1984

Utah Department of Transportation v. John D'Ambrosio, Mable D'Ambrosio, His Wife, Joseph Cha And Marion Cha, His Wife : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

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UTAH DEPARTMENT OF TRANSPORTATION,	:	
Plaintiff-Respondent,	:	
vs.	:	Case No. 19271
JOHN R. D'AMBROSIO and MABLE M. D'AMBROSIO, his wife; DOMENIC D'AMBROSIO and NORMA D'AMBROSIO, his wife; PAUL D'AMBROSIO; SHARON D'AMBROSIO; FRANCES D'AMBROSIO; JOSEPH CHA and MARION D. CHA, his wife,	:	
Defendants-Appellants.	:	

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BRIEF OF RESPONDENT

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APPEAL FROM A STIPULATED COURT JUDGMENT
OF THE CARBON COUNTY DISTRICT COURT
THE HONORABLE BOYD BUNNELL
DISTRICT JUDGE

----oo0oo----

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IN THE SUPREME COURT OF THE STATE OF UTAH

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UTAH DEPARTMENT OF TRANSPORTATION,	:	
Plaintiff-Respondent,	:	
vs.	:	
JOHN R. D'AMBROSIO and MABLE M. D'AMBROSIO, his wife; DOMENIC D'AMBROSIO and NORMA D'AMBROSIO, his wife; PAUL D'AMBROSIO; SHARON D'AMBROSIO; FRANCES D'AMBROSIO; JOSEPH CHA and MARION D. CHA, his wife,	:	Case No. 19271
Defendants-Appellants.	:	

----ooOoo----

BRIEF OF RESPONDENT

----ooOoo----

APPEAL FROM A STIPULATED COURT JUDGMENT
OF THE CARBON COUNTY DISTRICT COURT
THE HONORABLE BOYD BUNNELL
DISTRICT JUDGE

----ooOoo----

NATURE OF THE CASE

The present case was filed in the District Court of Carbon County for the purpose of acquiring a parcel of property from the Defendants-Appellants for the purpose of constructing the freeway near the City of Price, Utah. All of the issues were settled except the amount of just compensation which the Plaintiff-Respondent was obligated to pay to the Defendants-Appellants. On the day this case was set for jury trial, the parties stipulated to the value of the .10 of an acre that was being taken, as well as severance damages to the Defendants-Appellants' remaining property.

DISPOSITION IN THE LOWER COURT

The Plaintiff-Respondent filed its Complaint and was granted an Order of Immediate Occupancy. (R. 1-16, 20-23) The trial court, after hearing the same matter on two different occasions, ruled the Defendants-Appellants were entitled to have a jury trial on the issue of the fair market value of the .10 of an acre taken and severance damages to the Defendants-Appellants' remaining property caused by the taking of the private easement of ingress and egress and the construction of a new public easement of access. (R. 61-64, 107-108)

The Defendants-Appellants on the day this matter was scheduled for jury trial, stipulated to the value of the

of an acre taken and severance damages to their remaining property caused by the taking and any severance damages claimed to their remaining property by reason of the taking of the private easement and the construction of the new public easement. (R. 121-123)

It is from this judgment the present Defendants-Appellants have instituted this appeal.

STATEMENT OF FACTS

The Plaintiff-Respondent instituted four separate actions against the present Defendants-Appellants in the District Court of Carbon County, Civil Nos. 11212, 11213, 11241 and 11215 to acquire property needed for the new freeway which would be constructed near the City of Price. (See attached Exhibits which depict and show the four cases referred to above.) As the Court can see, all of the Defendants-Appellants listed in the present action, were also listed on the other three cases. The present record substantiates the fact that the legal descriptions of four cases could not be reconciled with the occupied properties and that it was almost impossible to determine the correct legal ownership. (R. 78-99, 36-51) It was only after the Plaintiff-Respondent performed an independent survey to reconcile the legal descriptions with the land as occupied

that the Court was able to correctly separate these matters into four separate cases. (R. 49-51)

The parcel of property, parcel 69:B, which contained .10 of an acre had in the past, been used by all of the Defendants-Appellants listed in all the four actions to provide access to their properties. All of the three other actions (Civil Nos. 11212, 11213 and 11215) had been either tried or settled by the time the stipulated court judgment in present actions was entered into. (R. 121-122) After the matters relating to ownership had been settled (R. 81-82, 107-108) the Plaintiff-Respondent then filed a Motion for Summary Disposition (R. 52-57) requesting the Court to determine the issue of severance damages the Defendants-Appellants were entitled to. As noted above, the Defendants-Appellants, with the exception of the Joseph Cha, et ux., Defendants-Appellants, owned the fee title to the property being taken on this case, parcel No. 69:B, .10 of an acre. (R. 81)

John D'Ambrosio	88.92%	undivided fee interest
Domenic, Paul, Sharon and Frances D'Ambrosio	11.08%	undivided fee interest

The Defendants-Appellants Joseph and Marion Cha had only easement rights over parcel No. 69:A. (R. 81)

As shown on Exhibit "I", a new public access road was

being constructed to replace the prior access road taken in the form of parcel No. 69:A. The new public access road would be constructed to provide access to all of the parties previously using the old private access shown as parcel No. 69:A.

Located immediately south of the new access road (Exhibit "I"), a residential lot and home was owned by Joseph and Marion Cha. Immediately south of the Cha lot was a residential lot and home which was owned by John and Mable D'Ambrosio.

The trial court ruled that the Defendants-Appellants were entitled to severance damages to their residential homes caused by the taking of their old private access and the construction of the new public access facility. (R. 61-63)

It must be noted that none of the Defendants-Appellants John and Mable D'Ambrosio and Joseph and Marion Cha, individually had owned property was being taken (R. 61) for the construction of the new freeway.

It is a deliberate mis-statement of the facts for the Defendants-Appellants on page five of the brief, to state these Defendants-Appellants were not entitled to <u>any</u> severance damages to their remaining individually owned properties. The court having previously ruled ... "the

owners are entitled to any damages that they may suffer as a result of the change in the access from the private easement previously had in the public easement now provided." (R. 63)

POINT I

THE RULING OF THE TRIAL COURT SHOULD BE AFFIRMED, SINCE IT RULED THESE DEFENDANTS-APPELLANTS ARE ENTITLED TO SEVERANCE DAMAGES TO THEIR INDIVIDUALLY OWNED RESIDENTIAL LOTS WHICH MAY HAVE BEEN CAUSED BY THE TAKING OF THEIR PRIVATE ACCESS AND THE SUBSTITUTION OF A PUBLIC ACCESS FOR INGRESS AND EGRESS

ARGUMENT

As noted above, the Plaintiff-Respondent, filed an action in eminent domain to acquire a .10 of an acre of the Defendants-Appellants' property for the purpose of constructing a freeway. Located on this .10 of an acre was a private easement of ingress and egress which provided one access to the Defendants-Appellants nearby properties. The design of the freeway provided for an alternate access to be constructed immediately to the south of where the .10 of an acre of taking was located. (Ex. "I")

The applicable state law in Utah on severance damages is as follows:

> §78-34-10 U.C.A. (1953, as amended)
> (2) If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to

be condemned and the construction of the improvements in the manner proposed by the Plaintiff.

The lower court made no distinction in its decision on whether the property sought to be acquired from the Defendants-Appellants was held by them in fee title or in the form of some easement. (R. 62)

This Plaintiff-Respondent is in complete agreement with the legal proposition that owners of property are entitled to compensation when their access is either destroyed or substantially impaired. Dooly Block v. Salt Lake Rapid Transit Co., 9 U. 31, 33 P. 229. In the later case of State Road Commission v. Rozzelle, et ux., 101 U. 464 120 P.2d 276 (1941), the Plaintiff sought to acquire a portion of the Defendant's property. The Defendant landowners sought severance damages to their remaining property. The Court only allowed those damages which had a definite causal relationship with the prior taking of the property. In other words the severance damages, to be compensable must flow from either the taking of the strip of property or from the nature of the construction thereon.

In the case of Utah Road Commission v. Hansen, 14 U.2d 305, 383 P.2d 917 (1963), the Utah Supreme Court re-affirmed that a landowner is entitled to severance damage caused or due to a loss or change of access to their remaining properties.

The three cases cited above, this Plaintiff-Respondent feels, support the decision of the lower court. The lower court in its ruling, stated the following: "The owners are entitled to any damages that they may suffer as a result of the change in the access from the private easement previously had to the public easement now provided ... (R.63)

The owners in this case have their recourse and are entitled to any damage suffered as a result of the change of the access and right-of-way, but since none of their fee owned property is being taken and no construction placed thereon the resulting damage to their fee would be consequential in nature and not compensable ..." (R. 61-62, 75)

The other Utah case which the Defendants-Appellants cited was the case of Utah State Road Commission v. Hooper, 24 U. 2d 249, 469 P.2d 1019 (1970). This Plaintiff-Respondent cites this case for the proposition that where a portion of a tract of property is taken, which affects the access to the landowners' remaining property, that it is proper to assess and award severance damages.

In the present case, this is exactly what the lower court did. Its rulings specifically allowed the Defendants-Appellants the right to claim severance damages to

their remaining property occasioned by the taking of the construction of the replacement of public access. (R. 64-67, 107-108, 121-123)

Also this Plaintiff-Respondent cites to this Court the case of Bd. of Education v. Croft, 13 U. 2d 310, 373 P.2d 697 (1962), in support of the proposition that landowners are not entitled to severance damage to their home tract, where no part of the tract was taken, and where there was no physical injury to the remaining home. Again, as noted above, the lower court specifically allowed to Defendants-Appellants the right to claim severance damages to the remaining property which may have been caused by the change in access i.e., from the private access they primarily enjoyed to the new public access provided.

In the case of UDOT v. Stanger, 21 U. 2d 188, 442 P.2d 941 (1968), our Supreme Court held that damages arising not out of severance, but as a consequence of the construction of a freeway, are not recoverable. This Court further defined severance damage as those that are unique with respect to the subject property and different from the damage which neighboring properties may have sustained. Severance damages had to be thus suffered by a devaluation of the owners' property not taken, this "causa causa

causans" of which was the actual taking of a portion of a landowner's property, which he previously owned.

Insofar as the claim of the Defendants-Appellants, Joseph and Marion Cha are concerned, they had no fee ownership in parcel No. 69:A. (Tr. 61) Consequently, none of these Defendants-Appellants fee owned property was being taken, and their access will be re-established. (Exhibit "I")

POINT II

THERE EXISTS NO UNITY OF OWNERSHIP IN LANDS NOT BEING CONDEMNED AND THAT BEING CONDEMNED, AND THEREFORE SEVERANCE DAMAGES CANNOT BE RECOVERED FOR ALLEGED DAMAGE TO PROPERTY NOT TAKEN

The leading authority on Eminent Domain has stated the rule which has been adopted by the Courts in the State of Utah regarding ownership as follows:

> It is of course, essential to constitute a single parcel that it be owned in its entirety by one owner or one set of owners. (Emphasis added)

Nichols on Eminent Domain, 3rd Edition, Section 14.31[2]. In the case of Utah State Road Commission v. Steele Ranch, 533 P.2d 888 (Utah, 1975), the Utah Supreme Court endorsed that concept and reversed a trial court ruling there was unity of ownership. The facts of the Steele Ranch case were that the ranch was in two ownerships. Most of the land being owned by the Steele Ranch Corporation of which Dr. Steele was the owner of all the outstanding stock and

smaller parcel upon which Dr. Steele personally. Dr. Steele in that case, argued that the uncontroverted testimony was that the corporate property and the home area were operated as a single unit. The uncontroverted evidence in the Steele Ranch case was that the only reason for the separate ownership was for tax and estate planning purposes.

Even though Dr. Steele owned all of the stock in the Steele Ranch Corporation giving him totalcontrol over it, the Utah Supreme Court held that there was not the requisite unity of ownership to allow severance damage to the property held by Dr. Steele in his name when only property in the name of the corporation was being taken.

The Plaintiff-Respondent submits that unity of ownership in the Steele Ranch case is more convincingly shown than in the instant case. In the Steele Ranch case Dr. Steele had exclusive control over both parcels. In the instant case, legal title of the property sought to be taken appears to be in the names of John and Mable D'Ambrosio, Sharon, Paul, Dominic and Sharon. The damages which the Defendants John and Mable are seeking to recover are to property which they own solely in their own names, i.e. damages to their home which is located some distance south of the property described in parcel No. 69:A.

The Utah Supreme Court in the case of State Road Com-

mission v. LeSourd, 24 U.2d 383, 472 P.2d 939 (1970), acknowledged the requirement of unity of ownership and in so doing cited as authority a Kansas case entitled McIntyre v. Board of County Commissioners, 211 P.2d 59 (1949). In the McIntyre case, T. W. McIntyre owned 80 acres of land and his wife Ruby owned an adjoining 80 acres farmed as a single unit. Regarding this farming operation, the Court found:

> That the two separately owned tracts had been farmed as a unit for many years is not disputed and from the record before us it probably is an established fact that considering the use to which it had been put, appellants's tract was diminished in value on account of the raod being built across his wife's tract, but the real question is - may the owner of one tract recover for such alleged damage to his tract on account of the taking of land belonging to another - or is his recovery limited to the damage resulting from the taking of a part of his tract.

McIntyre v. Board of County Commissioners, supra, at 62.

To this inquiry the Supreme Court of Kansas answered:

> Claims for damages in proceedings of this character are personal, and must be asserted in the name of the actual owners of the land affected. One person may not recover damages sustained by another, and manifestly special damages suffered by one proprietor could not be compensated by benefits accruing to another.

McIntyre v. Board of County Commissioners, supra, at 63.

In the instant case damages are being claimed to property solely owned by John and Mable D'Ambrosio where the ownership of the property taken by parcel No. 69:A is in multiple ownership. This type of ownership does not qualify

for severance damage because it lacks the requisite unity of ownership.

In a Kansas case subsequent to and relying on the Leintyre case, the Kansas Supreme Court found unity of ownership lacking where 410 acres of a 475 acre farm were owned by "Don F. Hogue and Fern H. Hogue, his wife, as joint tenants for estate planning purposes." Hogue v. Kansas Power & Light Company, 510 P.2d 1308 at 1309 and 1310 (Kansas, 1973). In spite of the fact that Mr. Hogue owned an undivided one-half interest in the 65 acre tract and the whole 475 acres were used as an integrated unit, the Court found no unity of ownership in the 65 acre tract that would allow a claim for severance damage where the take was from the 410 acres in his name. The Court in the Hogue case concluded:

> Mr. and Mrs. Hogue may not have realized all the implications of joint tenancy ownership when they planned their estate, we assume to their mutual advantage, but the thread of countervailing factors runs deeply through the stream of human experience, and expected benefits may often be offset, in part at least, by disadvantages.

Hogue v. Kansas Power & Light Company, supra, at 1312.

Plaintiff-Respondent submits that the facts in the Hogue case come closer to presenting unity of ownership than to those in the instant case, since in that case Mr. Hogue had legal title in both tracts, albeit an undivided

one-half interest in one and he could not even recover damage to his undivided one-half interest. The above-quoted language in the Hogue case is, Respondent submits, applicable to the instant case, since John and Mable D'Ambrosio own their home but only have in joint ownership in the property taken in parcel No. 69:A.

In the case of State v. Superior Court for Spokane County, 116 P.2d 752 (Wash., 1941), there were factual allegations very close to those made by the Defendants-Appellants, John and Mable D'Ambrosio. In this case the three landowners each owned property in their own names but had been used in a unified farming operation.

The Court in the Superior Court case held that there was no unity of title and that:

> The damages for taking a right-of-way are based on ownership of land actually taken and are limited to lands held under the same title.

State v. Superior Court, supra, at 756. Plaintiff-Respondent submits that in the instant case the land for which Defendants-Appelants, John and Mable D'Ambrosio are seeking damages are not "held under the same title" and therefore, severance damages are not recoverable to said lands.

CONCLUSION

Any damages which John D'Ambrosio, et ux. and Joseph [illegible], et ux. are claiming must originate and be limited to those accruing because a portion of their property has been taken. Under the fact of the present case none of their residential properties have been taken. Second, any access which they previously may have enjoyed has been fully restored. Third, though the original access to the residential properties was taken and the freeway constructed thereon, the foregoing did not result in any severance of their properties. Any damages to their homes are consequential in nature and are therefore, not compensable.

Finally, the trial court did allow these Defendants-Appellants the right to have their day in court on the issue of whether the taking of the original private access and the substitution of a public access resulted in any severance damages to their nearby properties. These Defendants-Appellants stipulated to a judgment which compensated them for any damage caused by the foregoing change in access. Any other damages which these Defendants-Appellants may be claiming are consequential in nature and would be the same

damges suffered by all property owners in the area of the construction of the highway project.

Respectfully submitted,

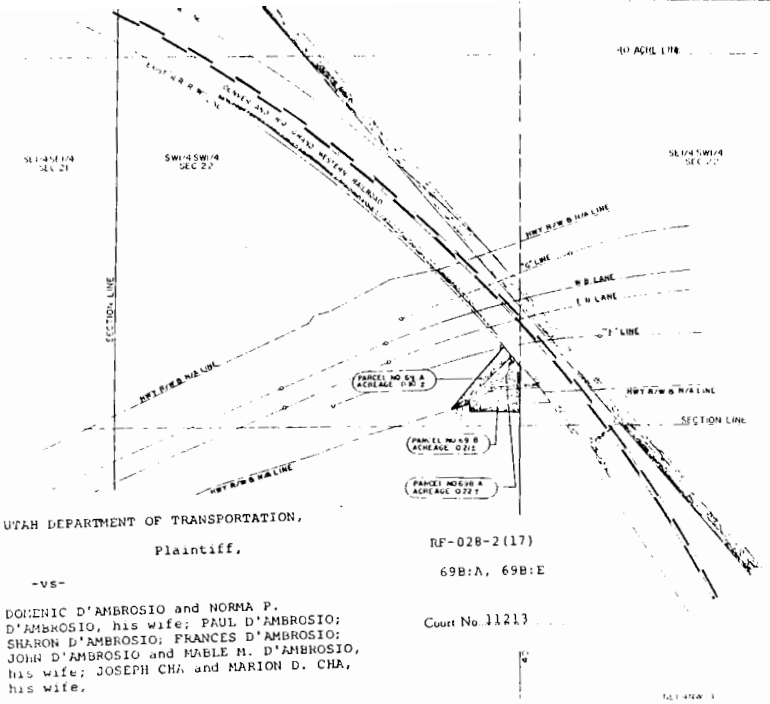
DAVID L. WILKINSON
Attorney General

By _____
STEPHEN C. WARD
Assistant Attorney General
Attorneys for Plaintiff-Respondent

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Respondent's Brief were mailed, postage prepaid, to Brant H. Wall, Attorney for Appellants, 800 Boston Building, Salt Lake City, Utah 84111, this 30 day of August, 1984.

_____



EXHIBIT

MAP SHOWING THE PROPERTY OF JOHN R D'AMBROSIO ET AL AND THAT PORTION REQUIRED FOR HIGHWAY PURPOSES
PROJECT NO RF-028-2(17)
LOCATION BLUECUT TO EAST PRICE
COUNTY CARBON
DRAWN BY B J WIXOM
CHECKED BY H E McLEAN

	TOTAL TRACT	0.91 AC ±
	LESS LAND FOR HIGHWAY	0.53 AC ±
	REMAINING LAND	0.37 AC ±
	EXISTING ROADS	
	RAIL ROADS	

UTAH DEPARTMENT OF TRANSPORTATION,

Plaintiff,

-vs-

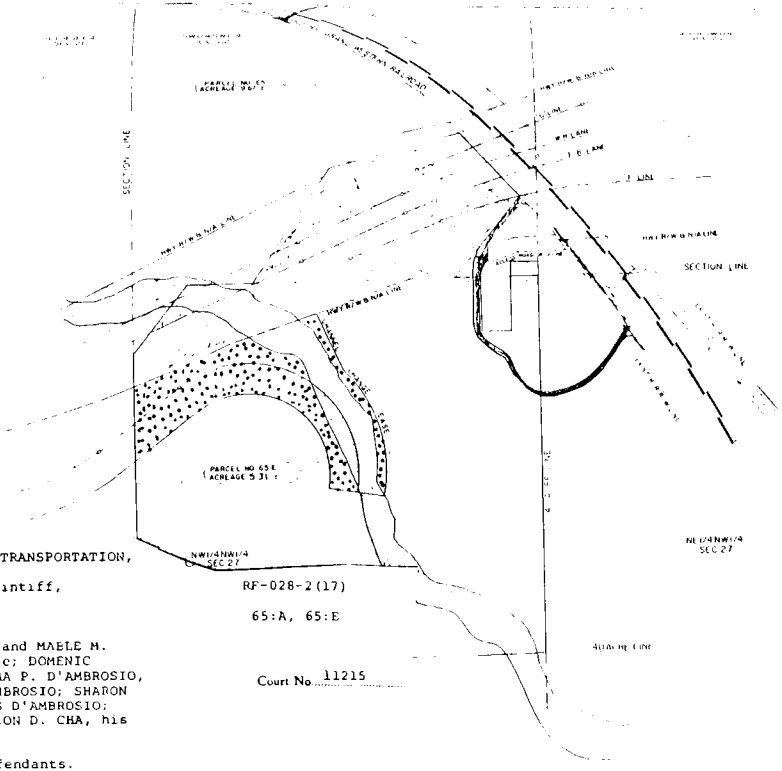
DOMENIC D'AMBROSIO and NORMA P. D'AMBROSIO, his wife; PAUL D'AMBROSIO; SHARON D'AMBROSIO; FRANCES D'AMBROSIO; JOHN D'AMBROSIO and MABLE M. D'AMBROSIO, his wife; JOSEPH CHA and MARION D. CHA, his wife,

Defendants.

RF-028-2(17)

69B:A, 69B:E

Court No. 11213



UTAH DEPARTMENT OF TRANSPORTATION,

Plaintiff,

-vs-

JOHN R. D'AMBROSIO and MABLE M. D'AMBROSIO, his wife; DOMENIC D'AMBROSIO and NORMA P. D'AMBROSIO, his wife; PAUL D'AMBROSIO; SHARON D'AMBROSIO; FRANCES D'AMBROSIO; JOSEPH CHA and MARION D. CHA, his wife,

Defendants.

RF-028-2(17)

65:A, 65:E

Court No. 11215

SECTION 27 T16S R7E

SCALE

EXHIBIT

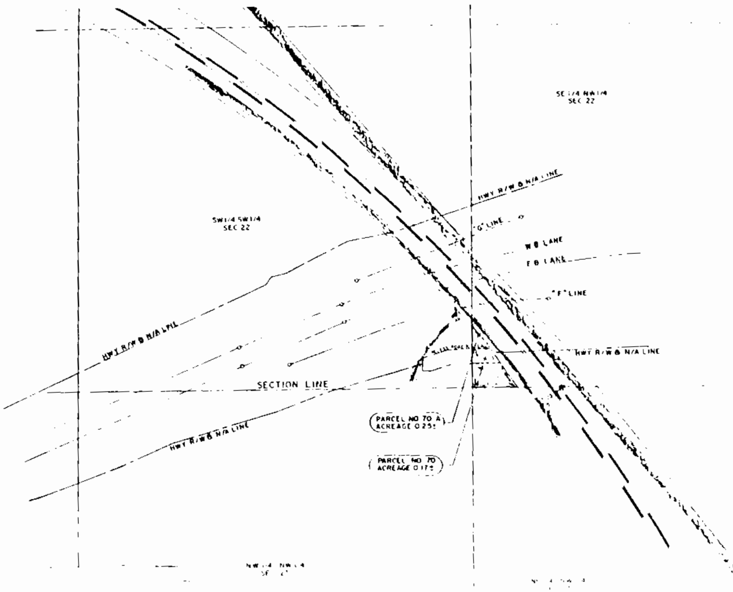
MAP SHOWING THE PROPERTY OF JOHN R. D'AMBROSIO, ET AL AND THAT PORTION REQUIRED FOR HIGHWAY PURPOSES

PROJECT NO RF-028-2(17)
LOCATION BLUE CUT TO EAST PRICE
COUNTY CARBON
DRAWN BY BJ WILLIAM
CHECKED BY HE MCLEAN

	TOTAL TRACT	41.49 AC ±
	LESS LAND FOR HIGHWAY	9.67 AC ±
	REMAINING LAND	31.82 AC ±
	EASEMENTS	5.31 AC ±
	EXISTING ROADS	
	RAILROADS	

Court No
11215

D'AMBROSIO, JOHN R ET AL (12560)



EXHIBIT

MAP SHOWING THE PROPERTY OF
JOHN R D'AMBROSIO ET AL
AND THAT PORTION REQUIRED FOR
HIGHWAY PURPOSES.
PROJECT NO RF 0...(17)
LOCATION BLUE C... EAST PRICE
COUNTY CARBON
DRAWN BY
CHECKED BY

UTAH DEPARTMENT OF TRANSPORTATION,

Plaintiff,

-vs-

JOHN R. D'AMBROSIO and MABLE
D'AMBROSIO, his wife, JOSEPH ... his wife;
... NORMA F
...
... D'AMBROSIO

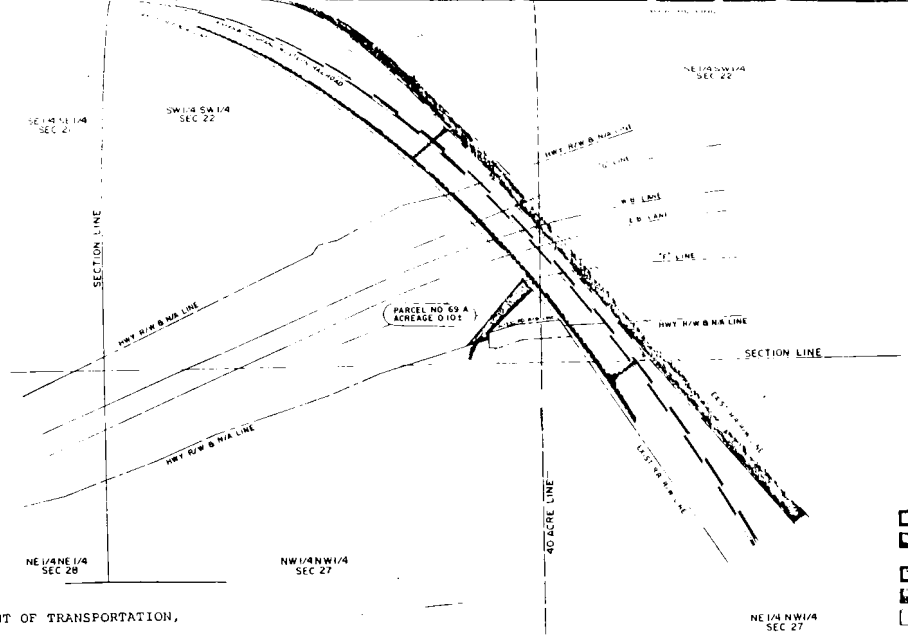
RF-028-2(17)

70:A, 70:E

Court No. 1212

40 ACRE LINE

[legend symbol]	TOTAL TRACT	
[legend symbol]	LESS LAND FOR HIGHWAY	
[legend symbol]	REMAINING LAND	
[legend symbol]	EXISTING R/W	
[legend symbol]	RAILS	



EXHIBIT

MAP SHOWING THE PROPERTY OF JOHN R O'AMBROSIO, ET AL AND THAT PORTION REQUIRED FOR HIGHWAY PURPOSES

PROJECT NO RF-028-2(17)
LOCATION BLUE CUT TO EAST PRICE
COUNTY CARBON
DRAWN BY D M RICHTER
CHECKED BY H E MCLEAN

	TOTAL TRACT	0.10AC ±
	LESS LAND FOR HIGHWAY	0.10AC ±
	REMAINING LAND	0.00AC ±
	EXISTING ROADS	
	RAILROADS	

recd no. 11214

UTAH DEPARTMENT OF TRANSPORTATION,

Plaintiff,

-vs-

JOHN R. D'AMBROSIO and MABLE M. D'AMBROSIO, his wife; DOMENIC D'AMBROSIO and NORMA P. D'AMBROSIO, his wife; PAUL D'AMBROSIO; SHARON D'AMBROSIO; FRANCES D'AMBROSIO; JOSEPH CHA and MARION D. CHA, his wife,

Defendants.

RF-028-2(17)

69:A

Court No. 11214