate.

#### 1. Adoption ≈7 2(3)

The state's strong interest in immediate secure adoptions for eligible newborns provides a sufficient justification for significant variations in parental rights of unwed fathers, who, in contrast to mothers, are not automatically identified by virtue of their role in the process of birth.

#### 5. Constitutional Law ≈212 1(1)

##### Infants ≈132

Statute specifying procedure for terminating parental rights of unwed father, requiring father to file acknowledgment of paternity prior to date child is released to

Tab G

**DIVERSIFIED EQUITIES, INC.,** a Utah corporation, and **Dakal, Inc.,** a Utah corporation, Plaintiffs and Respondents,

v.

**AMERICAN SAVINGS AND LOAN ASSOCIATION,** Defendant and Petitioner.

No. 870343.

Supreme Court of Utah.

July 12, 1989.

On Certiorari to the Utah Court of Appeals, Third District, Salt Lake County; J. Dennis Frederick.

Ted Boyer, H. Mifflin Williams, III, Salt Lake City, for defendant and petitioner.

Jerome H. Mooney, Arthur M. Strong, Salt Lake City, for plaintiffs and respondents.

Prior report: 765 P.2d 1277.

HALL, Chief Justice:

Having heard oral arguments and having further reviewed the record and the briefs on file, it appears that certiorari was improvidently granted. The case is therefore dismissed.

STEWART, DURHAM and  
ZIMMERMAN, JJ., concur.

HOWE, Associate Chief Justice  
(dissenting):

I dissent. I do not join in dismissing the writ of certiorari. No valid reason exists for doing so, and the majority expresses none. In *Israel Pagan Estate v. Capitol Thrift and Loan*, 771 P.2d 1032 (Utah 1989) (Howe, Assoc. C.J., dissenting), I set out the conditions under which the United States Supreme Court dismisses writs of certiorari as having been improvidently granted and suggested that we follow its practice. None of those conditions exist here, and I decry the wasteful use of time and money of the parties, their lawyers, and this Court which dismissal promotes. I

refer the reader to that opinion for a full expression of my views on this practice.



**BLUE CROSS AND BLUE SHIELD OF UTAH,** a nonprofit corporation,  
Plaintiff and Appellant,

v.

**STATE of Utah, Utah State Tax Commission, and Utah State Insurance Department,** Defendants and Appellees.

No. 19676.

Supreme Court of Utah.

July 19, 1989.

Rehearing Denied Sept. 19, 1989.

Nonprofit health service corporation challenged constitutionality of statute imposing premium income tax on health service corporations and other insurers, but exempting mutual benefit associations and cooperative benefit associations. The Third District Court, Salt Lake County, J. Dennis Frederick, J., granted summary judgment in favor of State, Tax Commission, and Insurance Department. Corporation appealed. The Supreme Court, Zimmerman, J., held that imposing premium income tax on nonprofit health service corporation, but exempting mutual benefit associations, did not violate "uniform operation of laws" provision of State Constitution, equal protection clause, or prohibition against private or special law.

Affirmed.

#### 1. Constitutional Law ¶213.1(2)

Examination into reasonableness of economic legislation under "uniform operation of laws" provision of State Constitution is at least as vigorous as that required by federal equal protection clause. Const. Art. 1, § 24; U.S.C.A. Const. Amend. 14.

## BLUE CROSS AND BLUE SHIELD v. STATE

Cite as 779 P.2d 634 (Utah 1989)

Utah 635

#### 2. Constitutional Law ¶209

If statutes can withstand scrutiny under "uniform operation of laws" provision of State Constitution, they comply with federal equal protection clause. Const. Art. 1, § 24; U.S.C.A. Const. Amend. 14.

#### 3. Constitutional Law ¶213.1(2)

In scrutinizing legislative measure under "uniform operation of laws" provision of State Constitution, it is necessary to determine whether classification is reasonable, whether objectives of action are legitimate, and whether there is reasonable relationship between classification and purposes. Const. Art. 1, § 24.

#### 4. Constitutional Law ¶70.1(12)

In tax area and in other areas of purely economic regulation, broad deference is given to legislature when scrutinizing reasonableness of classifications and relationship to legitimate, legislative purposes under "uniform operation of laws" provision of State Constitution. Const. Art. 1, § 24.

#### 5. Constitutional Law ¶229.2

##### Taxation ¶954

Insurance companies and health service corporations on the one hand and mutual benefit associations and cooperative benefit associations on the other hand were relevant groupings in "uniform operation of laws" challenge to statute imposing premium income tax on health service corporations and statute imposing premium income tax on other insurers, but exempting mutual benefit associations and cooperative benefit associations. Const. Art. 1, § 24; U.C.A. 1953, 31-14-4(1), 31-37-9(2) (Repealed); U.S.C.A. Const. Amend. 14.

#### 6. Constitutional Law ¶70.1(5)

Supreme Court deciding challenge to statutes under "uniform operation of laws" provision of State Constitution is not free to break out groups that might be distinguishable if legislature did not do so. Const. Art. 1, § 24.

#### 7. Constitutional Law ¶229.2

##### Taxation ¶955

Imposing premium income tax on nonprofit health service corporation and other insurers but exempting mutual benefit as-

sociations, was reasonably related to legitimate purposes of raising revenue and giving special treatment to fraternal nature of associations, and, therefore, did not violate "uniform operation of laws" provision of State Constitution or equal protection clause, even though associations could operate as for-profit corporations and were not required to be adjuncts of nonprofit, religious, cooperative, or benevolent organizations, and even though two of the six mutual benefit associations in State did not restrict themselves to issuing policies only to employees of single company or members of church or association; corporation failed to show tax took business from it or other commercial insurers. Const. Art. 1, § 24; U.C.A. 1953, 31-14-4(1), 31-37-9(2) (Repealed); U.S.C.A. Const. Amend. 14.

#### 8. Constitutional Law ¶213.1(2)

In determining whether classifications that legislature has used are reasonably related to legitimate legislative purpose and comply with "uniform operation of laws" provision of State Constitution, Supreme Court is not limited to considering those purposes that can be plainly shown to have been held by some or all legislators. Const. Art. 1, § 24.

#### 9. Constitutional Law ¶211(2)

Impact of measure can be relevant in determining whether legislative body has exceeded bounds of broad discretion it has in fashioning purely economic legislation and can be relevant in determining whether legislation complies with "uniform operation of laws" provision of State Constitution. Const. Art. 1, § 24.

#### 10. Statutes ¶95(1)

##### Taxation ¶955

Statutes imposing premium income tax on insurers of nonprofit health service corporations, but exempting mutual benefit associations and cooperative benefit associations, are "general laws" and do not violate state constitutional prohibition against private or special laws, in that statute complied with "uniform operation of laws" requirement of State Constitution. Const. Art. 1, § 24; Art. 6, § 26; U.S.C.A. Const.



Amend 14, UCA 1953, 31-14-4(1), 31-37-9(2) (Repealed)

See publication Words and Phrases for other judicial constructions and definitions

#### 11 Statutes — 77(1)

If law satisfies "uniform operation of laws" provision of State Constitution, it will not violate prohibition against private or special law. Const Art 1, § 24, Art 6, § 26

David R. Money, Salt Lake City, for plaintiff and appellant

David L. Wilkinson, Stephen G. Schwendiman, Bruce H. Pettet, Mary Beth Walz, Salt Lake City, for defendants and appellees

ZIMMERMAN, Justice

Plaintiff Blue Cross and Blue Shield of Utah ("Blue Cross"), a nonprofit health service corporation, appeals from a summary judgment granted against it and in favor of defendants State of Utah, Utah State Tax Commission, and Utah State Insurance Department (collectively, "the State"). This judgment upheld against state and federal constitutional challenge a pair of Utah tax statutes. Taken together, these statutes levied a 2.25 percent tax on subscription income received by nonprofit health service corporations and on premium income received by all other insurance companies in the state, but exempted from the tax the premium income received by insurance companies organized as mutual benefit associations ("MBAs"). Utah Code Ann §§ 31-14-4(1), 31-37-9(2) (Supp. 1981).<sup>1</sup> We conclude that the tax scheme enacted by these statutes is constitutional, therefore, the trial court's ruling is affirmed.

Blue Cross initiated this action against the State, challenging the taxing scheme represented by sections 31-14-4(1) and 31-37-9(2) of the Code. It contended that

MBAs were in all material respects indistinguishable from Blue Cross, a health service corporation, against which the MBAs competed directly. It also contended that by exempting MBAs from the 2.25 percent tax imposed on all other insurers, the legislature had placed Blue Cross at a competitive disadvantage and that in treating the MBAs and Blue Cross differently, the legislature had created a classification that bore no reasonable relation to the purpose of the taxing scheme, which was to raise revenue. Blue Cross attacked the taxing scheme under the equal protection clause of the fourteenth amendment to the United States Constitution as well as under the uniform operation of the laws provision and the special laws ban contained in the Utah Constitution. U.S. Const. amend XIV, § 1; Utah Const. art. I, § 24, Utah Const. art. VI, § 26. Both Blue Cross and the State filed motions for summary judgment. The trial court granted the State's motion and denied that of Blue Cross, holding that as a matter of law, Blue Cross had not demonstrated the taxing scheme's unconstitutionality. Blue Cross appeals that determination.

A grant of summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c), see, e.g., *Ron Case Roofing and Asphalt Paving, Inc. v. Blomquist*, 773 P.2d 1382, 1384 (1989). In considering an appeal from a grant of summary judgment, we view the facts in a light most favorable to the losing party below. *E.g., Seftel v. Capital City Bank*, 767 P.2d 941, 946 (Utah Ct. App. 1989); *Payne ex rel. Payne v. Myers*, 743 P.2d 186, 187-88 (Utah 1987). And in determining whether those facts require, as a matter of law, the entry of judgment for the prevailing party below, we give no deference to the trial court's conclusions of law; those conclusions are reviewed for correctness. *E.g., Bonham v. Morgan*, — P.2d —, —

time Blue Cross filed its first complaint. See Utah Code Ann. § 31A-1-202(2) (1986) ("An action or proceeding commenced under any law repealed by this title is not affected by the repeal.")

102 Utah Adv. Rep. 8, 9 (Feb. 23, 1989), *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985).

Blue Cross renews on appeal all the challenges it made below. We consider first its claims that the taxing scheme violates both the equal protection clause of the federal constitution and the uniform operation of the laws provision of the Utah Constitution. U.S. Const. amend XIV, § 1, Utah Const. art. I, § 24. We will then treat the assertion that the tax violates the special laws ban of article VI, section 26.

[1, 2] The principles and concepts embodied in the federal equal protection clause and the state uniform operation of the laws provision are substantially similar. *Mountain Fuel Supply Co. v. Salt Lake City Corp.*, 752 P.2d 884, 888 (Utah 1988); *Malan v. Lewis*, 693 P.2d 661, 669-70 (Utah 1984). However, our examination into the reasonableness of economic legislation under article I, section 24 of the Utah Constitution is at least as vigorous as that required by the federal equal protection clause, and probably more so. *Mountain Fuel Supply*, 752 P.2d at 889, 890, see *Recent Developments*, 1989 Utah L. Rev. 143, 317. Therefore, if the statutes under attack can withstand scrutiny under article I, section 24, they will not be found to violate the federal equal protection clause. 752 P.2d at 890. Accordingly, we will consider Blue Cross's claims under article I, section 24.

[3] Article I, section 24 of the Utah Constitution commands that "[a]ll laws of a general nature shall have uniform operation." Utah Const. art. I, § 24. The concept underlying this provision is "the settled concern of the law that the legislature be restrained from the fundamentally unfair practice" of classifying persons in such a manner that those who are similarly situated with respect to the purpose of a law are treated differently by that law, to the detriment of some of those so classified. *Mountain Fuel Supply*, 752 P.2d at 888. In scrutinizing a legislative measure under article I, § 24, we must determine whether the classification is reasonable, whether the objectives of the legislative action are legit-

imate, and whether there is a reasonable relationship between the classification and the legislative purposes. 752 P.2d at 890, see *Malan*, 693 P.2d at 670-75.

[4] It is important to note at the outset that our uniform operation of the laws analysis is guided by the well-settled proposition that all statutes are presumed to be constitutional and the party challenging a statute bears the burden of proving its invalidity. *City of West Jordan v. Retirement Bd.*, 767 P.2d 530, 537 (Utah 1988); *Baker v. Matheson*, 607 P.2d 233, 236 (Utah 1979); *State Tax Comm'n v. Wright*, 596 P.2d 634, 636 (Utah 1979). It is also important to note that although the broad outlines of the analytical model used in determining compliance with the uniform operation of the laws provision remain the same in all cases, the level of scrutiny we give legislative enactments varies. See, e.g., *Mountain Fuel Supply*, 752 P.2d at 888 n. 3; *Condemnation v. University Hospital*, 775 P.2d 348, 353-57 (Utah 1989) (opinions of Durham and Stewart, JJ.). In the tax area, as in other areas of purely economic regulation, we give broad deference to the legislature when scrutinizing the reasonableness of its classifications and their relationship to legitimate legislative purposes. *City of West Jordan*, 767 P.2d at 537; *Mountain Fuel Supply*, 752 P.2d at 888; *Baker*, 607 P.2d at 236. That broad deference leads us to sustain a classification if "facts can reasonably be conceived which would justify the distinctions or differences in state policy [expressed by the challenged legislation] as between different persons." *Baker*, 607 P.2d at 244 (citing *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911)). We do not, however, "accept any conceivable reason for the legislation. Rather, we judge such enactments on the basis of reasonable or actual legislative purposes." *Malan*, 693 P.2d at 671 n. 14.

[5, 6] Having stated the legal principles that govern our review of Blue Cross's claims, we proceed to the analysis, beginning with the statutory scheme, for it determines the classification at issue. Nor

<sup>1</sup> Title 31 of the Code has been repealed and replaced by title 31A. 1985 Utah Laws ch. 242, § 58 effective July 1, 1986. This opinion will address the constitutionality of the tax levied by title 31 because it was the law in effect at the

mally, there would be little dispute about the definition of the class to be tested. Here, however, where two sections of the Code combine to impose the taxes under attack, the classification issue is complicated. Section 31-37-9(2)<sup>3</sup> taxes at a 2.25 percent rate the premium income of all health service corporations, while section 31-14-4(1)<sup>4</sup> taxes at the same rate the premium income of all other insurers, but exempts MBAs.<sup>5</sup> The question is whether these two sections should be viewed separately, thereby placing Blue Cross in one class and all other insurers, including MBAs, in another, with members of each class subject to being compared only with other members of the same class, or whether the two sections should be viewed as part of one taxing scheme that classifies all insurers together, thereby permitting comparison of the law's treatment of subgroups within that larger class, such as all insurers but the MBAs, and the MBAs. Under our cases, if the legislature has classified all insurers but the MBAs in one group and the MBAs in another, those are the classifications we must examine. We are not free to break out groups that might be distinguishable if the legislature has not. See *Crowder v Salt Lake County*, 552 P.2d 646, 647 (Utah 1976), see also *State v Breed*, 111 Idaho 497, 725 P.2d 202, 205 (Ct App 1986), *Aetna Life Ins Co*

There shall be paid to the state tax commission by every corporation subject to the provisions of this act a tax of 2 1/4% of the total subscription income received by it during the next preceding calendar year from contracts covering risks in this state less the amount of all subscription income returned or credited to subscribers on direct business in this state. Utah Code Ann. § 31-37-9(2) (Supp 1981) (emphasis added).

Every insurance company engaged in the transaction of business in this state shall pay to the state tax commission, on or before March 31 in each year: (1) a tax of 2 1/4% of the total premium received by it during the next preceding calendar year from insurance covering property or risks located in this state, other than workmen's compensation and occupational disease disability insurance premiums specified in subsection (3), and other than ocean marine as specified in subsection (2) hereof less the amount of all premiums returned or credited to policyholders on direct business in this state and premiums received

*v Washington Life & Disability Ins Guar Ass'n*, 83 Wash 2d 523, 527 n 6, 520 P.2d 162, 165 n 6 (1974) (en banc). To resolve this issue, a brief history of the premium income tax is necessary.

As early as 1907, the legislature passed laws regulating "insurance corporations." Utah Compiled Laws tit 14, ch 7, §§ 403-422 (1907). Those laws imposed a tax on "[e]very insurance company doing business in this state" of 1.5 percent of the gross premiums received, less any property tax paid to the state. *Id* at §§ 419, 421. "Social," "benevolent," and "religious" organizations were excluded from these insurance laws, including the premium tax provision. *Id* at § 418. We are unaware of whether any of the then-existing social, benevolent, or religious organizations offered insurance to any of their members at the time, although the specific exemption would suggest that this is a distinct possibility. The 1907 statute did not define "insurance corporations." This lack was remedied in 1909, when insurance corporations were defined to include "all corporations, associations, partnerships or individuals engaged as principals in the insurance business, excepting fraternal and benevolent orders and societies." 1909 Utah Laws ch 121, § 2 (emphasis added).

In 1909, the legislature authorized the creation of county mutual insurance compa-

for reinsurance of such property or risks and, less the amount of dividends, including premium reduction coupons maturing within said year, paid or credited to policyholders within this state or applied in abatement or reduction of premiums due during the calendar year next preceding and less premiums on policies which have been or will be issued by domestic benefit [MBAs], or co-operative benefit associations.

Utah Code Ann. § 31-14-4(1) (Supp 1981) (emphasis added).

Technically, section 31-14-4(1) gives the MBAs a deduction rather than an exemption. But since the deduction eliminates the MBAs' liability for premium tax, it is *de facto* an exemption, and we will refer to it as such.

<sup>4</sup> "Subscription income" for health service corporations, the term used in section 31-37-9(2), is equivalent to "premium income" for other insurance companies, and the remainder of this opinion will refer to both types of income as premium income.

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nies that could provide protection against losses occasioned by fire. 1909 Utah Laws ch 95. In 1915, these county mutuals were exempted from the general statutes regulating insurance companies, including the provision imposing the 1.5 percent tax. Utah Compiled Laws title 19, ch 11, § 1187 (1917). The insurance laws were recodified in 1933. At this time, county mutuals and fraternal benefit societies were each broken out and covered by their own specific provisions of title 43 of the 1933 Code, and each was explicitly excluded from the other provisions of the insurance laws, including that imposing the premium tax. Utah Rev Stat. §§ 43-8-18, 43-9-4 (1933).

"Benefit associations" made their first appearance in the Code in 1935. At that time, the legislature required that they comply with the provisions of the newly enacted statute. 1935 Utah Laws ch 41. It appears that these associations were not to be subjected to the premium tax then applicable to all insurance companies, and it also appears that the new benefit associations were defined so as to permit the fraternal or religious benefit associations that had been previously exempted from the insurance laws to continue business under this new form with the proviso that those societies and/or organizations paying sick or death benefits to members or their dependents would be exempt from provisions of the Act. 1935 Utah Laws ch 41, § 18. During the same legislative session, the premium income tax on insurance companies was raised from 1.5 percent to 2.25 percent, where it remains today. 1935 Utah Laws ch 40.

In 1941, the legislature provided for the creation of "cooperative life insurance associations." 1941 Utah Laws ch 47. These associations appear not to have been subjected to the general premium tax applicable to insurance corporations. In 1943, the

5. In debate on the floor of the House of Representatives regarding the imposition of the 2.25 percent premium tax on Blue Cross and the other health service corporations Representative Guncell, the chair of the committee that recommended the legislation, said the committee had studied this issue for several years and "felt at that time that this bill that covers Blue Cross/Blue Shield should bring Blue Cross/Blue

laws of Utah were recodified. At that time, insurance companies, benefit associations, and cooperatives were each covered by separate titles. See Utah Code Ann tit 43, §§ 3, 11, 12 (1943). All the insurance laws were recodified in 1947. At that time, the exemption from the premium tax enjoyed by "domestic benefit or cooperative benefit associations" was inserted in the section imposing the tax on other insurers. 1947 Utah Laws tit 43, ch 14, § 4(1). The name "benefit associations" was also changed to "mutual benefit associations." 1947 Utah Laws title 43, ch 31.

In 1947, the legislature added chapter 80 to title 43. It applied to "non profit hospital service plans" such as Blue Cross. This is the first time such plans appeared in the Code. These hospital service plans were excluded from the coverage of the insurance laws that contained the 2.25 percent premium tax. 1947 Utah Laws tit 43, ch 30.

In 1969, the insurance laws were again recodified. What were then termed health service corporations were brought under the jurisdiction of the state Commissioner of Insurance, and the 2.25 percent premium tax was imposed on them. At the same time, the legislature barred the entry of any new MBAs or cooperatives into the insurance field, however, existing companies of that type were grandfathered, and the grandfathered companies remained tax exempt, as they had been since they were first recognized in the statutes. The reason for shifting health service corporations such as Blue Cross into the category of insurers subject to the premium tax appears to have been a desire to equalize what the legislature saw as competitive unfairness resulting from their previous tax exempt status.<sup>6</sup>

Shield under the same regulations and under the same taxing situation as other insurance companies in the State. I think I state as chairman of the committee the feeling of that committee—that the Blue Cross/Blue Shield Insurance Company should be taxed equally, and that it would be absolutely fair in light of the competitive situation that exists in the insurance industry."

As this history reveals, there is a good deal of variety in the types of organizations offering insurance, and ways of organizing and operating insurers are constantly evolving. Over the years since 1907, when insurance companies were first explicitly recognized in the Utah statute, the legislature has classified insurers and grouped them together in various ways at different times for purposes of regulation and taxation.<sup>6</sup> Since 1969, the legislature has grouped health service corporations and other insurance corporations together for purposes of imposing the 2.25 percent premium tax, and it has grouped mutual benefit associations and cooperative benefit associations together for the purposes of exempting them from the tax. Based on the legislature's very conscious decision in 1969 to group insurance corporations and health service corporations together for the purposes of the premium tax and to continue to exempt expressly MBAs and cooperatives from that tax, we conclude that we must accept those classifications for the purpose of analyzing the constitutionality of the premium tax. We therefore reject efforts by the State and Blue Cross to have us consider other groupings for comparison purposes, such as health service corporations and MBAs, or health service corporations alone. The relevant groupings for our purposes are insurance companies covered by section 31-14-4 and health service corporations covered by section 31-37-9, on the one hand, and MBAs and cooperative benefit associations, a subgroup of insurance companies, on the other (hereafter referred to collectively as "MBAs").

[7] Having settled the question of the relevant classifications, we next move to the three-step analytical model used to determine compliance with the uniform operation of the laws provision of article I, sec-

tion 24. See p. 637, *supra*. The first question is whether there is anything inherently unreasonable in the legislature's classifying all insurers together but then treating as a separate class those organized as MBAs. On its face, that distinction is not patently unreasonable. There might well be characteristics of companies organized as MBAs that would warrant treating them differently than other insurers. Indeed, the legislature has classified different insurers differently at various times for various regulatory or revenue purposes. Therefore, we cannot say that in the abstract, the classifications drawn by the statutes create a discrimination "with no rational basis." *Mountain Fuel Supply*, 752 P.2d at 890 (quoting *Mountain States Legal Found. v. Public Serv. Comm'n*, 636 P.2d 1047, 1055 (Utah 1981)). And the basis upon which the classification is made is certainly not proscribed. See *Mountain Fuel Supply*, 752 P.2d at 890.

The second issue under our analytical model is the legitimacy of the objectives pursued by the legislation. Here, the State advances two purposes. The first and predominant purpose of the premium income tax is to raise revenue for general governmental expenses. This is a legitimate purpose. *Mountain Fuel Supply*, 752 P.2d at 890. A second and somewhat subsidiary purpose suggested by the State for the inclusion in 1969 of health service corporations within the group of insurers subject to the premium tax is to equalize taxation of insurers who compete with each other. As for the exclusion of the MBAs from the tax, the State suggests that the legislature may have thought the "fraternal" nature of the MBAs warranted treating them differently than more commercially oriented insurers. This, too, is a legitimate legisla-

premium income is not taxed. See Utah Code Ann. § 31-42-31 (1974).

7. From our review of the record, we are unable to determine whether there are, in fact, any cooperative benefit associations. Certainly, none are part of this litigation. Therefore, for the purposes of this opinion, we will refer to those exempted from the premium tax as MBAs.

6. It is also noteworthy that a new form of what might broadly be termed health care insurance has emerged recently in the form of health maintenance organizations, or HMOs, and the legislature has chosen not to consider these insurance at all. They are not separately regulated, and they are not subject to the premium tax. The same is true of the "insurance" offered by motor clubs; they are not regulated, and their

tive purpose.<sup>8</sup>

The third and most critical question is whether the legislature chose a permissible means to achieve its legitimate ends. According to Blue Cross, MBAs are in all significant respects operationally indistinguishable from other insurers and compete directly against them. Blue Cross also contends that it has lost business to the MBAs because of the price-distorting impact of the premium tax. Blue Cross submitted a conclusory affidavit in support of this latter proposition which stated that Blue Cross had been unsuccessful in gaining the health insurance business of certain institutions served by MBAs and that the premium tax exemption enjoyed by MBAs gave them a competitive pricing advantage, including Blue Cross. Given the lack of any significant differences between the MBAs and nonprofit health service corporations and the competitive burden the premium tax creates for Blue Cross when competing with the MBAs, Blue Cross contends that the MBAs' premium tax exemption constitutes a discrimination that is not reasonably related to any legitimate legislative end; therefore, it must be declared invalid and the whole premium tax scheme struck down.

Blue Cross dismisses the State's claim that in imposing the tax on health service corporations, the legislature was also attempting to remedy a perceived market place inequity—that Blue Cross had proven itself to be a very successful competitor in the health care insurance market, that its exemption from the premium income tax paid by other generally for-profit insurers had become unfair, and that treating MBAs differently by continuing their exemption was appropriate because their "fraternal" character distinguished them from the commercial insurers—by asserting that there is virtually no legislative history explaining why the MBAs' exemption was continued. On this basis, Blue Cross contends that there is no legitimate objective for the leg-

8. Blue Cross strenuously objects that this supposed purpose was raised for the first time on appeal. Our review of the record indicates that this is not the case. The issue was raised before the trial court, and extensive reference to the

isolation beyond revenue enhancement and, therefore, we must judge the segregation of MBAs and Blue Cross into two different classes against that purpose only.

[8] In this approach to the issue, Blue Cross misperceives the applicable standard of review when addressing purely economic enactments. As stated earlier, in determining whether the classifications the legislature has used in such enactments are reasonably related to a legitimate legislative purpose, we are not limited to considering those purposes that can be plainly shown to have been held by some or all legislators. We will sustain a classification if we can reasonably conceive of facts "which would justify the distinctions or differences in state policy [expressed by the challenged legislation] as between different persons." *Baker*, 607 P.2d at 244 (citing *Lindsey v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911)). We do not "accept any conceivable reason for the legislation.... Rather, we judge such enactments on the basis of reasonable or actual legislative purposes." *Malan*, 693 P.2d at 671 n. 14. But we do not require any exact proof of those purposes; it is enough that they may be reasonably imputed to the legislative body.

With this standard in mind, we move on to consider the relationship of the means used to a legitimate end. From the legislative history cited to the trial court, it appears obvious that the health service corporations were subjected to the premium tax in 1969 because the legislature thought it unfair to exempt them from a tax imposed on their competitors in the marketplace. There is nothing in the legislative history, however, that helps explain why the MBAs' exemption was continued. It is in the history of the premium tax that we find a probable reason for treating the MBAs differently: the legislature considered MBAs, unlike health service corporations, to be different in character than the run-of-the-

legislative history of the premium tax scheme was submitted in support of the State's contention. Blue Cross certainly cannot contend that it has been surprised by the assertion of this claim again on appeal.



mill commercial insurer. This legislative judgment about the character of those exempted from the premium tax has a long history, dating back to the initial insurance legislation in 1907. From then on, what have variously been labeled fraternal, cooperative, religious, or mutual benefit associations that offer insurance to their members or adherents have been exempt from the premium tax and, at various times, have been subjected to entirely separate schemes of regulation. The question for us is whether the judgment that MBAs are sufficiently different to be eligible for different tax treatment is sustainable.

In an effort to find a reasonable basis for the legislature's separate classification of MBAs for purposes of the premium tax, we have reviewed their organizational structure and mode of operation, as they are explained in the statutes and record. In summary, we can say that while health insurance in Utah is offered by a variety of types of companies, including stock insurers,<sup>9</sup> mutual insurers,<sup>10</sup> reciprocal insurers,<sup>11</sup> mutual benefit associations,<sup>12</sup> and health service corporations<sup>13</sup> and each is organized and functions in a slightly different manner, there is little inherent in any of these forms of organization that is of much significance when it comes to determining what sorts of products they can or do offer in the insurance marketplace. And whatever distinctions may exist in organization, function, or product offered,

9 Utah Code Ann tit 31, ch 8 (1974)

10 Utah Code Ann tit 31 ch 9 (1974 & Supp 1981)

11 Utah Code Ann tit 31 ch 10 (1974 & Supp 1981)

12 Utah Code Ann tit 31 ch 31 (1966)

13 Utah Code Ann tit 31 ch 37 (1974 & Supp 1981)

14 Deseret Mutual Benefit Association has forty one policyholders most of which are affiliates of the Corporation of the President of the Church of Jesus Christ of Latter-Day Saints. Deseret Mutual does not use a sales force and does not solicit insurance business from the general public.

Associated American Mutual Life Insurance Company has only three policyholders—Deseret

the legislature did not find those distinctions significant for tax classification purposes. This is evident because MBAs share many characteristics both with health service corporations and with others of the insurers mentioned above, yet the legislature chose to treat MBAs differently for purposes of the premium tax.

The only characteristic that seems to set MBAs apart from the insurers taxed is that of the six MBAs in Utah, most are nonprofit and restrict their business to issuing policies only to employees of a single company or to members of a church or association to which the MBA is captive.<sup>14</sup> There is nothing in the statutes under which the MBAs are organized that requires them to so restrict their business or prevents them from being operated as for-profit corporations. However, all but two have so restricted themselves with respect to the sources of their business, and only one MBA is operated as a for-profit corporation. This raises two questions: first, can the legislature treat all insurers sharing these characteristics as a separate class for purposes of the premium tax; second, if the class includes some insurers that do not share those characteristics, does that fact invalidate the classification measure? We treat these questions separately.

The first issue, whether these characteristics are sufficient to justify the legislature's treating those sharing them as a

Mutual Benefit Association Intermountain Health Care (formerly owned by the LDS Church) and the Corporation of the President of the Church of Jesus Christ of Latter-Day Saints. Associated American provides coverage only for employees of Intermountain Health Care.

Electric Mutual Benefit Association provides group hospital and surgical insurance and accidental death insurance to employees of Utah Power & Light Company.

Educators Mutual Insurance Association provides insurance to members of the Utah Education Association and others who are engaged in certain educational activities in Utah.

Gem State Mutual offers insurance to anyone in Utah but primarily sells group policies to small businesses.

Allied Mutual Assurance Association is a for-profit corporation that offers insurance to anyone in Utah but it does not offer health or accident insurance.

## BLUE CROSS AND BLUE SHIELD v STATE

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distinct class of insurers for purposes of the premium tax, we answer in the positive. We see nothing illegitimate in treating insurers that can be characterized as adjuncts of nonprofit, religious, cooperative, or benevolent organizations as different than what might be characterized as commercial insurers. By exempting MBAs from the premium tax, the legislature may have been expressing its judgment that entities of this type are not comparable to commercial insurers that compete in the open market and should not therefore be burdened by the premium tax. That judgment does not appear to be without rational foundation.

Blue Cross notes that the law under which these insurers are organized does not require MBAs to have the characteristics that we conclude could have motivated the legislature to treat them separately. The relevant question is not whether the law requires those characteristics, but whether in fact they share those characteristics. If they all did, we would have no further question about whether the exemption is reasonably related to a legitimate legislative purpose; however, they do not. Gem State Mutual and Allied Mutual Assurance do not have the same captive affiliation with a specific group that characterizes all the rest of the MBAs, both these companies sell to anyone in Utah, and Gem State sells health insurance, presumably in direct competition with Blue Cross and other health insurers. We cannot conceive of any reason why such insurers would be treated differently for purposes of the premium tax. To this extent, then, the legislature, in exempting all entities organized as MBAs from the premium tax, has used a classification that imperfectly effects its purposes.

This gives rise to the second issue posed above: if the class includes some insurers that do not share the characteristics that could be legitimately used to define the class, does that fact invalidate the classification measure? We think that it does not.

The explanation for this conclusion requires that we return to the standard governing review of challenges under the uniform operation of the laws provision of article I, section 24 to the constitutionality of legislation that is purely economic. As noted earlier, we accord the legislature broad deference when reviewing the reasonableness of the relationship between the classifications it uses and legitimate legislative purposes it seeks to achieve. However, the analytical model spelled out above does not explicitly address the question of what we do when faced with what we conclude is an imperfect classification, even after we accord the legislative act every presumption. The answer lies in an examination of the impact of the misclassification.

[9] There is nothing inherent in the article I, section 24 test as it was stated in *Malan* and our other decisions based on equal protection or uniform operation of the laws principles such as *Allen v Intermountain Health Care, Inc.*, 635 P.2d 80 (Utah 1981) and *Redwood Gym v Salt Lake County Comm'n.*, 624 P.2d 1138 (Utah 1981), that expressly requires us, in determining the constitutionality of an enactment, to take into account the impact of the legislative classification under attack on those classified. However, it seems clear that the impact of a measure can be relevant to determining whether the legislative body has exceeded the bounds of the broad discretion it has in fashioning purely economic legislation.

For example in *Mountain Fuel Supply*, appellant Mountain Fuel contended that Salt Lake City had created an arbitrary classification when it singled out for the imposition of a franchise tax, set at four percent of gross receipts, all public utilities supplying natural gas, electricity, and telephone service and all others supplying natural gas, electricity, and telephone service in competition with the public utilities.<sup>15</sup> Mountain Fuel contended that the classifi-

15 The Salt Lake City ordinance under attack taxed equally all suppliers of gas, electricity and telephone services. It was not limited in its reach to public utilities. *Mountain Fuel Supply*

*Co v Salt Lake City Corp.* 752 P.2d 884, 886 & n 1 (Utah 1988). But see opinion of Howe J concurring 752 P.2d at 891.



cation was invalid because it did not treat equally all those similarly situated; specifically, the City did not impose the tax on those who sold heating fuels other than gas and electricity in direct competition with those taxed. Finally, Mountain Fuel contended that as a result of this tax, its ability to compete for certain customers, such as those able to switch from coal to gas with ease, was severely hampered.

The Court rejected Mountain Fuel's challenge to the ordinance. In so doing, we accepted as fact the claim that those subjected to the tax, including both utilities and nonutilities, were competitively disadvantaged to some degree because of the tax. 752 P.2d at 891. We also implicitly accepted as fact the contention that natural gas and electricity competed with other fuels in the heating fuel market. *Id.* But we determined that the question was not whether Salt Lake City had drawn perfectly the boundaries of the class of persons to be taxed; rather, the question was whether the City had drawn them in a permissible fashion. The permissibility of the classification was determined by balancing the justifications advanced by the City for excluding those who might logically have been included in the class against the harm allegedly suffered by those excluded as a result of the exclusion of their competitors. *Id.* We concluded that Mountain Fuel had not shown that the competitive disadvantage imposed on those taxed as a result of the arguably misdrawn class lines was sufficiently great, given the effectiveness of the tax in accomplishing the City's aims and the administrative efficiencies realized by not including in the taxed class those providing heating fuels other than natural gas and electricity, to warrant a finding that the burden resulting from the ordinance was "unreasonable" or "unjustifiable." *Id.*<sup>16</sup>

It is important to note that in evaluating the justifications for imposing the tax on suppliers of natural gas, electricity, and telephone service, the Court gave wide latitude to the City in demonstrating that the

classification boundaries it drew were reasonably related to its revenue and tax-spreading objectives. Although the justifications for not taxing suppliers of alternative heating fuels focused on the ease of collecting the tax from public utilities and their ability to pass the tax on to customers, the fact remains that the tax was also levied on small-scale, non-utility suppliers of those same commodities and services. The administrative ease and efficiency claims advanced by the City to distinguish the public utilities from the suppliers of alternative fuels arguably did not apply when the non-utility suppliers who were taxed were compared with the alternative fuel suppliers who were not. See 752 P.2d at 891.

At the margins, then, the operation of the City's classification scheme might not have stood the test of its justifications. Some might have been excluded who could logically have been included and vice versa. However, the Court still affirmed the validity of the City's ordinance because, on the whole, after considering the burdens it imposed on those taxed, it appeared to be a reasonable attempt to achieve the legitimate government ends.

In so holding, we demonstrated the operation of the principle that in the area of purely economic legislation, and especially taxation, we do not require perfection. This principle was well stated in *Baker v. Matheson*, 607 P.2d 233 (Utah 1979):

Legislative enactments that are basically economic in nature rarely affect all persons equally. Such enactments require classifications which necessarily reflect legislative judgments which accord various weights to various shadings of differences in human affairs. Razor thin distinctions which are entirely devoid of some arbitrariness are rarely, if ever, possible. The rationality of the classifications is a matter of degree. If courts were to insist upon logical precision in creating classifications not consistent with the nature of the problem to be

defining those subject to it, see *Continental Bank & Trust Co. v. Farmington City*, 599 P.2d 1242 (Utah 1979).

addressed, legislative power would be seriously crippled. As Justice Holmes observed, "We must remember that the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501, 51 S.Ct. 228, 229, 75 L.Ed. 482 (1931).

607 P.2d at 243, see *Recent Developments, Uniform Operation of Economic Regulations*, 1989 Utah L. Rev. 143, 307.

Returning to the present case, the question is whether the legislature acted impermissibly when it used a classification—MBAs—to achieve its objective of excluding insurers that can be characterized as adjuncts of nonprofit, religious, cooperative, or benevolent organizations from the premium tax when that classification is overinclusive in that it exempts not only such organizations, but also two insurers that are apparently indistinguishable from those taxed. As noted, the classification used in *Mountain Fuel* was also overinclusive. It taxed nonutility vendors that did not fit the justifications offered for the classification and that were presumably disadvantaged by the tax when competing against sellers of alternative fuels. Yet we upheld the classification, inasmuch as there had been no showing that the competitive burden imposed was unreasonable in light of the reasons offered in support of the classification used in imposing the franchise tax.

Similar logic applies in this case. Blue Cross submitted a conclusory affidavit to the trial court suggesting that it had been unable to secure contracts for insurance from some customers who had insured through MBAs. However, Blue Cross did not show that this business would have gone to it or to some other commercial insurer but for the premium tax, nor did it demonstrate that any disadvantage which resulted from the premium tax that it or the other insurers suffered when competing with MBAs was substantial or caused Blue Cross or the other insurers any financial hardship. The legislature is not to be denied an "effective means of raising needed revenues unless that means imposes an unreasonable burden on the affected parties." *Mountain Fuel*, 752 P.2d at 891.

In the present case, Blue Cross failed to show that it or any other insurer incurred any burden. Therefore, even though we cannot conceive of any reason for exempting two MBAs from the premium tax, that misclassification of insurers resulting from the measure is not sufficient to warrant striking down the tax.

For the foregoing reasons, we conclude that the challenge to the premium tax under article I, section 24 must be rejected. Since we reject that claim under the Utah Constitution, we also reject the challenge made under the equal protection clause of the fourteenth amendment to the United States Constitution. *Mountain Fuel*, 752 P.2d at 890.

[10, 11] The next issue is Blue Cross's challenge to the premium tax under article VI, section 26 of the Utah Constitution. That provision states: "No private or special law shall be enacted where a general law can be applicable." Utah Const. art. VI, § 26. Our cases make it clear that a special law is a law that classifies its objects unreasonably, as by selecting from a general class particular persons, places, or things for the purpose of conferring privileges or imposing burdens. See, e.g., *Hulbert v. State*, 607 P.2d 1217, 1223-24 (Utah 1980), *Utah Farm Bureau Ins. Co. v. Utah Ins. Guar. Ass'n*, 564 P.2d 751, 754 (Utah 1977). Although there may be some differences between the reach of article I, section 24 and article VI, section 26, our cases to date have, in essence, viewed the special laws ban to be the flip side of the uniform operation of the laws command. See *State v. Bishop*, 717 P.2d 261, 265 (Utah 1986). If a law satisfies the requirement of article I, section 24, that all laws of "a general nature shall have uniform operation," it will not violate article VI, section 26.

In the present case, we have found that sections 31-14-4(1) and 31-37-9(2) operate to validly impose a premium tax on insurers, except for MBAs. As such, these statutes constitute general laws. And we have found that they do not offend the uniform operation of the laws requirement of article I, section 24. We therefore conclude that

16. For another case reflecting the examination of the burdens imposed by a tax in considering the reasonableness of the classification scheme

they do not violate the special laws ban of article VI, section 26

For the reasons stated above, we affirm the judgment of the trial court.

HALL, C.J., HOWE, Associate C.J., and STEWART and DURHAM, JJ., concur



STATE of Utah, Plaintiff and Appellee,  
v.

Henry S. BRUCE, Jr., Defendant  
and Appellant.

No. 840325.

Supreme Court of Utah

July 28, 1989

Defendant was convicted in the Third District Court, Salt Lake County, Leonard H. Russon, J., of aggravated robbery. Defendant appealed. The Supreme Court, Howe, Associate C.J., held that (1) investigatory stop was proper, (2) in-court identification by police officer was proper, (3) prior convictions should not have been admitted for impeachment purposes but admission was harmless, and (4) defendant's conviction would be reduced from aggravated robbery to robbery.

Conviction vacated in part and case remanded.

Zimmerman, J., filed a concurring and dissenting opinion in which Durham, J., concurred.

#### 1 Criminal Law §1036(4)

Defendant did not waive for appellate review challenge to admission of evidence which was subject of motion to suppress when defendant failed to further object to admission of evidence at trial where trial

judge was also judge who presided over suppression hearing.

#### 2 Criminal Law §1158(4)

In the absence of clear error, the Supreme Court upholds trial judge's factual assessment underlying decision to grant or deny suppression motion.

#### 3 Arrest §63.5(2)

Police officers may, in appropriate circumstances and in appropriate manner, approach person for purposes of investigating possible criminal behavior, even though there is no probable cause to make arrest.

#### 4 Arrest §63.5(4)

In justifying particular investigatory intrusion, police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant intrusion.

#### 5 Arrest §63.5(6)

While police officers who issued radio broadcast may have improperly placed two black males in front seat of orange car seen leaving scene of robbery, sufficient information was provided and articulable facts existed to support at least reasonable suspicion that robber was in orange car, therefore, stop was made in objective reliance on broadcast which was issued by officers possessing reasonable suspicion justifying stop.

#### 6 Criminal Law §339.10(2)

In-court identification of defendant by police officer, who pulled defendant's arrest file and looked at his photograph to see if defendant was person officer had seen standing across from store on night of robbery, was admissible, although it was contended that identification was based on out-of-court one photo showup, there was no reasonable likelihood of irreparable misidentification at trial resulting from police officer's conduct.

#### 7 Criminal Law §782(5.5)

Trial court did not abuse its discretion in refusing to give cautionary instruction on eyewitness identification where four eyewitnesses identified defendant two witnesses stood only an arm's length from

man they both identified as defendant, they had particularly good opportunity to observe, it was highly likely that result would have been exactly the same even if cautionary instruction had been given, and defense counsel's cross examination of State's witnesses and extensive closing argument more than sufficiently alerted jury to possibility of error in eyewitness identification.

#### 8 Witnesses §345(1)

Convictions for crimes not involving dishonesty or false statement cannot be used for impeachment purposes unless they are felony convictions and trial court has applied proper balancing test under rule Rules of Evid., Rule 609(a).

#### 9 Witnesses §345(1)

Factors to consider when balancing probative value of prior crimes evidence against prejudicial effect, for purposes of determining admissibility for impeachment, include nature of crime, as bearing on character for veracity of witness, recentness or remoteness of prior conviction, similarity of prior crime to charged crime, importance of credibility issues in determining truth in prosecution tried without decisive nontestimonial evidence, and importance of accused's testimony, as perhaps warranting the exclusion of convictions probative of accused's character for veracity.

#### 10 Witnesses §345(2)

Prior conviction for theft may be admissible for impeachment purposes if in fact crime was committed by fraudulent or deceitful means. Rules of Evid., Rule 609(a).

#### 11 Criminal Law §1170½(1)

##### Witnesses §337(16, 19)

Defendant's prior convictions for stealing type crimes of retail theft and attempted burglary were not crimes of "dishonesty or false statement" which could be admitted for impeachment purposes, however admission of prior convictions was harmless given evidence of guilt. Rules of Evid., Rule 609(a)(2).

#### 12 Criminal Law §1170½(1)

Standard for reversal in cases involving erroneous failure to exclude prior con-

victions for impeachment purposes is whether, absent error, there was reasonable likelihood of more favorable result for defendant. U.C.A. 1953, 76-6-301, 76-6-302.

#### 13 Criminal Law §1184(3)

There was insufficient evidence to establish that defendant used firearm or facsimile thereof, or any deadly weapon, in course of committing robbery, therefore, defendant was entitled to have conviction reduced from aggravated robbery to robbery. U.C.A. 1953, 76-6-302.

Debra K. Loy, Salt Lake City, for defendant and appellant.

David L. Wilkinson, Salt Lake City, for plaintiff and appellee.

HOWE, Associate Chief Justice

Defendant Henry S. Bruce, Jr., appeals from his jury conviction of aggravated robbery, a felony of the first degree. Utah Code Ann. § 76-6-302 (1978, Supp. 1989).

On November 26, 1985, the Corner Mart gas and convenience store in northwest Salt Lake City was robbed. At approximately 3:00 in the afternoon, Sue Ann Candelaria, a store employee, received a phone call from a man claiming to have a gun pointed directly at her. He instructed her to put all the money from the register in a bag and give it to a man who would soon be entering the store. The caller threatened to shoot her if she did not comply. Within a few minutes, a young man whom she subsequently identified as defendant entered the store and placed his hand under his jacket as though he had a gun and demanded that Candelaria "do what the man on the phone said." She did not see a gun and later testified that she could not recall that the man made any reference to his having a gun. She stated, "It just looked like a normal thing, like a gun, but it wasn't. I knew it wasn't." Without putting the money in a bag, she gave the robber approximately \$214, and he left the store, heading north on foot. As he walked away, Candelaria saw him appear to place the money down the front of his pants.

Tab H

**ALLEGHENY PITTSBURGH COAL CO. v. COUNTY  
COMMISSION OF WEBSTER COUNTY,  
WEST VIRGINIA**

**CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST  
VIRGINIA**

No. 87-1303. Argued December 7, 1988—Decided January 18, 1989\*

The West Virginia Constitution in relevant part establishes a general principle of uniform taxation so that all property, both real and personal, shall be taxed in proportion to its value. The Webster County tax assessor, from 1975 to 1986, valued petitioners' real property on the basis of its recent purchase price. Other properties not recently transferred were assessed based on their previous assessments with minor modifications. This system resulted in gross disparities in the assessed value of generally comparable property. Each year, respondent county commission affirmed the assessments, and petitioners appealed to the State Circuit Court. Eventually, a number of these appeals were consolidated and decided. The State Circuit Court held that the county's assessment system systematically and intentionally discriminated against petitioners in violation of the State Constitution and the Fourteenth Amendment's Equal Protection Clause. It ordered respondent to reduce petitioners' assessments to the levels recommended by the state tax commissioner in his guidelines for local assessors. The State Supreme Court of Appeals reversed. It held that the record did not support a finding of intentional and systematic discrimination because petitioners' property was not assessed at more than true value, as appropriately measured by the recent arm's-length purchase price of the property. In its view, any comparative undervaluation of other property could only be remedied by an action by petitioners to raise those other assessments.

**Held**

1 The assessments on petitioners' property violated the Equal Protection Clause. There is no constitutional defect in a scheme that bases an assessment on the recent arm's-length purchase price of the property, and uses a general adjustment as a transitional substitute for an individual reappraisal of other parcels. But the Clause requires that such general adjustments be accurate enough to obtain, over a short period of time, rough equality in tax treatment of similarly situated property own-

\*Together with No. 87-1310, *East Kentucky Energy Corp. et al. v. County Commission of Webster County, West Virginia*, also on certiorari to the same court.

ers. This action is not one involving permissible transitional inequality, since petitioners' property has been assessed at roughly 8 to 35 times more than comparable neighboring property and these discrepancies have continued for more than 10 years with little change. The county's adjustments to assessments that are carried over are too small to seasonably dissipate the disparity. Pp. 342-344.

2 The Equal Protection Clause permits a State to divide different kinds of property into classes and to assign to each a different tax burden so long as those divisions and burdens are neither arbitrary nor capricious. West Virginia has not drawn such a distinction here as its Constitution and laws provide that all property of the kind held by petitioners shall be taxed uniformly according to its estimated market value. There is no suggestion that the State has in practice adopted a different system that authorizes individual counties to independently fashion their own substantive assessment policies. The Webster County assessor has, apparently on her own initiative, applied state tax law in a manner resulting in significant and persistent disparity in assessed value between petitioners' and similarly situated property. The intentional systematic undervaluation of such other property unfairly deprives petitioners of their rights under the Clause. Pp. 344-346.

3 The State might on its own initiative remove the discrimination against petitioners by raising the assessments of systematically and intentionally undervalued property in the same class. A taxpayer in petitioners' position, however, forced to litigate for redress, may not be remitted by the State to the remedy of seeking to have the assessments of the undervalued property raised. P. 346.

— W. Va. —, 360 S. E. 2d 560, reversed and remanded.

REHNQUIST, C. J., delivered the opinion for a unanimous Court.

*E. Barrett Prettyman, Jr.*, argued the cause for petitioners in both cases. With him on the briefs were *John G. Roberts, Jr.*, and *William James Murphy*.

*C. William Ullrich*, Chief Deputy Attorney General of West Virginia, argued the cause for respondent. With him on the brief were *Charles G. Brown*, Attorney General, and *Jack Alsop*.†

†Briefs of *amici curiae* urging reversal were filed for the National Association of Realtors by *Laurent K. Janik*, and for the National Taxpayers Union by *Gale A. Norton*.

[Footnote is continued on p. 338.]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The West Virginia Constitution guarantees to its citizens that, with certain exceptions, "taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value . . . ." Art. X, § 1. The Webster County tax assessor valued petitioners' real property on the basis of its recent purchase price, but made only minor modifications in the assessments of land which had not been recently sold. This practice resulted in gross disparities in the assessed value of generally comparable property, and we hold that it denied petitioners the equal protection of the laws guaranteed to them by the Fourteenth Amendment.

Between 1975 and 1986, the tax assessor for Webster County, West Virginia, fixed yearly assessments for property within the county at 50% of appraised value. She fixed the appraised value at the declared consideration at which the property last sold. Some adjustments were made in the assessments of properties that had not been recently sold, although they amounted to, at most, 10% increases in 1976, 1981, and 1983 respectively.<sup>1</sup>

*Benna Ruth Solomon and Eugene J. Comey* filed a brief for the National Association of Counties et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for the Pacific Legal Foundation et al. by *Ronald A. Zumbrun, Anthony T. Caso, and Jonathan M. Coupal*, and for the International Association of Assessing Officers by *James F. Gossett*.

<sup>1</sup> Petitioners contend that the adjustments to the assessments for property not recently transferred were uneven at best. According to petitioners, a study of the assessed value of all coal tracts in Webster County from 1983 to 1984 was introduced at trial and demonstrated that the assessment of 35% of the tracts was unchanged during that period. The courts below do not appear to have made specific factual findings accepting or rejecting this study or petitioners' conclusions drawn from it. For the purposes of argument, we will accept the county's figures since we find that, even accepting those figures, the adjustments do not dispel the constitutional flaw in the assessment system.

In 1974, for example, Allegheny Pittsburgh Coal Company (Allegheny) purchased fee, surface, and mineral interests in certain properties for a stated price somewhat in excess of \$24 million, and during the tax years 1976 through 1983 its property was assessed annually at half of this figure. In 1982 Allegheny sold the property to East Kentucky Energy Corp. (Kentucky Energy) for a figure of nearly \$30 million, and the property thereafter was annually assessed at a valuation just below \$15 million. Oneida Coal Company and Shamrock Coal Company participated in similar transactions in Webster County, and the property they purchased or sold was assessed in a similar manner.

Each year, petitioners pursued relief before the County Commission of Webster County sitting as a review board. They argued that the assessment policy of the Webster County assessor systematically resulted in appraisals for their property that were excessive compared to the appraised value of similar parcels that had not been recently conveyed. Each year the county commission affirmed the assessments, and each year petitioners appealed to the State Circuit Court. A group of these appeals from Allegheny and its successor in interest, Kentucky Energy, were consolidated by the West Virginia Circuit Court and finally decided in 1985. App. to Pet. for Cert. in No. 87-1303, p. 15a. Another group of appeals from Shamrock and Oneida were consolidated and decided by the West Virginia Circuit Court early the next year. App. to Pet. for Cert. in No. 87-1310, p. 49a.<sup>2</sup>

The judge in both of these cases concluded that the system of real property assessment used by the Webster County assessor systematically and intentionally discriminated against

<sup>2</sup> After each of these primary decisions adjudicating the validity of the assessments to the lands in question, petitioners obtained a number of other orders applying the findings in the primary decisions to their specific cases and to other appeals not consolidated in the primary decisions. See App. to Pet. for Cert. in No. 87-1310, pp. 79a, 83a, and 86a.



petitioners in violation of the West Virginia Constitution and the Fourteenth Amendment's Equal Protection Clause. He ordered the county commission to reduce the assessments on petitioners' property to the levels recommended by the state tax commissioner in his valuation guidelines published for use by local assessors. Underlying the judge's conclusions were findings that petitioners' tax assessments over the years were dramatically in excess of those for comparable property in the county. He found that "the assessor did not compare the various features of the real estate to which the high assessment was applied with the various features of land assessed at a much lower rate." App. to Pet. for Cert. in No. 87-1303, p. 29a; App. to Pet. for Cert. in No. 87-1310, p. 59a. "The questioned assessments were not based upon the presence of economically minable or removable coal, oil, gas or harvestable timber in or upon petitioners' real estate, as compared to an absence of the same in or upon [neighboring] properties." *Ibid.* Nor were they "based upon present use or immediately foreseeable economic development of petitioners' real estate." *Ibid.* Rather, "[t]he sole basis of the assessment of petitioners' real estate was, according to the assessor, the consideration declared in petitioners' deeds." *Ibid.*<sup>3</sup>

<sup>3</sup> Respondent argues in this Court that petitioners' land was not truly comparable to that of the surrounding properties. It points to the fact that one of the parcels held by Allegheny, and then by Kentucky Energy, comprising 4,287 acres, allegedly contains 32 million tons of low-sulfur coal recoverable by strip mining. This unusually valuable parcel skews the average value of all the properties, as well as serving as a basis for higher valuation of this parcel than those surrounding it.

Petitioners make a number of answers: First, they rely on respondent's stipulations that "[t]he properties surrounding the property owned by . . . Petitioner, . . . are comparable properties in that they are substantially the same geologically as the properties of the Petitioner . . ." Record 1319-1320, 1085. Next, they point to the factual findings of the West Virginia Circuit Court, never rejected by the West Virginia Supreme Court of Appeals, that "[a]lthough the real estate of each of these petitioners is not identical to that of all other real estate in Webster County, it

This approach systematically produced dramatic differences in valuation between petitioners' recently transferred property and otherwise comparable surrounding land. For the years 1976 through 1982, Allegheny was assessed and taxed at approximately 35 times the rate applied to owners of comparable properties. After purchasing that land, Kentucky Energy was assessed and taxed at approximately 33 times the rate of similar parcels. From 1981 through 1985, the county assessed and taxed the Shamrock-Oneida property at roughly 8 to 20 times that of comparable neighboring coal tracts. These disparities existed notwithstanding the adjustments made to the assessments of land not recently conveyed. In the case of the property held by Allegheny and Kentucky Energy, the county's adjustment policy

appears that petitioners' real estate is substantially similar to the real estate of the others in topography, location, access, development, mineral content and forestation, and that the petitioners' real estate is substantially similar to adjacent and contiguous tracts and parcels of real estate owned by others." App. to Pet. for Cert. in No. 87-1303, p. 16a; App. to Pet. for Cert. in No. 87-1310, p. 50a. Finally, they note that the court's findings were founded on the testimony of Kentucky Energy's expert witness, the one who testified to the estimated 32 million tons of coal under Kentucky Energy's land, that the surrounding properties were equally promising. On direct examination he said:

"As far as comparing this area with the surrounding property, geologically, those same seams are present on all the other properties [suggested as comparable]. The same coal seams are present there. . . . [T]he coal is there and I know that the chances of them being mineable are just as good there as they are on the [Kentucky Energy] properties.

" . . . There may be some variations, depending on which individual seam is mineable from one property to the other, but in the long run they are very similar properties located within the same area and there is no geological reason that they should not be comparable." Brief in Opposition in No. 87-1303, pp. 10a-11a.

We think that petitioners' submissions justify the conclusion on the record presented to us that their properties were, in aspects relevant to valuation and assessment, comparable to surrounding property valued and assessed at markedly lower amounts.

would have required more than 500 years to equalize the assessments.

On appeal, the Supreme Court of Appeals of West Virginia reversed. It found that the record did not support the trial court's ruling that the actions of the assessor and board of review constituted "intentional and systematic" discrimination. It held that "assessments based upon the price paid for the property in arm's length transactions are an appropriate measure of the 'true and actual value' of . . . property." *In re 1975 Tax Assessments against Oneida Coal Co.*, — W. Va. —, —, 360 S. E. 2d 560, 564 (1987). That other properties might be undervalued relative to petitioners' did not require that petitioners' assessments be reduced: "Instead, they should seek to have the assessments of other taxpayers raised to market value." *Id.*, at —, 360 S. E. 2d, at 565 (quoting *Killen v. Logan County Comm'n*, — W. Va. —, —, 295 S. E. 2d 689, 709 (1982)). We granted certiorari to decide whether these Webster County tax assessments denied petitioners the equal protection of the law and, if so, whether petitioners could constitutionally be limited to the remedy of seeking to raise the assessments of others. 485 U. S. 976 (1988).

We agree with the import of the opinion of the Supreme Court of Appeals of West Virginia that petitioners have no constitutional complaint simply because their property is assessed for real property tax purposes at a figure equal to 50% of the price paid for it at a recent arm's-length transaction. But their complaint is a comparative one: while their property is assessed at 50% of what is roughly its current value, neighboring comparable property which has not been recently sold is assessed at only a minor fraction of that figure. We do not understand the West Virginia Supreme Court of Appeals to have disputed this fact. We read its opinion as saying that even if there is a constitutional violation on these facts, the only remedy available to petitioners was an effort to have the assessments on the neighboring properties raised

by an appropriate amount. We hold that the assessments on petitioners' property in this case violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and that petitioners may not be remitted to the remedy specified by the Supreme Court of Appeals of West Virginia.

The county argues that its assessment scheme is rationally related to its purpose of assessing properties at true current value: when available, it makes use of exceedingly accurate information about the market value of a property—the price at which it was recently purchased. As those data grow stale, it periodically adjusts the assessment based on some perception of the general change in area property values. We do not intend to cast doubt upon the theoretical basis of such a scheme. That two methods are used to assess property in the same class is, without more, of no constitutional moment. The Equal Protection Clause "applies only to taxation which in fact bears unequally on persons or property of the same class." *Charleston Fed. Savings & Loan Assn. v. Alderson*, 324 U. S. 182, 190 (1945) (collecting cases). The use of a general adjustment as a transitional substitute for an individual reappraisal violates no constitutional command. As long as general adjustments are accurate enough over a short period of time to equalize the differences in proportion between the assessments of a class of property holders, the Equal Protection Clause is satisfied. Just as that Clause tolerates occasional errors of state law or mistakes in judgment when valuing property for tax purposes, see *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350, 353 (1918); *Coulter v. Louisville & Nashville R. Co.*, 196 U. S. 599 (1905), it does not require immediate general adjustment on the basis of the latest market developments. In each case, the constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners. *Allied Stores of Ohio v. Bowers*, 358 U. S. 522, 526–527 (1959), and cases there cited; cf. *FPC v. Hope Natural Gas*

Co., 320 U. S. 591, 602 (1944) (noting, in the ratemaking context, that “[i]t is not theory, but the impact . . . that counts”).

But the present action is not an example of transitional delay in adjustment of assessed value resulting in inequalities in assessments of comparable property. Petitioners’ property has been assessed at roughly 8 to 35 times more than comparable neighboring property, and these discrepancies have continued for more than 10 years with little change. The county’s adjustments to the assessments of property not recently sold are too small to seasonably dissipate the remaining disparity between these assessments and the assessments based on a recent purchase price.

The States, of course, have broad powers to impose and collect taxes. A State may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable. *Allied Stores, supra*, at 526–527 (“The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products”). It might, for example, decide to tax property held by corporations, including petitioners, at a different rate than property held by individuals. See *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U. S. 356 (1973) (Illinois *ad valorem* tax on personalty of corporations). In each case, “[i]f the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.” *Brown-Forman Co. v. Kentucky*, 217 U. S. 563, 573 (1910).<sup>4</sup>

<sup>4</sup>We need not and do not decide today whether the Webster County assessment method would stand on a different footing if it were the law of a State, generally applied, instead of the aberrational enforcement policy it appears to be. The State of California has adopted a similar policy as Article XIII A of its Constitution, popularly known as “Proposition 13.” Proposition 13 generally provides that property will be assessed at its 1975–1976 value, and reassessed only when transferred or constructed upon, or in a limited manner for inflation. Cal. Const., Art. XIII A, § 2 (limiting

But West Virginia has not drawn such a distinction. Its Constitution and laws provide that all property of the kind held by petitioners shall be taxed at a rate uniform throughout the State according to its estimated market value. There is no suggestion in the opinion of the Supreme Court of Appeals of West Virginia, or from any other authoritative source, that the State may have adopted a different system in practice from that specified by statute; we have held that such a system may be valid so long as the implicit policy is applied evenhandedly to all similarly situated property within the State. *Nashville C. & S. L. R. Co. v. Browning*, 310 U. S. 362, 368–369 (1940). We are not advised of any West Virginia statute or practice which authorizes individual counties of the State to fashion their own substantive assessment policies independently of state statute. See *Salsburg v. Maryland*, 346 U. S. 545 (1954). The Webster County assessor has, apparently on her own initiative, applied the tax laws of West Virginia in the manner heretofore described, with the resulting disparity in assessed value of similar property. Indeed, her practice seems contrary to that of the guide published by the West Virginia Tax Commission as an aid to local assessors in the assessment of real property.

“[I]ntentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property.” *Sunday Lake Iron Co., supra*, at 352–353; *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 445–446 (1923); *Cumberland Coal Co. v. Board of Revision of Tax Assessments in Greene County, Pa.*, 284 U. S. 23, 28–29 (1931). “The equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.” *Hillsborough v. Cromwell*, 326

inflation adjustments to 2% per year). The system is grounded on the belief that taxes should be based on the original cost of property and should not tax unrealized paper gains in the value of the property.



U. S. 620, 623 (1946). We have no doubt that petitioners have suffered from such "intentional systematic undervaluation by state officials" of comparable property in Webster County. Viewed in isolation, the assessments for petitioners' property may fully comply with West Virginia law. But the fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings. The relative undervaluation of comparable property in Webster County over time therefore denies petitioners the equal protection of the law.

A taxpayer in this situation may not be remitted by the State to the remedy of seeking to have the assessments of the undervalued property raised. "The [Equal Protection Clause] is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class." *Hillsborough, supra*, at 623, citing *Sioux City Bridge Co., supra*, 445-447; *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U. S. 239, 247 (1931); *Cumberland Coal Co., supra*, at 28-29. The judgment of the Supreme Court of Appeals of West Virginia is accordingly reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

**SHEET METAL WORKERS' INTERNATIONAL  
ASSN. ET AL. v. LYNN**

**CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT**

No. 86-1940. Argued November 7, 1988—Decided January 18, 1989

In an attempt to alleviate a financial crisis plaguing petitioner local union (Local), which is an affiliate of petitioner international union (International), the International's president appointed Richard Hawkins as trustee to supervise the Local's affairs, with authority under the International's constitution to suspend the Local's officers and business representatives. Five days after a special meeting at which the Local's membership defeated Hawkins' proposal to increase their dues, Hawkins notified respondent Lynn, an elected business representative of the Local, that he was being removed "indefinitely" from his position because of his outspoken opposition to the proposal at the meeting. After exhausting his intraunion remedies, Lynn brought suit in Federal District Court, claiming that his removal violated the free speech provision of Title I of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA or Act). The court granted summary judgment for petitioners under *Finnegan v. Leu*, 456 U. S. 431, which held that the discharge of a union's appointed business agents by the union president, following his election over the incumbent for whom the business agents had campaigned, did not violate Title I. However, the Court of Appeals reversed, holding that *Finnegan* did not control where the dismissed union official was elected rather than appointed, and rejecting the contention that Lynn's removal was valid because it was carried out under Hawkins' authority as trustee.

**Held:** The removal of an elected business agent, in retaliation for statements he made at a union meeting in opposition to a dues increase sought by the union trustee, violates the LMRDA. Pp. 352-359.

(a) Petitioners' argument is unpersuasive that Lynn's status as an elected, rather than an appointed, official is immaterial, and that the loss of his union employment cannot amount to a Title I violation because he remains a member of the Local and was not prevented from attending the special meeting, expressing his views on the dues proposal, or casting his vote. Even though Lynn was not actually prevented from exercising such Title I rights, his removal interfered with those rights by forcing him to choose between them and his job. Moreover, in contrast to the discharge of an appointed union official, the removal of an elected

er The subrogee insurer may still sue the insured for liability in excess of the policy amount or outside the scope of coverage. In addition, the subrogee insurer may directly sue the insolvent insurer, although such suit is unlikely to produce any significant recovery.

As to the third factor, we do acknowledge that rights of indemnity and contribution are significant longstanding rights derived from traditional principles of equity. After weighing the three factors, however, we believe RAM's cause of action against Dunbar Kapple is not such a vested right that it cannot be impaired by subsequent legislation. At this point, RAM's cause of action is merely a contingent right, one that could be reduced to a vested right only after litigation against Dunbar Kapple and sufficient proof, as determined by the trier of fact, to establish that Dunbar Kapple was in fact negligent in its design and manufacture of the product and that such negligence was the proximate cause of the employee's injury. We are particularly persuaded by the reasoning in *Peterson* and in *Benson v Farmers Union Central Exchange, Inc.*, 414 N.W.2d 425 (Minn Ct. App 1987), *pet. for rev denied* (Minn Nov

24, 1987), where the courts found that the legislature, as a matter of public policy, could enact retroactive legislation affecting various rights of recovery in pending personal injury actions.

Because we determine that RAM's action is barred under either Minnesota or Illinois law, we do not address the issue of which state's law should apply under a conflicts analysis. See *Pitco*, 145 Wis 2d at 532-33, 427 N.W.2d at 420 (no need to address which state's law applies where there is no conflict).

### DECISION

The trial court correctly ruled that under either Minnesota or Illinois law, RAM's action for indemnity and contribution against Dunbar Kapple, the insured of an insolvent insurer, is barred.

Affirmed.



Cite as 443 N.W.2d 249 (Neb. 1989)

232 Neb 806

**NORTHERN NATURAL GAS COMPANY,  
and Enron Liquids Pipeline  
Company, Appellants,**

v.

**STATE BOARD OF EQUALIZATION  
AND ASSESSMENT, Appellee.**

No. 88-706.

Supreme Court of Nebraska

July 14, 1989

Pipeline company whose property was centrally assessed for tax purposes appealed from decision of the State Board of Equalization and Assessment dismissing its request that its unit valves be equalized with railroads and car companies doing business in Nebraska and deciding to equalize its property, and all other centrally assessed property, through application of statewide "aggregate level of assessment" determined by Department of Revenue to be 88 7/10% of actual value. The Supreme Court, Hastings, C.J., held that (1) Board denied pipeline company equal protection by not taxing personal property of railroads and car companies, even though it acted involuntarily and under compulsion of federal law, and (2) underground pipelines were personal property exempt from taxation, not fixtures.

Reversed and remanded for further proceedings.

#### 1. Taxation ⇐493.6

Any person, county, or municipality affected by final decision of State Board of Equalization and Assessment may prosecute appeal to Supreme Court. Neb Rev St § 77-510.

#### 2. Administrative Law and Procedure ⇐676

When appeal from administrative agency is not taken pursuant to Administrative Procedure Act because of special statute, standard of review in Supreme Court is to search only for errors appearing in the record, i.e., whether decision con-

forms to law, is supported by competent and relevant evidence, and was not arbitrary, capricious, or unreasonable. Neb Rev St § 84-918.

#### 3. Taxation ⇐446 1/2

State Board of Equalization and Assessment has wide latitude of judgment and discretion in equalizing assessment of property.

#### 4. Taxation ⇐446 1/2

State Board of Equalization and Assessment acts in quasi-judicial capacity when equalizing property.

#### 5. Taxation ⇐251

Initial determination as to whether certain locally assessed property is exempt from taxation, made by county boards of equalization, involves mixed question of fact and law.

#### 6. Appeal and Error ⇐893(1)

In instances where Supreme Court is required to review case for error appearing in the record, questions of law are nonetheless reviewed de novo on the record.

#### 7. Taxation ⇐450(1, 4)

In application before State Board of Equalization and Assessment, taxpayer may employ any factual or legal argument in support of his, her, or its position requesting equalization, subject to final determination of questions of law on de novo basis by Supreme Court on appeal.

#### 8. Taxation ⇐450(4)

When State Board of Equalization and Assessment arbitrarily undervalues particular class of property so as to make another class of property disproportionately higher, or achieves the same result because of legislative action, Supreme Court must correct constitutional inequity by lowering complaining taxpayer's valuation to such an extent as to equalize it with other property in state. Const Art 8, § 1.

#### 9. Constitutional Law ⇐229(3)

##### Taxation ⇐42(2)

State Board of Equalization and Assessment denied equal protection to public service entity whose property was centrally assessed by not taxing personal property

of railroads and car companies in the same class, even though it was compelled by federal law to exempt latter entities' property from taxation. U.S.C.A. Const. Amend. 14.

#### 10. Taxation ⇐40(8)

Under principle that uniformity and equality required by law is to be preferred as just and ultimate purpose of law where it is impossible to secure both standard of true value and that of uniformity and equality, taxpayer whose property alone is taxed at 100% of its true value has right to have assessment reduced to percentage of that value of which others are taxed even though this represents departure from statutory requirement. U.S.C.A. Const. Amend. 14.

#### 11. Taxation ⇐67

For tax purposes in Nebraska, "personal property" includes all property other than real property and franchises. Neb. Rev.St. § 77-104.

See publication Words and Phrases for other judicial constructions and definitions.

#### 12. Fixtures ⇐1

To determine whether item constitutes fixture, Supreme Court looks at three factors—actual annexation to realty or something appurtenant thereto, appropriation to use or purpose of that part of realty with which it is connected, and intention of party making annexation to make article permanent accession to freehold—and third factor is generally regarded as the most important, with the other two having value primarily as evidence of intention.

#### 13. Fixtures ⇐4

Whether party making annexation intends to make article a permanent accession to freehold can be inferred from nature of articles affixed, relation and situation of that party, structure and mode of annexation, and purpose or use for which annexation has been made.

#### 14. Fixtures ⇐7

In considering issue of annexation when determining whether article is fixture, important factor is whether removal of article will injure realty or article itself.

#### 15. Fixtures ⇐1

Chattel that is necessary or useful adjunct to realty may be said to have been appropriated to use or purpose of realty to which it was affixed, whereas chattel that is attached for use which does not enhance value of land is generally deemed not to become part of land.

#### 16. Fixtures ⇐6

##### Taxation ⇐220

Underground pipelines were personal property exempt from taxation, not fixtures; pipeline company had right to remove pipeline and did so on occasion, pipeline was not adapted to agricultural use to which ground in which it was embedded was applied and did not improve land or make it more valuable, and pipeline company did not intend to make pipelines a permanent accession to freehold in light of evidence that its normal method of operation was to obtain easements for purposes of laying pipelines, which were generally located on rights-of-way rather than land pipeline company owned in fee. Neb. Rev.St. §§ 77-103, 77-104.

#### 17. Taxation ⇐42(1)

Although taxing authorities may classify different types of property for taxation purposes, results reached by such different methods and reasonable classifications must be correlated so that valuations reached shall be uniform and proportionate. U.S.C.A. Const. Amend. 14; Const. Art. 8, § 1.

##### Syllabus by the Court

1. State Equalization Board: Appeal and Error. Neb. Rev. Stat. § 77-510 (Cum. Supp. 1988) provides that any person, county, or municipality affected by a final decision of the State Board of Equalization and Assessment may prosecute an appeal to the Supreme Court.

2. Administrative Law: Appeal and Error. When an appeal from an administrative agency is not taken pursuant to the Administrative Procedure Act because of a special statute, the standard of review in this court is to search only for errors appearing in the record; i.e., whether the

decision conforms to law, is supported by competent and relevant evidence, and was not arbitrary, capricious, or unreasonable.

3. State Equalization Board: Taxation: Valuation. The State Board of Equalization and Assessment has a wide latitude of judgment and discretion in equalizing assessment of property.

4. State Equalization Board: Taxation: Valuation. The State Board of Equalization and Assessment acts in a quasi-judicial capacity when equalizing property.

5. Appeal and Error. In instances where the Supreme Court is required to review a case for error appearing in the record, questions of law are nonetheless reviewed de novo on the record.

6. State Equalization Board: Taxation: Valuation: Appeal and Error. In an application before the State Board of Equalization and Assessment, a taxpayer may employ any factual or legal argument in support of his, her, or its position requesting equalization, subject to the final determination of questions of law on a de novo basis by this court on appeal.

7. State Equalization Board: Taxation: Valuation: Appeal and Error. When the State Board of Equalization and Assessment arbitrarily undervalues a particular class of property so as to make another class of property disproportionately higher, or achieves the same result because of legislative action, the Supreme Court must correct that constitutional inequity by lowering the complaining taxpayer's valuation to such an extent as to equalize it with other property in the state.

8. State Equalization Board: Taxation: Federal Acts: Equal Protection. The State Board of Equalization and Assessment, by not taxing the personal property of certain property in a class, although acting involuntarily and under compulsion of federal law, nevertheless, by complying with that mandate, has denied another taxpayer in that same class the equal protection of the law contrary to the 14th amendment to the Constitution of the United States.

9. Constitutional Law: Taxation: Valuation. The right of a taxpayer whose property alone is taxed at 100 percent of its true value is to have his, her, or its assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute.

10. Constitutional Law: Taxation: Valuation. Where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of law.

11. Taxation: Property: Words and Phrases. For tax purposes in Nebraska, personal property includes all property other than real property and franchises.

12. Property: Appurtenances: Intent. To determine whether an item constitutes a fixture, this court looks at three factors: (1) actual annexation to the realty, or something appurtenant thereto, (2) appropriation to the use or purpose of that part of the realty with which it is connected, and (3) the intention of the party making the annexation to make the article a permanent accession to the freehold.

13. Property: Appurtenances: Intent. Of the three factors determining whether an item constitutes a fixture, the most important is the intention to make the article a permanent accession to the freehold.

14. Property: Appurtenances: Intent. The intention of the party making the annexation can be inferred from the nature of the articles affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.

15. Property: Appurtenances. In considering the issue of annexation, an important factor is whether removal of the article will injure the realty or will injure the article itself.

16. Property: Appurtenances. If a chattel is a necessary or useful adjunct to the realty, then it may be said generally to

have been appropriated to the use or purpose of the realty to which it was affixed.

17. **Constitutional Law: Taxation: Valuation.** Although the taxing authorities may classify different types of property for taxation purposes, nevertheless, the results reached by such different methods and reasonable classifications must be correlated so that the valuations reached shall be uniform and proportionate.

John K. Boyer, Norman H. Wright, and Amy S. Bones of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., Omaha, for appellants.

Robert M. Spire, Atty. Gen. and L. Jay Bartel, Lincoln, for appellee.

HASTINGS, C.J., and BOSLAUGH, WHITE, CAPOREALE, SHANAHAN, GRANT and FAHRNBRUCH, JJ.

HASTINGS, Chief Justice.

This is an appeal by Northern Natural Gas Company and Enron Liquids Pipeline Company (hereinafter collectively referred to as Enron) from a decision of the Nebraska State Board of Equalization and Assessment (the Board) with respect to a request made by Enron for equalization of centrally assessed property.

[1] Enron appealed directly to this court pursuant to Neb.Rev.Stat. § 77-510 (Cum.Supp.1988), which provides in part: "From any final decision of the State Board of Equalization and Assessment with respect to the valuation of any real or personal property, any person, county, or municipality affected thereby may prosecute an appeal to the Supreme Court."

[2] Since appeal was not taken pursuant to Neb.Rev.Stat. § 84-918 (Reissue 1987) of the Administrative Procedure Act, this court's standard of review is not de novo on the record. This court has decided that when the Administrative Procedure Act is inapplicable because another method of appeal has been prescribed, the standard of review will be to search only for gross errors appearing in the record; i.e., whether the decision conforms to law, is

supported by competent and relevant evidence, and was not arbitrary, capricious, or unreasonable. *In re Application A-15738*, 226 Neb. 146, 410 N.W.2d 101 (1987) (direct appeal to the Supreme Court from the Department of Water Resources); *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987).

The disputes involved in this appeal arose in part as a result of three cases which were decided by the U.S. District Court for the District of Nebraska: *Trailer Train Co. et al. v. Leuenberger*, No. CV87-L-29 (D.Neb. Dec. 11, 1987), *aff'd* No. 88-1118 (8th Cir. Dec. 19, 1988), *cert. denied*, *Boehm v. Trailer Train Co. et al.*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 2065, 104 L.Ed.2d 630 (1989); *Burlington Northern RR. Co. et al. v. Leuenberger*, No. CV87-L-565 (D.Neb. Dec. 10, 1987); and *Oklahoma Gas & Electric Co. et al. v. Leuenberger*, No. CV88-L-52 (D.Neb. Jan. 26, 1988).

The plaintiffs in *Trailer Train* were car companies that furnish railcars to railroads. Their only relationship to Nebraska stems from the fact that their railcars are located or operated in Nebraska by the railroads. The federal district court held that the assessment of the plaintiffs' personal property and the imposition, levy, or collection of any personal property taxes against the plaintiffs pursuant to Neb.Rev.Stat. §§ 77-624 et seq. (Reissue 1986) violates § 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act), and permanently enjoined the imposition, levy, and collection of any personal property taxes from the plaintiffs. On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed, ruling that the levy and collection of Nebraska's ad valorem tax on car company property violated the 4-R Act.

The plaintiffs in *Burlington Northern RR. Co.* were several of the railroads that do business in Nebraska. The federal district court preliminarily enjoined and restrained the collection of ad valorem property tax payments for tax year 1987 on that portion of plaintiffs' operating property that consists of personal property. The

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court issued the preliminary injunction after finding reasonable cause to believe that the gross personal property tax levied on the plaintiffs results in discriminatory treatment of common carriers by railroad, in violation of § 306(1)(d) of the 4-R Act.

The plaintiffs in *Oklahoma Gas & Electric Co.* were carlines doing business in Nebraska. The federal district court enjoined distribution of the Nebraska carline tax for the 1987 tax year, finding reasonable cause to believe that the tax violates § 306 of the 4-R Act.

The result in each case was reached through application of the 4-R Act, a federal statute. To prevent the unreasonable burdening of interstate commerce that results from discriminatory state and local taxation of rail carrier property, Congress enacted the 4-R Act, Pub.L. No. 94-210, 90 Stat. 54, § 306 (codified at 49 U.S.C. § 26c (1976); recodified at 49 U.S.C. § 11503 (1982) in accordance with the revised Interstate Commerce Act of 1978).

At issue in *Trailer Train* was whether Nebraska's personal property taxation system, which provides for extensive exemptions from personal property tax under Neb.Rev.Stat. § 77-202 (Supp.1987), violates § 306(1)(d) of the 4-R Act, which prohibits the imposition of any tax which results in discriminatory treatment of a common carrier by railroad. The federal district court found that the Nebraska system of taxation did violate the federal statute. According to the court,

Under the Nebraska scheme, the majority of the personal property in the state is statutorily exempted from taxation, while a minority of personal property, including all the property that belongs to Trailer Train in the state, is subject to an *ad valorem* tax on its actual value.... [T]he Nebraska system favors a majority of the property of possible taxpayers by exempting that property from taxation but denies the property of rail car lines the same favorable treatment.

*Trailer Train*, *supra*, slip. op. at 6. The court further found that the actual result of Nebraska's taxation scheme is an unfair

and discriminatory tax burden on the railroads.

In light of the federal district court's rulings in the three cases discussed above, Enron submitted a request with the Board asking that its unit values be equalized with the railroads and gross car companies doing business in Nebraska, i.e., that the portion of the unit value that is comprised of personal property be disregarded in determining the amount of property tax it owes to the state. In conjunction with this request, Enron also sought a determination that its pipelines constitute personal property.

Enron is a public service entity within the meaning of Neb.Rev.Stat. § 77-801 (Reissue 1986). Northern Natural Gas, a division of Enron Corporation, owns, maintains, and operates a gas pipeline system in Nebraska. Enron Liquids, a subsidiary of Enron Corporation, owns, maintains, and operates a liquid hydrocarbon pipeline in Nebraska. Enron's property is centrally assessed by the state for property tax purposes through the Tax Commissioner rather than county assessors, pursuant to Neb.Rev.Stat. § 77-802 (Cum.Supp.1988).

To establish the value of a centrally assessed taxpayer, the Department of Revenue uses a methodology known as "unit value." Rather than valuing individual items of property owned by such a taxpayer, the department values the property of the taxpayer as a total unit. Dennis Donner, the central assessment manager of the Department of Revenue, explained the unit value method at the Board's August 2, 1988, hearing:

These values are derived by use of the unit value concept, which is a valuation of the company as a going concern, as opposed to just a simple summary of the assets of the company. The Department uses the traditional three approaches to value, that being the market[,], income and cost approach in developing these values, and then it correlates the results into an indication of value for the company. This value is then allocated to the state of Nebraska, based on varying



factors, depending on which particular industry we're referring to.

Once the department has calculated the unit value of the centrally assessed taxpayer and determined what portion of that value should be taxed by Nebraska, the Tax Commissioner apportions the total taxable value to all taxing subdivisions in which property of the taxpayer is located and certifies to the county assessors the value so determined. § 77-802.

During the August 2, 1988, hearing, the Board dismissed Enron's request for equalization with the railroads and car companies doing business in Nebraska. Additionally, the Board decided to equalize Enron's property, and all other centrally assessed property, through application of a statewide "aggregate level of assessment" determined by the Department of Revenue to be 88.7 percent of actual value. The department first calculated the average ratio of assessed value to actual value for all classes of tangible property: residential (improved and unimproved), commercial and industrial (improved and unimproved), agricultural (improved and unimproved), personal, and centrally assessed. Then the department aggregated the average ratios to arrive at the 88.7 percent figure.

At the Board's August 2, 1988, hearing, Enron objected to being equalized with the statewide "aggregate level of assessment" of 88.7 percent of value. In dismissing the matter, the Board stated in its order:

[T]he uncontraverted [sic] evidence shows that all property valued by the state, including the property of Enron, is at 100 percent of value; that said property is equalized to the same level of value as all property valued by the state that being the aggregate level of value for all tangible property in this state; and, that the State Board has properly fulfilled its duty to equalize all the tangible property in the state.

Enron argues before this court that its property should be assessed at 73.7 percent of actual value, the aggregate level at which unimproved agricultural land is being valued in this state.

Since the perfection of this appeal, on December 19, 1988, an opinion was filed in the U.S. Court of Appeals for the Eighth Circuit which affirmed the decision of the U.S. District Court in *Trailer Train Co. et al. v. Leuenberger*, No. CV87-L-2 (D.Neb. Dec. 11, 1988). That court said in part:

In [*Burlington Northern R. Co. v. Bair*, 584 F.Supp. 1229 (S.D.Iowa 1984)] the other centrally assessed taxpayer were still subject to the personal property tax as are the taxpayers here who are not in agriculturally related businesses. The railroad in that case received the same "preferential tax treatment" the Trailer Train is accorded here. This is because the other taxpayers are not protected by § 306(1)(d). When three-fourths of the commercial and industrial personal property in the state is not taxed because personal property used in agriculturally-related business is exempt, railroads are discriminated against in their personal property is taxed. The appropriate remedy, as awarded by the trial court, is to enjoin the collection of the discriminating tax, even though the taxpayers do not receive the same benefits.

*Trailer Train Co. et al. v. Leuenberger*, No. 88-1118, slip. op. at 7 (8th Cir. Dec. 19 1988). Following argument of the case in this court, the Supreme Court of the United States issued an order on May 15, 1989 denying the petition for certiorari filed by the Tax Commissioner of Nebraska. Therefore, the Board's argument throughout its brief that the judgment of the U.S. District Court is not binding in this instance is no longer valid.

Enron assigns as error: (1) The Board erred in dismissing its request for equalization; (2) the Board erred in failing to find Enron's pipelines to be personal property and to equalize that portion of its correlated unit value with railroads and car companies doing business in Nebraska; (3) the Board erred in adopting and applying a "blended" or "aggregate" equalization ratio, composed of an average of the levels at which all various types of property are valued; and (4) the Board erred in failing

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to equalize Enron's property with unimproved agricultural land.

Basically, Enron made two requests of the Board. First, it contended that its property should be equalized with the property of the railroads and car companies operating in Nebraska, which were also assessed on a unitary basis. In other words, the final judgment of the federal court enjoined the State of Nebraska from assessing the personal property of railroads and car companies, and Enron insists that it not be taxed on that portion of its unit value that represents personal property. In that connection, it further argues that its pipelines are personal property and should not be assessed. Secondly, Enron did not want the Board to equalize its other property with the aggregate level of assessment for all property in the state, including centrally assessed property such as Enron's which is assessed at 100 percent of actual value.

The Board argues that it lacks authority and jurisdiction to consider and act on the issues raised by Enron in the first instance, and therefore this court acquired no jurisdiction to consider the issues on appeal. In other words, the issues raise questions of law, including constitutional issues, and the Board insists that it has no authority to consider those issues.

[3-5] Neb.Rev.Stat. § 77-505 (Cum. Supp.1988) requires the Board to review the abstracts of assessments of property submitted by the county assessors and to equalize such valuations for tax purposes within the state. More pertinent to this case, § 77-802 requires the Tax Commissioner to determine the total taxable value of a public service entity like Enron for each of the local assessing districts. The action of the Tax Commissioner, of course, is appealable to the Board. This court has stated the Board has a wide latitude of judgment and discretion in equalizing assessment of property. *City of Omaha v. State Board of Equalization & Assessment*, 181 Neb. 734, 150 N.W.2d 888 (1967). The Board acts in a quasi-judicial capacity when equalizing property. *Box Butte County v. State Board of Equalization &*

*Assessment*, 206 Neb. 696, 295 N.W.2d 670 (1980). County boards of equalization are required to make the initial determination as to whether certain locally assessed property is exempt from taxation, which involves a mixed question of fact and law. See, e.g., *Ev. Luth. Soc. v. Buffalo City Bd. of Equal.*, 230 Neb. 135, 430 N.W.2d 502 (1988); *Bethphage Com. Servs. v. County Board*, 221 Neb. 886, 381 N.W.2d 166 (1986).

Implicit in the determination of tax exemption, as pointed out in *Bethphage*, was the application of the facts to § 77-202(1)(c), which provides that exempt from taxation is property "owned by ... religious, charitable ... organizations and used exclusively for ... charitable ... purposes ...". Certainly this involves a mixed question of fact and law and involves the quasi-judicial power of the board of equalization.

[6] In the instant case, there is a difference between Enron being able to request equalization with the railroads and car companies and Enron being entitled to be equalized with the railroads and car companies. It is common sense that Enron cannot be equalized with those companies unless it makes a request. It also seems clear that to make such a request, Enron must start with the Board, the only entity with statutory authority to equalize the valuations of centrally assessed taxpayers. As previously stated, our review on an appeal such as this is for error appearing in the record, but we review questions of law de novo on the record.

[7] We therefore hold that in an application before the Board, a taxpayer may employ any factual or legal argument in support of his, her, or its position requesting equalization, subject to the final determination of questions of law on a de novo basis by this court on appeal.

[8] Article VIII, § 1, of the Nebraska Constitution provides in relevant part that except for motor vehicles, "[t]axes shall be levied by valuation uniformly and proportionately upon all tangible property...." It would seem that no question exists that

if the Board arbitrarily undervalues a particular class of property so as to make another class of property disproportionately higher, or achieves the same result because of legislative action, this court must correct that constitutional inequity by lowering the complaining taxpayer's valuation to such an extent so as to equalize it with other property in the state. See, *Kearney Convention Center v Board of Equal*, 216 Neb 292, 344 N.W.2d 620 (1984), *Banner County v State Bd. of Equal.*, 226 Neb 236, 411 N.W.2d 35 (1987). Thus being the case, no logical reason exists why the same requirement of valuation reduction should not be imposed when the disproportionality is brought about by a final judgment of the federal court exempting the personal property of the railroads and car companies from the imposition of a state tax.

[9] The state, by not taxing the personal property of railroads and car companies, although acting involuntarily and under compulsion of federal law, nevertheless, by complying with that mandate, has denied Enron equal protection of the law contrary to the 14th amendment to the US Constitution.

In *Sioux City Bridge v Dakota County*, 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923), the county taxed the bridge company's property at actual value while other property in the county was assessed at only 55 percent of its value. The bridge company alleged this practice violated the equal protection clause of the 14th amendment to the US Constitution.

Citing *Sunday Lake Iron Co v Wakefield*, 247 U.S. 350, 38 S.Ct. 495, 62 L.Ed. 1154 (1918), the Court stated:

"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other

taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property."

(Citations omitted) *Sioux City Bridge, supra*, 260 U.S. at 445, 43 S.Ct. at 191. The Court held that the taxing of the bridge company's property at 100 percent of its actual value while other property is taxed at 55 percent of its actual value violates the equal protection clause of the 14th amendment.

[10] The Court also held that the right of the taxpayer whose property alone is taxed at 100 percent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of law.

260 U.S. at 446, 43 S.Ct. at 191.

As we have previously stated, it makes no difference if the undervaluation of the property of the railroad and car companies comes about because of deliberate action by the Board, legislative enactment, or the final and binding judgment of the federal courts. The conclusion remains the same. The equal protection clause of the 14th amendment mandates that the same result be reached with respect to the personal property of Enron as that in the case of the railroad and car companies.

It therefore becomes necessary to determine whether the pipelines of Enron are personal property and thus exempt from taxation under the doctrine of *Trailer Train Co., et al. v Leuenberger*, No. CV87-L-29 (D.Neb. Dec. 11, 1987), *aff'd* No. 88-1118 (8th Cir. Dec. 19, 1988), *cert. denied*, *Boehm v Trailer Train Co., et al.*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 2065, 104 L.Ed.2d 630 (1989).

[11] Neb. Rev. Stat. § 77-103 (Reissue 1986) provides:

The terms real property, real estate and lands shall include city and village lots and all other lands, and all buildings, fixtures, improvements, cabin trailers or mobile homes which shall have been permanently attached to the real estate upon which they are situated, mines, minerals, quarries, mineral springs and wells, oil and gas wells, overriding royalty interests and production payments with respect to oil or gas leases, units of beneficial interest in trusts, the corpus of which includes any of the foregoing, and privileges pertaining thereto.

Personal property includes all property other than real property and franchises. Neb. Rev. Stat. § 77-104 (Reissue 1986). The issue therefore is whether pipelines are fixtures, and thus real property, or are personal property.

Section 77-103 does not provide a definition for fixtures. However, this court in *State ex rel. Meyer v. Peters*, 191 Neb. 330, 215 N.W.2d 520 (1974), stated that the common law rules relating to fixtures are largely codified in § 77-103.

[12] To determine whether an item constitutes a fixture, this court looks at three factors: (1) actual annexation to the realty, or something appurtenant thereto, (2) appropriation to the use or purpose of that part of the realty with which it is connected, and (3) the intention of the party making the annexation to make the article a permanent accession to the freehold. *Bank of Valley v U.S. Nat. Bank*, 215 Neb. 912, 341 N.W.2d 592 (1983), *T-V Transmission v County Bd. of Equal.*, 215 Neb. 363, 338 N.W.2d 752 (1983).

[13] The third factor, the intention to make the article a permanent accession to the freehold, is generally regarded as the most important factor when determining whether an article is a fixture. The other two factors, annexation and appropriation to the use of the realty, have value primarily as evidence of such intention. See generally *Bank of Valley v U.S. Nat. Bank, supra*. The intention of the party making the annexation can be inferred from the nature of the articles affixed, the relation and situation of the party making

the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made. *Bank of Valley v U.S. Nat. Bank, supra*, *Pick v Fordyce Co. op. Credit Assn.*, 225 Neb. 714, 408 N.W.2d 248 (1987), *Fuel Exploration, Inc v Novotny*, 221 Neb. 17, 374 N.W.2d 838 (1985).

In this case, the pipelines are buried in the ground. In *Sulphur Springs Val Elec. Coop v City of Tombstone*, 1 Ariz. App. 268, 401 P.2d 753 (1965), *aff'd* 99 Ariz. 110, 407 P.2d 76, the Arizona court had to address whether the pipes, poles, and wires that were the chief components of a utility distribution system were fixtures and therefore real property that had to be sold at public auction. To determine whether an article is a fixture, the Arizona courts consider the same three factors this court considers.

The pipes were buried in the ground. The court noted that there was no evidence of an agreement between the city and owners of the fee that the chattels were to become accessions to the realty. The court held that because there was no proof of the adaptability to the use for which the real estate was appropriated and no proof of an intent by the annexor that the attachment of the chattels be permanent, despite annexation to the realty, the utility equipment had not lost its character as personal property.

[14] In considering the issue of annexation when determining whether an article is a fixture, some courts have looked at whether removal of the article will injure the realty or will injure the article itself. Enron quotes at length from one such case:

In *Stem Brothers, Inc v Alexandria Township*, 6 N.J. Tax 537 (1984), the question was whether certain underground storage tanks were fixtures or personal property. In this case, the court focused upon the injury by removal test, and stated: "These [the five underground storage tanks] could be lifted from the subject property intact just as could be done with the 20,000 gallon above-ground tanks and no damage at all



would occur to the tanks. The only preparatory work that would need to be done before the tanks could be lifted onto a truck would be removal of the soil covering them. The excavation that would result from uncovering one of the 20,000 gallon tanks would be large. Each such tank is ten feet in diameter and 30 feet long so that the excavation would have to be somewhat longer, wider, and deeper than those dimensions. Despite this size, however, such an excavation could not in any reasonable sense be said to constitute 'irreparable' physical damage to the land because the hole could easily be refilled. As a result, the land would be virtually the same in all respects as it had been before. The sole question, then, is whether the excavation would constitute 'serious' physical damage to the land within the meaning of the phrase 'material injury' as used in the Business Personal Property Tax Act.

"Some of the factors which might have to be considered in determining whether 'serious physical damage' had occurred to unimproved land are (a) any change in the market value of the land as a result of the condition, (b) the amount of time and the cost required to repair the condition, and (c) the hazard or dislocation caused by the condition.

"I find that no 'serious physical damage' would be caused to plaintiff's land by an excavation to remove the underground storage tanks and to restore plaintiff's unpaved parking yard to its original state. There is no indication that the value of the land would be affected by such an excavation. The entire process of removing a tank and restoring the ground to its original state would require only two days and would create no serious hazard or dislocation. Finally, the cost to excavate and refill the hole would be relatively insignificant.

"I therefore conclude that all nine of plaintiff's fuel oil storage tanks were business personal property for the tax year 1981 and that the tanks should not have been assessed by the taxing district

for local property tax purposes. 6 N.J. Tax at 543."

<sup>1820</sup>Brief for appellants at 26-27.

Earl Berdine, an Enron employee, testified in his deposition that very little damage generally results to the pipe when it is removed and that the only damage to the land is "a temporary inconvenience while the work is actually going on and then after the work is completed the land is restored, put back into its original use."

[15] The second factor, appropriation to the use or purpose of that part of the realty with which the article is connected, focuses on the relationship between the article and the use which is made of the realty to which the article is attached. If the chattel is a necessary or useful adjunct to the realty, then it may be said to have been appropriated to the use or purpose of the realty to which it was affixed. If the chattel is attached for a use which does not enhance the value of the land, it is generally deemed not to become a part of the land. See 1 G. Thompson, Commentaries on the Modern Law of Real Property § 56 (1980).

The pipeline companies in *Yellowstone Pipe Line Co. v. St. Bd. of Equal.*, 138 Mont. 603, 358 P.2d 55 (1960), *cert. denied* 366 U.S. 917, 81 S.Ct. 1095, 6 L.Ed.2d 241 (1961), were attempting to establish that their pipelines were real estate. The pipelines were imbedded in real estate rights of way obtained from the owners of the fee by written conveyance. The State Board of Equalization argued that the pipelines did not improve the real estate, served no purpose on the land, did not enhance the value of the real estate, and could be removed at any time by the company.

Under Montana case law, if property was placed on land to improve it or make it more valuable, it was generally deemed a fixture, but if it was attached for a use which did not enhance the value of the land, it remained a chattel. Considering the established rules regarding fixtures, the *Yellowstone Pipe Line Co.* court stated:

The line could as easily lie on top of the ground were it not for the maintenance problem brought on by its exposed posi-

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tion and the difficulty of crossing natural and man-made obstructions. Does the pipe line improve the land and make it more valuable? To the contrary the land <sup>1821</sup> makes the pipe line more valuable since it removes it from danger of damage were it exposed. To what purpose is the pipe line put? It is used for the transportation of petroleum products and, in our opinion, such use bears no relationship whatever to the use of the realty. There can exist here no presumption that respondents intended the pipe to become part of the realty because the evidence is conclusive that they had no such intention.

*Id.* 138 Mont. at 630-31, 358 P.2d at 69. The court concluded that the pipeline is not a fixture.

As Enron points out in this case, it has the right to remove its pipeline and does so on occasion. According to Enron, and we agree, the pipeline is not adapted to the use to which the ground in which it is embedded is applied. Most of the ground is agricultural land, and while the pipe is in place, a farmer or rancher may continue to conduct his normal operations. The pipeline does not improve the land nor make it more valuable. The ground is only a foundation upon which the pipes can rest. Use of the pipeline bears no relationship to the use of the realty, the pipeline being buried in order in part to minimize maintenance.

Finally, was the intention of Enron to make the article a permanent accession to the freehold?

In a number of cases, the courts have considered the fact that the annexor had an easement as establishing an intent that the article remain personal property. In *Southwestern Public Service Co. v. Chaves County*, 85 N.M. 313, 512 P.2d 73 (1973), the court had to decide whether certain equipment located on easements, including poles and transmission lines, was real estate. The court noted that if Southwestern intended the equipment installed on unowned land to become part of the realty, Southwestern would under general law, be parting with title to the equipment. The court concluded that there was no evi-

dence, of either a subjective or objective nature, indicating Southwestern had any such intention. To the same effect, see, *Sulphur Springs Val. Elec. Co. op. Inc. v. City of Tombstone*, 1 Ariz. App. 268, 401 P.2d 753 (1965), *Liberty Lk. Sewer v. Liberty Lk. Utils.* 37 Wash. App. 809, 683 P.2d 1117 (1984), *In re Mobilife Corp.*, 167 So.2d 336 (Fla. App. 1964).

<sup>1822</sup>The evidence here was that Enron's normal method of operation is to obtain easements for purposes of laying its pipelines. Its pipeline is generally located on rights-of-way rather than land Enron owns in fee. Enron never intended, as we view the record, to part with the title to its pipelines by conducting its operation in this manner. Furthermore, the evidence discloses that Enron retains possession of the pipes for purposes of repair, replacement, and recycling if necessary.

[16] The Board cites only one case in which the court held that the gas pipeline of a gas transmission company was not personal property but, rather, was real property for tax purposes. *Transco Corp. v. Prince William Co.*, 210 Va. 550, 172 S.E.2d 757 (1970). That court agreed that the chief test to be considered in determining whether the chattel has been converted into a fixture is the intention of the party making the annexation. We agree, but conclude that in the instant case the intention of Enron was not to convert its annexations into fixtures. Consequently, we find the pipelines to be personal property.

Finally, because the unitary value of Enron may include some real property, it is necessary that we determine whether that portion of its valuation should be based on an aggregate or blended ratio, or on the average ratio of unimproved agricultural land.

[17] In *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984), we held that the uniformity clause of the Nebraska Constitution required that the complaining taxpayer's land had to be valued at 44 percent, the lowest ratio of assessed valuation to actual valuation. We had concluded that although the

taxing authorities may classify different types of property for taxation purposes, nevertheless, the results reached by such different methods and reasonable classifications must be correlated so that the valuations reached shall be uniform and proportionate. The record in this case does not support such a favorable finding for the Board.

Although article VIII, § 1, of the Nebraska Constitution was amended in 1984 in an attempt to permit the valuation of agricultural land by a different method, this court concluded that the result must be correlated with the value of all other land. At the risk of being redundant, we state that such a result has not been reached in this case.

The Board has asked us to reconsider our decision in *Banner County v State Board of Equal*, 228 Neb 236, 411 N.W.2d 35 (1987). There is nothing to reconsider. Neb. Const. art. VIII, § 1, providing that "[t]axes shall be levied by valuation uniformly and proportionately" (emphasis supplied), to say nothing of the 14th amendment to the U.S. Constitution, which directs that no state shall "deny to any person within its jurisdiction the equal protection of the laws," both remain viable and in full force and effect. *Banner County* could be written in no other way.

The order of the State Board of Equalization and Assessment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS



232 Neb 885

**Frederick M. GETZSCHMAN,**  
AIA, Appellee,

v

**MILLER CHEMICAL COMPANY, INC.,**  
a Nebraska Corporation, and Lawrence  
Hoffman, Appellants, Carol Hoffman,  
Appellee.

No 87-746

Supreme Court of Nebraska

July 21, 1989

Architect sued clients for breach of contract, in regard to client's refusal to pay architect on the ground that the actual construction costs were in excess of client's anticipation. Clients counterclaimed for negligence and breach of fiduciary duty. The District Court, Douglas County, Lawrence J. Corrigan, J., entered judgment on a jury verdict for architect, and clients appealed. The Supreme Court, Shanahan, J., held that: (1) a jury question was presented as to whether architect's claim was defeated by clients' claim that the construction costs exceeded an alleged agreement, (2) the court did not abuse its discretion in rejecting clients' tendered instructions on tort claims, and (3) court properly rejected testimony of clients' expert concerning an architect's duties in the course of a contracted project.

Affirmed

## 1 Contracts ¶196

If there is express contract for architectural services, architect's duties are determined by contract for architect's employment.

## 2 Contracts ¶280(4)

Implicit in every contract for architectural services is duty of architect to exercise skill and care which are commensurate with requirements of profession.

## 3 Contracts ¶280(4)

If architect fails to exercise reasonable professional care in discharge of his con-

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tractual duties architect breaches contract of employment.

## 4 Action ¶27(1)

Accompanying every contract is common law duty to perform thing agreed to be done with care, skill, reasonable expediency, and faithfulness, and negligent failure to observe any of these conditions is tort as well as breach of contract.

## 5. Action ¶27(1)

In context of negligence claim based on architectural contract, tort liability may arise when architect negligently fails to perform express or implied contractual duty.

## 6. Contracts ¶321(1)

Architect employed to prepare plans and specifications for building, with understanding that construction would be accomplished within certain cost limitations, can not recover compensation for architectural services when building cannot be erected except at cost materially in excess of amount specified.

## 7. Contracts ¶312(1)

When architect has no express contractual obligation to design structure within specified budget or to estimate construction cost of proposed project, construction at cost greater than anticipated by or acceptable to owner is no defense to architect's action to recover fee.

## 8. Judgment ¶199(6)

Entry of judgment notwithstanding verdict is authorized if appropriate motion is filed within ten days after reception of verdict to be set aside. Neb. Rev. St. § 25-1315 02.

## 9 Judgment ¶199(39)

Motion for judgment notwithstanding verdict may be granted when movant's previous motion for directed verdict, made at conclusion of all evidence, should have been sustained. Neb. Rev. St. § 25-1315 02.

## 10 Trial ¶142

Court cannot decide issue as matter of law unless facts adduced on issue are such that reasonable minds can draw but one conclusion from evidence, in jury trial,

when evidence compels but one reasonable conclusion regarding issue or question in litigation; court can properly direct verdict on such issue or question.

## 11 Contracts ¶352(3)

In architect's breach of contract action against client arising from client's refusal to pay architect, evidence presented jury question as to whether architect's claim was defeated by client's defense that actual cost of construction was in excess of client's anticipation; evidence was conflicting on question whether client informed architect that there was limitation on cost of construction, and there was no contractual provision concerning architect's estimate of costs.

## 12 Appeal and Error ¶1032(3)

To establish reversible error from court's refusal to give requested instruction, appellant has burden to show that appellant was prejudiced by court's refusal to give tendered instruction; that tendered instruction is correct statement of law, and that tendered instruction is warranted by evidence.

## 13 Contracts ¶353(8)

In architect's breach of contract action against client, arising from client's refusal to pay architect on ground that actual construction costs were in excess of client's anticipation, court did not commit reversible error by rejecting client's requested instructions on architect's duty of reasonable care, and breach of fiduciary duty; court's instruction on architect's contractual duties expressed elements which, if proved, entitled client to recover on its counterclaim for tortious breaches of duty by architect.

## 14 Appeal and Error ¶970(2)

Evidence ¶99

Admission or exclusion of evidence is matter for discretion of trial court, whose ruling on evidential question will be upheld unless such ruling constitutes abuse of discretion.