

1963

# Thiokol Chemical Corporation v. United States of America : Brief of Intervenor

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

THIOLKOL CHEMICAL CORPORATION,  
a Corporation,

*Plaintiff-Respondent and Cross-  
Appellant,*

and

UNITED STATES OF AMERICA:

*Plaintiff-Intervenor and Cross-  
Appellant*

—vs.—

LE GRANDE PETERSON,

*Defendant-Appellant*

OCT 29 1963

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Case No. 9312

FILED

OCT 14 1963

Clerk, Supreme Court, Utah

## BRIEF OF INTERVENOR

APPEAL FROM THE JUDGMENT OF THE  
FIRST DISTRICT COURT FOR BOX ELDER  
COUNTY, HONORABLE LEWIS JONES, JUDGE

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—vs.—

LE GRANDE PETERSON,

*Defendant-Appellant*

Case No. 9912

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## BRIEF OF INTERVENOR

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### STATEMENT OF NATURE OF THE CASE

This case involves the applicability and constitutionality of the Utah privilege tax, Section 59-13-73 of the Utah Code Annotated, 1953, amended (Appendix, *infra*),<sup>1</sup> as applied to property owned by the United States of America and used by Thiokol Chemical Corporation in the performance of a Government research and development contract.

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1. The Utah Code Annotated is hereafter cited as U.C.A.

## DISPOSITION IN THE LOWER COURT

This suit was commenced by Thiokol Chemical Corporation (hereafter called Thiokol) for the refund of \$125,801.29 in taxes paid under protest to Le Grande Peterson, treasurer of Box Elder County. (R. 204-206.) The United States is entitled to the full amount of any refund (R. 249) and was accordingly granted leave to intervene as a party plaintiff (R. 215). By their complaints, Thiokol and the United States sought a declaration that Section 59-13-73, U.C.A., was unconstitutional and a refund of the tax paid under that section on the grounds that (1) the incidence of the tax was on the United States; (2) Thoikol made no taxable use of and had no taxable interest in the property assessed; (3) the tax imposed by Section 59-13-73, U.C.A., when compared with the tax imposed on state-owned property taxed under Section 59-2-2, U.C.A., discriminated against the United States and those with whom it dealt; (4) Section 59-13-73, U.C.A., was applied in such a manner as to discriminate against the United States and those with whom it dealt. (R. 204-206, 216-218.) Trial was had before the Honorable Lewis Jones, sitting without a jury, in the First Judicial District Court, Box Elder County, State of Utah. On April 12, 1963, the court filed its findings of fact and conclusions of law awarding judgment to Thiokol and the United States on the ground that the statute was applied in such a manner as to discriminate against the United States and those with whom it dealt. (R. 245-253.) However, the court ruled against the other points urged by Thiokol and the United States. The defendant, Le Grande Peterson, appealed from this

judgment and Thiokol and the United States cross-appealed from the court's failure to grant the prayed for declaratory relief. (R. 255, 259.)

## RELIEF SOUGHT ON APPEAL

The United States, as cross-appellant, seeks a declaration that Section 59-13-73, U.C.A., is unconstitutional in that (1) it purports to tax users of federally-owned property on the full value of such property, whereas comparable users of state-owned property are treated differently under Section 59-2-2, U.C.A., and (2) Thiokol does not have a taxable interest in the property. The United States, as respondent, urges the affirmance of the trial court's ruling that Section 59-13-73, U.C.A., was applied in a manner that discriminated against the United States and those with whom it dealt.<sup>2</sup>

## STATEMENT OF FACTS

The plaintiff, Thiokol Chemical Corporation (hereafter called Thiokol), is a Delaware corporation that is qualified to do business in the State of Utah and was in fact doing business within the state during the year 1961. (R. 245-246.) Since 1957, a portion of Thiokol's business has involved research and development on the first stage of the Minuteman Missile under a contract entered into with the United States. (Ex. 6.) During

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2. Although the United States has not argued in this brief that the exemption of charitable and religious organizations in Section 59-13-73, U.C.A. renders that section unconstitutional, the United States does not waive this point but refers to the argument as made in the brief submitted by Thiokol.

1961, the taxable year in question, this research was conducted at Thiokol's Wasatch Division which is located in Box Elder County, Utah. (R. 68, 246.)

The contract between Thiokol and the United States is of the cost-plus-fixed-fee type and under its terms Thiokol's compensation is based on a percentage of the original estimate of the total cost of performance. (R. 77, 246.) Under this type of contract any subsequent cost saving will not reduce the compensation and any increase in costs over and above the original estimates will not increase Thiokol's fee unless the increase is attributable to changes in the work or services to be performed. The fee is thus completely fixed at the outset of the contract and the efficiency or inefficiency which Thiokol demonstrates in the use of the equipment furnished by the Government will not affect its profit. (R. 77-78, 84.)

Thiokol is not free to decide for itself how to proceed with the research and must obtain approval from the Air Force Ballistic Systems Division (a division of the United States Air Force) prior to embarking on any project. The United States maintains a staff of approximately sixty people at the Wasatch Division and United States approval is required of such items as: security policies, safety measures, labor relations, accounting, procurement, and the company's organizational structure including wages and salaries. (R. 69-75.) The research and development activities of Thiokol relate to the first stage of the missile only, stages two and three being the responsibility of other contractors and final assembly



occurs at Boeing Plant 77, Hill Air Force Base. (R. 151-152.) The efforts of all these contractors are coordinated by the Ballistics Systems Division which has technical responsibility for seeing that the total missile is operational. (R. 151.)

In accordance with the terms of the contract, the United States provided Thiokol with machinery, equipment and other personal property to be used in the performance of the contract. (R. 246; Exs. 1, 6.) This property was furnished without charge, and the contract specifically provided that title to such property was to remain in the United States. (Ex. 6.) The United States reserved the right to divert any of the equipment furnished to other uses at other locations (R. 72), although this right was not exercised in 1961 (R. 73). During the tax year in question all of the property furnished by the United States was used by Thiokol solely in the performance of the contract. (R. 246.)

In the year 1961, an assessment in the aggregate amount of \$244,958.80 was made against Thiokol with respect to certain properties located in Box Elder County, and of this amount \$125,801.29 was assessed against property title to which remained in the United States. (Ex. 1.) On November 29, 1961, Thiokol paid the total assessment and protested that portion of the assessment attributable to the property owned by the United States. This action for the recovery of the protested tax was then instituted against the defendant, Le Grande Peterson, treasurer of Box Elder County, Utah. (R. 204-206, Ex. 1.) Since any recovery in this suit would inure to

the benefit of the United States, the United States moved to file a complaint in intervention and was granted leave to intervene on August 28, 1962. (R. 215.) The complaints of both Thiokol and the United States called into question the constitutionality of Section 59-13-73 and the Attorney General of Utah was notified of the proceeding in accordance with Section 78-33-11, U.C.A. The Attorney General thereafter appeared and participated throughout the proceeding. (R. 209-210.)

The case came to trial before the Honorable Lewis Jones, District Judge, sitting in the District Court of Box Elder County, Utah, and culminated in an award of judgment for the United States and Thiokol on April 12, 1963. (R. 252-253.) This judgment was predicated on the trial court's conclusion that the United States had proved (R. 249) —

That defendant and other responsible taxing officials of the State of Utah and Box Elder County, in assessing and levying taxes for the year 1961, discriminated against plaintiff, Thiokol Chemical Corp., and United States of America, intervenor, in the manner in which they construed, applied and enforced Section 59-13-73 of the Utah Code Annotated, 1953, as amended.

The evidence adduced at the trial bearing on this finding can be divided into two distinct categories. First, the evidence bearing on the practices and policies of the taxing officials of Box Elder County in administering Sections 59-2-2 and 59-13-73, U.C.A.; and, second, the evidence illustrating the administration of these sections on a state-wide basis.

**The administration of Section 59-13-73 U.C.A.  
by the taxing officials of Box Elder County.**

At the trial it was proved that there were numerous parcels of property that were leased or sold by the State and local officials of Box Elder County which were subject to the tax imposed by Section 59-13-73 but were not taxed pursuant to that section. These included several parcels of real estate referred to as the "Brigham City Properties" which were all leased or sold under contract by the city. They consist of lots 1, 15 and 16 of block 6, Brigham City five-acre plot in the N.W.  $\frac{1}{4}$  of section 14. T. 9 and N. R. 2. W.S.L.M., known as the "Septic Plant Site" and approximately 16.75 acres in the S.  $\frac{1}{2}$  of S.W.  $\frac{1}{4}$  of section 18. T. 9. N. R. 2. W.S.LM, known as the "Gravel Pit Site"; and approximately 19.51 acres owned by the Board of Education of the Box Elder County School District, an instrumentality of the County. (R. 247.) Although the court found (R. 247) that at least part of each of these properties were in the possession of, and used by, private individuals, associations, or corporations in connection with business conducted for a profit, it was stipulated between the parties to this suit that these properties were not taxed under Section 59-13-73 U.C.A., or any other provision of the Utah law (Ex. 1).

In addition, the parties stipulated that there were upwards of 380 parcels of land in the State of Utah, title to which remains in the State of Utah and which were held by contract vendees under contracts of sale from the state. (Ex. 1.) Pursuant to the provisions of Sections 59-5-50 and 59-5-51, U.C.A., the State Land Board an-

nually prepared a list of these properties and forwarded the list to the State Tax Commission which in turn sent it to the local assessors. (R. 246-247; Ex. 3.) The list sent to the taxing officials of Box Elder County for the year 1961 contained 34 properties that were located within the limits of the County. The trial court found that at least 27 of these properties were used in a business for profit and were in all other respects subject to the provisions of Section 59-13-73, U.C.A., but were not taxed pursuant to that section. (R. 247-248.) To the extent that these properties were taxed at all, it was pursuant to Section 59-2-2, U.C.A., which taxes purchasers of state lands on their equity interest only. (Ex. 1.)

Fred L. Peterson, County Assessor for Box Elder County, was called on to explain his failure to assess any of these properties under Section 59-13-73, U.C.A. As to the "Brigham City Properties" he testified on direct examination (R. 159-160):

Q \* \* \* Did you, in making your assessment for the year 1961, conduct any investigation as to the properties owned by the Board of Education of Box Elder County, by the City of Brigham, or any other municipalities of Box Elder County, which were then under lease to private parties and used by those private parties in connection with their businesses conducted for a profit?

A No, sir.

Q You made no such investigation prior to making the assessments for the year 1961?

A After it appeared in the name of the city or the county it went off the tax rolls.

**Q** And you didn't stop to consider that perhaps that was leased to a private owner who was using it in connection with a business?

**A** I did not.

It is true that as to one parcel of property, the "Gravel Pit Site," Mr. Peterson had directed an inquiry to the Utah State Tax Commission and had been informed that the property should be taxed under Section 59-13-73, U.C.A. (R. 180; Ex. 9.) Nevertheless, this property was not taxed, the failure to tax being explained as an oversight.<sup>3</sup>

Mr. Peterson was also specifically examined with reference to the 34 properties purchased from the State by private individuals under a contract which provided that title was to remain in the state. He stated that such properties were taxed on the purchasers' equity interest only and that no investigation had been made to determine whether any of the purchasers used the property in connection with a business conducted for a profit. (R. 157-158.)

No evidence was produced at the trial that Fred L. Peterson, County Assessor for Box Elder County, had assessed any property within that County under Section 59-13-73, U.C.A., with the single exception of the property owned by the United States and used by Thiokol.

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3. It is only in connection with this failure to tax the gravel pit site that Mr. Peterson testified there was an oversight. Appellant's suggestion that the failure to tax all of these properties was due to an oversight is not supported by this testimony. (Br. 9; R. 179-180.)

## **The discriminatory application of Section 59-13-73, U.C.A., on a state-wide basis.**

The evidence introduced at the trial concerning the State-wide failure to apply Section 59-13-73, U.C.A., to many properties that were properly subject to its terms was voluminous. The series of special use leases were introduced and the court found (R. 247) that nine of these leases (Exs. 1-c, 1-h, 1-i, 1-j, 1-o, 1-q, 1-r, 1-u, and 1-v; (R. 247) were for lands leased to private individuals or corporations in business for a profit. Of these special use leases in evidence, only five were taxed under Section 59-13-73, U.C.A. (Exs. 1-c, 1-q, 1-r, 1-u, and 1-v; R. 247-248.) The leases that were taxed appeared to be all owned by utilities subject to the taxing jurisdiction of the State Tax Commission itself rather than the County assessors. (R. 97-98, 138.)

In addition to the special use leases, evidence was also presented to indicate that there were upwards of 380 parcels of land which on January 1, 1961, were in the possession of private individuals under a contract of sale from the State. The trial court found that approximately 200 of these properties were in the hands of private individuals using the property in connection with a business for a profit, but were not taxed under Section 59-13-73, U.C.A. (R. 277.) To the extent that users of these properties were taxed they were taxed under Section 59-2-2, U.C.A., on their equities only. (Ex. 1.)

In relation to lands sold by the State, the State Tax Commission is required to certify to the local assessors

the equity value of property sold by the State so that the tax may be imposed pursuant to Section 59-2-2, U.C.A. (Sections 59-5-50 and 59-5-51 of U.C.A.) Mr. Max H. Kerr, Director of Property Tax for the Utah State Tax Commission, was asked on cross-examination whether any consideration was given to a change in this practice after the passage of Section 59-13-73, U.C.A. He replied, "So far as I know the only thing that has happened since the imposition of this law in regard to state land equities has been the same as before. We have been certifying them to the County Assessors in accordance with the law that requires us to." (R. 107.) He was further examined relative to the Commission's activities with relation to Section 59-13-73, U.C.A., and testified as follows (R. 107-108):

Q Have any new instructions been issued by the State Tax Commission?

A With regard to this?

Q Yes.

A Not to my knowledge.

Q Does the State Tax Commission have the authority to direct County Assessors to assess property which they have overlooked when it comes to the attention of the State Tax Commission that the properties have been omitted from the tax rolls?

A It is my understanding that the Tax Commission has the authority, after the Board of Equalization has met, to review the work of the County Assessors and to assess in its own name this property.

Q Any property that was omitted?

A Yes.

Q Has the State Tax Commission, in the exercise of that authority, ever made any assessments under section 59-13-73 for the year 1961?

A Not to my knowledge.

The only effort made by the State Tax Commission to advise county assessors as to the enforcement of Section 59-13-73 occurred at the annual assessor's school conducted on December 10 and 11, 1959. The major part of the discussion that occurred at the assessor's school involved a legal analysis of the recent Michigan cases and an opinion as to the constitutionality of taxing users of Federal Government property. The only indication that property other than that belonging to the United States was also included within the ambit of the tax occurs in one sentence where it is stated, "Of course, this does not apply only to Government owned property but also may apply to any exempt property." (Ex. 7, p. 24.) No other directive relative to the application of Section 59-13-73, U.C.A., was ever prepared by the State Tax Commission. (R. 132.)

The trial court on the basis of this evidence found that there were more than 200 parcels of property used by individuals subject to the provisions of Section 59-13-73, U.C.A., but that only five parcels not belonging to the Federal Government were taxed under that section. (R. 247-248.) The conclusions of the court are ably summarized in its oral opinion (R. 200-201):

Well, regardless of whether it's the 14th Amendment or the right of the government to carry on its primary functions, there's no question about it, gentlemen. Under the law as announced in Washington the state must uniformly



and without discrimination enforce its laws. The court can't bring itself to the point of making a finding of fact in this case that because the tax people of Utah have only assessed the Southern Pacific Railroad on an easement and the Texas Company on three or four oil leases, and Thiokol, that this practice has been so acquiesced in by the tax people as to constitute discrimination in the legal sense. These state land contracts, gentlemen, under the stipulation of the parties there are about 200 or some such number of these contracts that the court has examined, which if the court recalls correctly there's about that number where the purchaser of these state lands in 1961 placed those lands to commercial use. The court finds from the stipulation that this was a commercial use, but nothing was done collectively by those tax people. I'll just treat them collectively as tax people, because the Tax Commission has supervisory duties under the Constitution and the assessor has, I guess, primary responsibility. But collectively in all the counties of the state there apparently has been a studied indifference over these state land contracts, and notwithstanding the fact that the Land Board is across the hall or another floor, somehow or other, though these lands are being used for grazing of animals and used in commercial practice, in not one instance, if the court recalls the record correctly, has any assessment been made under this privilege tax.

Now the court is just simply impelled into the conclusion that so long as the state is going to continue to practice such discrimination, the least this court can do is to raise its voice in protest and decide in favor of the plaintiff and find that the tax has been discriminatorily applied and with reluctance direct that the money be returned with the interest provided by statute. \* \* \*

## ARGUMENT

### POINT I.

THE EVIDENCE INTRODUCED AT TRIAL CLEARLY SUPPORTS THE TRIAL COURT'S FINDING THAT THE TAXING OFFICIALS OF BOX ELDER COUNTY AND THE STATE OF UTAH DISCRIMINATED AGAINST THE UNITED STATES AND THOSE WITH WHOM IT DEALT IN THEIR ADMINISTRATION OF THE UTAH PRIVILEGE TAX, SECTION 59-13-73, U.C.A.

The basic legal principles upon which the decision of this case rests had their genesis in one of the early landmark cases in our constitutional history. In 1819 Chief Justice Marshall writing for the Court in *McCulloch v. Maryland*, 4 Wheat, 316, 437, held that under our system of dual sovereignty "the states have no power, by taxation or otherwise to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government". Since its inception this principle has had two aspects. First, the states may not levy a tax the incidence of which falls upon the Federal Government or its instrumentalities. *United States v. Allegheny County*, 322 U.S. 174 (1944); *United States v. City of Detroit*, 355 U.S. 466 (1958); *City of Detroit v. Murray Corp.*, 355 U.S. 489 (1958). The second aspect of this decision was most recently restated in *Phillips Co. v. Dumas School Dist.*, 361 U.S. 376, 387, which held that, "it still remains true, as it has from the time of *McCulloch v. Maryland*, 4 Wheat. 316, that a state tax may not discriminate against the Government or those with whom it deals."

The trial judge based his resolution of the present controversy on the second aspect of this principle. He ruled that although Section 59-13-73, U.C.A., Appendix, *infra*, was not a tax on the United States, and that on its face the section did not discriminate against the United States, nevertheless the officials of both Box Elder County and the State of Utah have applied the tax with such "studied indifference" (R. 200) that discrimination against the Federal Government and those with whom it dealt was the inescapable result. An examination of the evidence leaves room for no other conclusion.

**A. The evidence of discrimination by the taxing officials of Box Elder County.**

The defendant in this suit is Le Grande Peterson, treasurer of Box Elder County, the taxes were assessed by the officials of Box Elder County on property possessed and used by Thiokol within the County. In these circumstances it is the contention of Thiokol and the United States that, although the tax is imposed by state law, they are entitled to a refund on showing that the officials of the County wielded their power in such a way as to discriminate against the United States and those with whom it dealt. It is not essential to show, as was in fact the case, that this discrimination existed throughout the State.

Section 59-13-73, U.C.A., by its terms purports to tax all individuals using exempt property in business for a profit of 40 per cent of the fair market value of that property. Accepting for purposes of argument the trial judge's interpretation of the relationship between Sec-

tion 59-2-2, U.C.A., Appendix, *infra*, and Section 59-13-73, U.C.A., it was the duty of the county officials to apply Section 59-13-73, U.C.A., equally to all persons using either federal or state property in business for a profit.<sup>4</sup> In fact, although the evidence reveals that there were many parcels of property owned by the State and used by private persons in business for a profit within the jurisdiction of Box Elder County, not a single user of such property who was subject to the tax was assessed. As to the properties identified in evidence as "Brigham City properties" the record discloses that they were not taxed under any provision of the Utah law. (R. 247; Ex. 1.) Moreover, there were 34 parcels of property purchased by private individuals under a contract of sale from the state title to which remained in the State. (Ex. 8.) To the extent that these individuals were taxed at all, the tax was levied solely on their equity in the property; yet the trial court found that at least 27 of these properties were used in a business for a profit, and in all other respects were subject to the provisions of Section 59-13-73, U.C.A. (R. 247-248.)

Only one assessment was made pursuant to Section 59-13-73, U.C.A., by the county officials for 1961; the assessment against Thiokol. (R. 246.) It is therefore not surprising that the trial judge failed to credit the appellant's factual contention that the County's failure to assess state users was due to mere oversight. The only testimony to this effect cited by appellant (Br 9) is

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4. Respondents do not accept the trial court's conclusion (R. 250) that Section 59-13-73 U.C.A., impliedly repealed the inconsistent provisions of Section 59-2-2, U.C.A. See part II, *infra*.

with reference to a single parcel of property, the so-called "Gravel Pit Site." As to that parcel the county assessor had sought advice from the Utah State Tax Commission as to its taxability and had been informed by the Commission that the user was taxable under Section 59-13-73. (Ex. 9.) Nevertheless, despite this correspondence the gravel pit site was not taxed in 1961 and it is solely in relation to this failure to assess that Fred L. Peterson, the County Assessor, testified that there was an oversight. (R. 179.) The evidence adduced at trial thus clearly shows that the defendant and other county officials discriminated against Thiokol and the United States in their complete failure to assess any taxpayer other than Thiokol for the tax due under Section 59-13-73, U.C.A. In this situation the trial judge's finding of discrimination is unassailable.

#### **B. The evidence of discrimination by taxing officials throughout the state.**

In its brief in this Court appellant seems to proceed upon the assumption that the United States is required to show that this discriminatory application of the act prevailed throughout the State (pp. 46-58.) Since the defendant in this case is the treasurer of Box Elder County, a state-wide showing of discrimination seems unnecessary. However, as the trial judge's conclusions indicate, the discrimination against the United States was not confined to Box Elder County but occurred throughout the State. The record indicates that across the State as a whole there were 380 vendees of land under contract of sale from the state and of these approximately 200 were subject to tax under Section 59-13-73,

U.C.A. However, not one of these individuals found subject to the tax was assessed under Section 59-13-73, U.C.A. (R. 247-248.)<sup>5</sup> To the extent that any of the 380 vendees were taxed at all it was upon their equity only under Section 59-2-2, U.C.A. In addition, a series of special use leases was introduced into evidence. Five of these, all apparently utilities subject to the assessment jurisdiction of the Utah State Tax Commission rather than the county assessors, were taxed in accordance with Section 59-13-73, U.C.A. (R. 138.) These five use leases constitute the only evidence that any users of state property were assessed under Section 59-13-73, U.C.A., in 1961.

The United States made careful inquiry at the trial to ascertain what steps had been taken by the Utah State Tax Commission to inform the local assessors under the Commission's supervision of the privilege tax and advise them as to its implementation. The state witnesses indicated that the only action taken in this respect was at the 1959 Assessors School at which the new tax was discussed. (R. 105.) The entire discussion at that time centered on the constitutionality and revenue potential of applying the tax against persons using United States property. Only one sentence of that discussion intimated

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5. Appellant has suggested for the first time in its brief in this Court that the assessor of Kane County taxed some property within that county in accordance with Section 59-13-73, U.C.A. (Br. 46.) This is contrary to the stipulation of facts (Ex. 1), and the court's findings (R. 247-248), and concerns a fact as to which respondents have no knowledge and have never had the opportunity to challenge, by cross-examination or otherwise. It is certainly not a proper subject of judicial notice and respondents strenuously object to any consideration of the matter in this suit.

that the applicability of the tax extended beyond users of federal property and included users of all forms of exempt property. (Ex. 7, p. 24.)

Other than the proceedings at the above-mentioned school, no other steps appear to have been taken by the Utah State Tax Commission. The Commission has continued to certify equity values of vendees of state land contracts and no directives appear to have been issued indicating to the recipients of these equity lists that they might be useful in discovering property subject to the privilege tax. (R. 107, Ex. 8.) It thus appears that there is ample evidence to support the trial judge's finding that the discriminatory actions of state taxing officials against Thiokol and the United States occurred on a state-wide basis.

It is true that Max H. Kerr, Director of Property Tax for the Utah State Tax Commission, testified that it was the Commission's policy to tax all exempt property alike, and that the only reason that property subject to the tax would escape assessment would be attributable to the lack of discovery. (R. 98-101.) However, Mr. Kerr also testified that the Commission has authority to assess any property not assessed by the county assessors, but admitted this authority had never been exercised under Section 59-13-73, U.C.A. (R. 108.) Section 59-5-46, U.C.A., chronicles the many and varied functions of the Utah State Tax Commission and clearly indicates the large measure of responsibility vested in that body to control, advise and supplement the work of the county assessors. For example, Mr. Kerr testified

that the Commission continually makes investigations to determine the existence of property that has escaped taxation, although he could not recall a single instance where property was uncovered and added to the tax rolls under Section 59-13-73, U.C.A., (R. 111.) In these circumstances the trial judge seems clearly correct in failing to find as a fact that the state-wide failure to assess could be attributable to oversight. Under Utah law the failure to find a fact as urged by one of the parties is within the prerogative of the fact finder and the trial judge's factual determinations will not be overruled. *De Vas v. Noble*, 13 U.2d 133. The appellant has failed to show any error in the trial court's refusal to accept "oversight" as an explanation.

### **C. The sufficiency of the evidence to sustain the trial court's finding.**

In addition to suggestion that the trial court erred in failing to find that the discriminatory application of the tax was due to oversight, appellant has suggested that there is insufficient evidence of discrimination itself. (Br. 47.) This challenge by appellant seems to be predicated on two different grounds. First, it is argued (Br. 48) that even though Section 59-13-73 U.C.A. purports to apply to all property, both real and personal, Thiokol may only rely on evidence of a discriminatory treatment of personal property. Second, it is argued (Br. 52-55) that in order to prove unconstitutional discrimination, Thiokol and the United States must prove a specific intent to discriminate and the evidence of this intent was insufficient.



Appellant's first argument clearly ignores the language of the statute itself. It is predicated on the proposition that the State Legislature might have passed a different statute, one covering personal property only, and that such a statute if it had been enacted might have been applied in a non-discriminatory manner. However, this argument cannot detract from the fact that the statute as passed applied equally to persons using real or personal property in a business for profit. The statute by its terms covered many people subject to the tax in addition to Thiokol, yet as applied by the county only Thiokol was assessed and as applied on a state-wide basis, only a handful of utilities were assessed. (R. 246-249.) The overwhelming majority of people subject to Section 59-13-73 U.C.A. escaped that section's mandate completely.

The only case cited by appellant (Br. 48) in support of its argument is *Esso Standard Oil v. Evans*, 345 U.S. 494; however, an examination of that case reveals that it is concerned with a totally different situation. In that case Esso was storing gasoline owned by the United States in tanks owned or leased by Esso and was held subject to the Tennessee tax on the total gallonage so stored. An earlier Tennessee case had exempted a state agency from this tax on the basis that the storage tanks were leased by the state agency. The Supreme Court held that a distinction in treatment based on whether the storage tanks were in the possession of a private party or the Government was a reasonable classification and refused to assume that the state would have denied an exemption to the United States if the United States

had leased the storage tanks rather than Esso. Thus in *Esso* the United States was posing the hypothetical possibility that Tennessee would not have followed its earlier precedent even if the United States had leased the storage tanks. This case is certainly not an authority which permits appellants to argue that a differently worded statute in this case might have been applied in a non-discriminatory manner. If anything, *Esso Standard Oil v. Evans, supra*, supports the respondent's position that we are concerned with the actual statute and its actual application. In this case it is clear that the statute as actually drawn subjected a large number of persons to its tax, but as actually applied only the users of federal property were assessed in Box Elder County, and when viewed on a state-wide basis only a handful of utilities were included within the section's ambit. (R. 246-249.)

Appellant's second challenge (Br. 52-55) to the sufficiency of the evidence to sustain the trial judge's finding of discriminatory intent is equally without merit. In the first instance appellant has proceeded on the assumption that the legal standard upon which the trial judge must weigh the evidence is the same standard used in the "equal-protection clause" cases. On the basis of that assumption appellant then argues that the evidence was insufficient. Both the assumption upon which the appellant has proceeded and the conclusion it reached on the basis of this assumption are incorrect.

Appellant's claim that the sufficiency of the evidence must be measured against the same legal standard as the Supreme Court of the United States has used in the equal-protection clause cases is incorrect as a matter

of law. As the Supreme Court of the United States declared most recently in *Phillips Co. v. Dumas School Dist.*, 361 U.S. 376, 385 "It is true that perfection is by no means required under the equal protection test of permissible classification. But we have made it clear, in the equal protection cases, that our decisions in that field are not necessarily controlling where problems of intergovernmental tax immunity are involved."

To the same effect was Mr. Justice Jackson's statement in *United States v. Allegheny County*, 322 U.S. 174, 191:

The questions in this case do not arise under the Fourteenth Amendment. They depend on provisions adopted and principles settled long before the Fourteenth Amendment and which exist independently of it.

Thiokol's claim is predicated on supremacy clause principles announced some fifty years before the Fourteenth Amendment was even adopted. The right asserted by Thiokol and the United States in this case is founded exclusively upon the Federal Government's right to operate without discrimination directed against it or those with whom it deals. When evidence is adduced at trial that a tax has been applied in such a way as to affect the United States differently than those equally affected under the statutory terms, such application cannot be sustained. As long as such unequal treatment has any practical impact on the United States or those with whom it deals, the application of that law is unconstitutional. *Iowa-Des Moines Bank v. Bennett*, 284 U.S. 239.

The *Iowa-Des Moines Bank* case, *supra*, presents an excellent example of the distinction between the equal

protection clause test of discrimination and the test applied when the immunity of the United States is involved. That case involved the consolidated claim of both a national and a state bank, that they were discriminated against by being taxed at a higher rate on their stock than similar monied corporations. The state court assumed the discrimination as charged, but held that it was attributable to the illegal action of the county auditor and that no cause of action existed. The Supreme Court of the United States reversed; however, it treated the rights of the national bank differently from the rights of the state bank. As to the national bank, the Court held that it was an instrumentality of the Federal Government, taxable only by the consent of the Federal Government, and stated "The limits of this permission (to tax) were transgressed when the treasurer exacted from this petitioner taxes at rates greater than those applied in exacting payment from the competing domestic corporations." (P. 244.) There was no suggestion that any intentional or systematic discrimination was required. It was only when Justice Brandeis reached the part of the opinion (p. 245) labeled "Second," which concerned the claim of the state bank under the equal protection clause, that the claim of intentional and systematic discrimination became important. Thus it is clear that appellant's challenge to the sufficiency of the evidence in the instant case, based as it is on the equal protection standard, is predicated on a incorrect articulation of the test against which the evidence adduced at trial is to be judged. The evidence clearly reveals that, regardless of what may have been the intent of the legislature in passing Section 59-13-73, U.C.A., it has been administered

with such an uneven hand that a very real discriminatory impact against the United States has resulted. The collection of the tax in these circumstances was therefore in violation of the Constitution of the United States and the trial judge was correct in granting judgment to Thio-kol and the United States in the refund action.

However, even if we assume, for purposes of argument, that the proper test of discrimination in this case is the same as that applied in the equal protection clause cases, the United States has met its burden of proof. It seems clear from the trial judge's oral opinion, findings and conclusions of law (R. 195-202, 245-251), there was substantial evidence to meet the equal protection standard. Under Utah law the burden of course rests upon the appellant to show wherein such findings are unsupported by the evidence. In *Lowe v. Rosenlof*, 12 U. 2d 190, 192, it was stated:

This court has stated on numerous occasions that findings of fact made by the trial court will not be disturbed so long as they are supported by substantial evidence. Therefore, the findings of the lower court must be affirmed unless there was no reasonable basis in the evidence on which the court could fairly and rationally have thought the requisite proof was met.

Appellant's argument (Br. 52) in this respect merely suggests that the failure to assess the great bulk of property attributable to Section 59-13-73, U.C.A., was due either to a mistake as to the facts or a mistake as to the law. As we noted earlier, the trial judge did not accept the appellant's factual theory that this failure was attributable to a mere oversight. This was the court's

prerogative as fact finder. *De Vas v. Noble, supra*. In addition appellant seems to suggest that the evidence is insufficient because no one testified that they intended to discriminate against the United States. (Br. 55-56.) This latter argument seems predicated on the ground that in order to have discrimination in the terms of the equal protection test the taxing officials must have some *specific* intent to discriminate — in other words, an evil motive. This is not the law. It is true that the equal protection test requires an intentional or systematic discrimination between persons similarly situated. But the intention required is merely a general intent. *Yick Wo v. Hopkins*, 118 U.S. 356; *Sioux City Bridge v. Dakota County*, 260 U.S. 441; *Cumberland Coal Co. v. Board*, 284 U.S. 23; *Hillsborough v. Cromwell*, 326 U.S. 620. The complete failure of the county officials to assess any persons subject to the tax and their similar failure to even trouble to make an investigation to determine the existence of such persons provides overwhelming support for the trial court's characterization of their actions as involving a "studied indifference" (R. 200); the apparent parallel lack of action that occurred throughout the state is equally conclusive in this regard.

It is quite clear that both the county officials and the State Tax Commission knew, or should have known, that there were a great number of state-owned properties that were used by persons subject to the privilege tax. The very fact that there were 380 properties in the hands of private individuals under contract of sale from the State should have made this clear. (Ex. 8.) Certainly appellants could not have believed that not one of these

properties was used in business for a profit, yet no effort was made to determine which of these properties were subject to the tax. If the appellants purposely failed to ascertain which properties were subject to the tax because they did not believe Section 59-13-73, U.C.A., applied to state-owned lands, the tax was unconstitutionally exacted. In such a case, the "intent" requirement of the equal protection test is satisfied by showing that the defendants intended not to tax state property; the fact that they did not have a conscious purpose to discriminate, or that their failure was based on a mistake of law, is irrelevant. On the other hand, if they believe Section 59-13-73, U.C.A., was applicable to those among the 380 who used the property in business for a profit, and were merely indifferent to the discrimination which must follow their failure to investigate or assess such property, the intention test is equally satisfied. In such a case the "intent" element is supplied by the studied indifference of the taxing officials in the face of a result that they knew, or should have known, was certain to follow.

Accordingly, although the United States does not concede that the equal protection test of discrimination is applicable to this case, even when the evidence is measured against that standard, it is clear that there was ample evidence to support the trial court's finding that (R. 250):

The taxes paid under protest were discriminatorily assessed and levied in violation of the Constitution of the United States and the State of Utah, and were therefore illegal and void.

**D. The trial court was correct in ordering a refund of the full amount of the tax which was illegally collected.**

In its brief (Br. 56) the appellant has contended in the alternative that if the evidence is sufficient to sustain the trial judge's findings, the relief accorded was nevertheless improper. Appellant contends that the trial court should have created its own tax by determining "the percentage value that the assessment to Thiokol bore to the average percentage assessment to the non-assessed property and granted a reduction, if any, in the excess amount and judgment only for that amount." (Br. 58.)

The suggestion of appellants bears a striking resemblance to the contention rejected by the Supreme Court in *Moses Lake Homes v. Grant County*, 365 U.S. 744. In that case Grant County attempted to tax the full value of buildings and improvements on privately-owned Wherry Act leaseholds of housing developments on a federally-owned Air Force base, although it taxed other leaseholds, including privately-owned leaseholds of tax-exempt state lands, at a lower valuation. The Court of Appeals had directed that the tax be reduced to what it would have been if the tax had been levied on a non-Wherry Act leasehold basis. In reversing this direction, the Supreme Court simply stated "When, as here, the tax is invalid, it 'may not be exacted.' *Phillips Co. v. Dumas School District*, 361 U.S., at 387." (365 U.S. 744, 752).

In this case the taxing officials of Box Elder County enforced Section 59-13-73, U.C.A., against Thiokol for its use of United States property but failed to enforce that tax against any other taxpayers subject to the tax.



Appellant suggests that if the Court finds this action unconstitutional the Court may then proceed to fashion a different tax which will be constitutional. Appellant seems to ignore the fact that there is no legislative authorization for such behavior and that its suggestion would in effect require this Court to draft a totally new statute and then decree its application.<sup>6</sup>

Appellant argues that it is essential for this Court to fashion such a remedy because otherwise Thiokol would be put "in a better position than others and all he is entitled to is to be placed in a generally equal position." (Br. 57.) This argument is simply not in accord with the facts. The legislature in 1959 passed a privilege tax. The taxing officials failed to apply this tax to anyone but Thiokol. Thiokol is therefore entitled to the same treatment that everyone else received: not to be taxed under Section 59-13-73 U.C.A.

Appellant appears to have once again been misled by the equal protection cases. In those cases the situation sometimes arises that the valuation of the complaining parties' property is greatly in excess of the valuation placed on similar property of others. In such a situa-

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6. In addition, the formula that appellant would have this Court apply has a doubtful constitutional basis and the United States does not concede that it would be valid. It appears to aggregate all the properties subject to the tax and then apply an average rate of tax to Thiokol. However, some of these properties were not taxed at all. Some were taxed on the equity interest only and the amount of tax would thus vary from property to property according to the particular contracts and the rate of payment. Any rate derived from such a scheme appears entirely too whimsical, arbitrary and incapable of ascertainment to serve as a basis for taxing users of property owned by the United States.

tion the obvious remedy is to reduce the plaintiff's valuation to those and of all others similarly situated. The situation here is quite different. We are not confronted with a discriminatory exercise of power under a statute with regard to the amount of the assessment; rather, we are confronted with a failure to apply the statute at all. Accordingly, the appropriate remedy is not to apply Section 59-13-73, U.C.A., to Thiokol.

## II

### THE TAX IMPOSED ON USERS OF STATE PROPERTY BY SECTION 59-2-2, U.C.A., WHEN COMPARED WITH THE TAX IMPOSED ON USERS OF FEDERAL PROPERTY BY SECTION 59-13-73, U. C .A., WORKS AN UNCONSTITUTIONAL DISCRIMINATION AGAINST THE UNITED STATES.

Section 59-2-2, U.C.A., is one of the exemption provisions contained in the Utah tax code. In effect this section limits the tax liability of contract purchasers and lessees of state land to the value of their equities in the land and any improvements. Sections 59-5-50, and 59-5-51, U.C.A., seem specifically designed to facilitate the administration of the tax in relation to state-owned properties by providing that the State Land Board is to submit a list of properties sold by the State to the State Tax Commission, which is in turned required to inform the local assessors of any such properties. Nothing in Section 59-2-2, U.C.A., provides for any difference in tax treatment when the contract purchasers or lessees use the state property in business for a profit.

On the other hand, Section 59-13-73, U.C.A., purports to tax persons using tax-exempt property in business for a profit on the full value of such property. It is apparent that unless Section 59-13-73, U.C.A., has superseded or repealed the limitation on the tax imposed by Section 59-2-2, U.C.A., to the extent that purchased state property is used in business for a profit, Section 59-13-73, U.C.A., is unconstitutional. *Phillips Co. v. Dumas School Dist.*, 361 U.S. 376; *Moses Lake Homes v. Grant County*, 365 U.S. 744. This much the appellants have conceded. In their brief it is stated (p. 39) :

Indeed, were any different construction given the statute a difference in tax assessment valuation would exist between lessees and beneficial possessors of federal lands and those of state lands. This would obviously render the Privilege Tax discriminatory and hence unconstitutional.

In order to avoid the unconstitutional discrimination inherent in the two sections, the trial court held that Section 59-13-73, U.C.A., impliedly repealed Section 59-2-2, U.C.A., to the extent that the latter section purports to limit the tax on persons using state property in business for a profit. (R. 250.) In support of this ruling appellants rely on the principle<sup>7</sup> that (Br. 41) —

if there are two possible constructions of a statute, one of which will render the statute constitutional, and the other unconstitutional or render the constitutionality doubtful, the interpretation will be adopted which will save the statute.

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7. Appellants also suggest (Br. 45) that Section 59-13-77, U.C.A., expressly repeals any inconsistent portion of Section 59-2-2, U.C.A.; however, nothing in the language of that section suggests any form of repeal was intended.

However, appellants also recognize (Br. 43) that an application of the above canon of construction to the facts of this case creates a conflict with the equally persuasive principle that the law does not favor repeal by implication. Sutherland, *Statutory Construction* (3d ed.), Section 2014.

In this respect this Court has stated in *Union Pac. R. Co. v. Public Service Commission*, 103 U. 186, 196:

It is elementary that statutes may be repealed by implication, and where the provisions of a later statute are clearly and manifestly repugnant to the provisions of existing statutes the latter are deemed repealed to the extent of such repugnancy. Such repeals, however, are not favored, and if two apparently conflicting acts can be reasonably construed so as to reconcile and give an effect to each, such construction should be adopted.

That the statutes in question can be construed without repugnancy is amply illustrated by the actions of the taxing officials in this case. These officials, whose administrative actions in construing the statutes are entitled to great weight (*E. C. Olsen Co. v. State Tax Commission*, 109 U. 563, 578), simply applied Section 59-13-73, U.C.A., to users of federal properties and Section 59-2-2, U.C.A., to users of state property. The difficulty is not that the legislature has enacted two statutes that are repugnant in their operation, rather, the problem stems from the fact that the two statutes, when construed in harmony with one another, violate the United States Constitution. *Phillips Co. v. Dumas School Dist.*, *supra*; *Moses Lake Homes v. Grant County*, *supra*.

### III

PROPERLY CONSTRUED, SECTION 59-13-73 U.C.A., IS NOT APPLICABLE TO THIOKOL'S USE OF THE GOVERNMENT'S PROPERTY IN PERFORMANCE OF THE RESEARCH AND DEVELOPMENT CONTRACT BETWEEN THEM; AND, IF CONSTRUED TO APPLY TO SUCH USE, SECTION 59-13-73 U.C.A., VIOLATES THE CONSTITUTIONAL IMMUNITY OF THE UNITED STATES FROM STATE TAXATION BECAUSE LAID UPON A USE SOLELY FOR THE BENEFIT OF THE UNITED STATES.

Under the terms of the research and development contract between Thiokol and the United States (Ex. 6) Thiokol's compensation was fixed at the outset of the contract. Unless there was a change in the work to be performed, Thiokol's fee would remain unchanged regardless of the actual costs that are incurred (R. 77) and this predetermined compensation could not be increased by the extent or manner in which Thiokol used the Government property in its possession (R. 74). Since Thiokol could not derive any pecuniary benefit from its use of this property, it does not constitute the "possession or other beneficial use" which is taxed by Section 59-13-73, U.C.A. Moreover, if it be deemed to be the use contemplated by the statute, the tax is here actually being levied on the Government's beneficial use of its own property in the conduct of Government business.

Thiokol is not selling the first stage of a missile to the United States. It is selling only its research and development services in connection with the production of

a missile and this missile is owned by the United States in every phase of its production. Thiokol's fee for its research and development services is firmly fixed and it cannot be taxed on the Government-owned property used in performing the services since it has no taxable interest in such property. That any such tax is a tax on the United States is well illustrated by an example given in the District Court's decision in *United States v. Livingston*, 179 F. Supp. 9, 23 (E.D.S.C.), affirmed *per curiam*, 364 U.S. 281:

The custodian of a federal post office building is paid for the performance of his duties, but his use of the materials he requires in the performance of his housekeeping duties is so completely that of the United States that no one would think of taxing him upon the value of the materials.

This result plainly does not turn on a distinction between individual and corporate employment. A local express company hired at a monthly fee to manage and operate a post office on behalf of the United States could not be taxed on the use of the post office if all profit from the post office operations would belong to the United States. In this case the tax is one upon the United States (although it purports to be upon a Government contractor and is collected from the contractor) because it is a tax on the beneficial use of the property; and the United States reaps all the benefits from the use of the property it owns.

The unconstitutionality of the tax imposed by Section 59-13-73, U.C.A., as applied to this case is highlighted by a comparison of the present case with the

Michigan "use" tax cases decided in 1957. *United States v. City of Detroit*, 355 U.S. 466; *United States v. Township of Muskegon*, 355 U.S. 484. (A companion case, *City of Detroit v. Murray Corp.*, 355 U.S. 489, did not involve a "use" tax.) In the Michigan cases, the Supreme Court held that a state may impose upon an independent contractor a use tax measured by a value of tax-exempt property used in the business of manufacturing products later to be sold in one case to third parties and in the other to the United States. In each case, a private party used Government property to manufacture goods which it then sold for its own profit. Its profit from the sale of its product was the result of application not only of its own work but also of the property it used. In short, the contractor enjoyed the benefits of the use of Government-owned property. Therefore, the private contractor could be taxed upon the privilege of using the capital assets owned by the United States. Here, in contrast, the fee received by Thiokol is in no part attributable to the Government-owned property used in the performance of its research and development contract. The payments are simply and entirely for Thiokol's services; it cannot profit by any increase or decrease in production because of the efficiency or inefficiency of the Government-owned equipment; it uses this equipment because it is needed in the research and development and not because it profits from the product this property helps to produce. Any benefits from the use of the Government-owned property belong to the United States and any tax on the benefits of using this Government property is a tax upon the United States, which alone enjoys the benefits of its use.

In the Michigan cases, the Supreme Court recognized the distinction we are now urging, and reserved for a future case the question here presented. In *United States v. Township of Muskegon*, 355 U.S. 484, 486-487, the Supreme Court emphasized that Continental, which used Government property in the performance of supply contracts with the Government, "was free within broad limits to use the property as it thought advantageous and convenient in performing its contracts and maximizing its profits from them." The Supreme Court noted that Continental was "acting as a private enterprise selling goods to the United States. In a certain loose way it might be called an 'instrumentality' of the United States, but no more so than any other private parties supplying goods for its own gain to the Government." It stated (355 U.S., P. 486): "The case might well be different if the Government had reserved such control over the activities and financial gain of Continental that it could properly be called a 'servant' of the United States in agency terms." In thus reserving the question, however, we do not believe that the Supreme Court intended to make immunity depend upon whether the private party was an "independent contractor" rather than a servant, as that distinction has developed in the law concerning a master's liability for the torts of a servant. Rather, we suggest that the Supreme Court used the phrase "'servant' of the United States" as a shorthand phrase to describe the private party which was paid to perform services for the Government as distinguished from one who was "free \* \* \* to use the property as it thought advantageous and convenient in performing its contracts and maximizing its profits from them."



The question left open in the Michigan cases and here presented—whether a state may tax a private party's use of Government property in the course of rendering services for the United States where the private party never owned or enjoyed the product of its services, but was merely paid a fee for its time and efforts—was decided in favor of constitutional immunity in *Livingston v. United States*, 364 U.S. 281, affirming, *per curiam*, 179 F. Supp. 9 (E.D.S.C.)<sup>8</sup>

That case involved a management contract with the Atomic Energy Commission (A.E.C.). Under this contract, the du Pont Company had agreed to construct and operate A.E.C. plants and facilities located in South Carolina for the exclusive benefit of the United States. All the products produced or processed were at all times owned by the United States, as were all of the equipment, materials and supplies used in connection with such production. South Carolina's Tax Commission asserted that du Pont was liable for the payment of sales or use taxes upon the property it used on behalf of the United States. The Supreme Court affirmed the judgment of a three-judge District Court which had held that in these circumstances the South Carolina tax was a tax upon the United States, and not upon du Pont.

It is true that in the *Livingston* case du Pont received no fee for its services and here Thiokol received a sub-

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8. It is true that the reasoning of the *Livingston* case, *supra*, seems to have been rejected in *United States v. Boyd*, 363 S.W. 193 (Tenn. 1962), as appellants have indicated. (Br. 16-17.) The *Boyd* case is now on appeal to the Supreme Court. (Docket No. 185, October Term 1963.)

stantial fee. But that distinction is immaterial, since the fee received in the present case did not depend in any way upon how successfully Thiokol utilized the Government's property. Thiokol could not use the Government's property in this case in any way which would result in its "maximizing its profits from them." *Township of Muskegon, supra*. Indeed, the District Court in the *Livingston* case did not ground its decision on the absence of reward for du Pont's services, a matter about which there was some dispute. It held that, even if du Pont was viewed as having received substantial consideration for its services, it could not be taxed on the use of Government-owned property where, as here, the consideration received by Thiokol was not related in any way to the value or the tax-exempt status of the property used. The court there said, "In a sense, of course, du Pont may be said to have the use of all the materials and facilities at the Savannah River Plant, but in the same sense it may be said that the individual members of the AEC have the use of all of the facilities entrusted to their care." 179 F. Supp., p. 23. We submit that here, too, while Thiokol may be said to have had the use and possession of the Government's equipment, this use and possession were no different from that which individual employees of the A.E.C. or post office have of the facilities entrusted to their care. Accordingly, if Section 59-13-73, U.C.A., which requires "possession or other beneficial use" is applied to this case despite the fact that Thiokol cannot derive any pecuniary benefit from the use of Government property, such an application is unconstitutional because Thiokol has no taxable interest in the property.

## CONCLUSION

The judgment of the trial court is correct insofar as it held that Section 59-13-73 U.C.A. had been applied in such a manner as to discriminate against the United States and those with whom it dealt. The trial court erred in failing to declare that (1) the lesser tax imposed on users of state land under Section 59-2-2 U.C.A. rendered the higher tax imposed on users of federal property under Section 59-13-73 U.C.A. unconstitutional, (2) Thiokol had no interest in the property which Section 59-13-73 purports to or could constitutionally tax.

Respectfully submitted,

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## APPENDIX

### 6 Utah Code Annotated (1953) :

SEC. 59-2-2. *State lands — Improvements taxable.* — No tax shall be levied upon lands, the title to which remains in the state, held or occupied by any person under a contract of sale or lease from the state, but this provision shall not be construed to prevent the taxation of improvements on such lands and an interest therein to the extent of money paid, or due, in part payment of the purchase price thereof, whether an extension of payment has been granted or not prior to the levy of such tax. Where final payment has been made upon such lands, the contract of sales shall, for the purpose of taxation, be regarded as passing title to the purchaser or assignee, and the state land board shall immediately certify the receipt of such final payment to the state tax commission.

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### 6 Utah Code Annotated (1953, 1963 Pocket Supp) :

SEC. 59-13-73. *Privilege tax upon possession and use of tax-exempt property.* — *Exceptions.* — From and after the effective date of this act there is imposed and there shall be collected a tax upon the possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation, when such property is used in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public airport, park, fair ground, or similar property which is available as a matter right to the use of the general public, or where the possessor or user is a religious, educational or charitable organization or the proceeds of such use or possession in-

ure to the benefit of such religious, educational or charitable organization and not to the benefit of any other individual association or corporation. No tax shall be imposed upon the possession or other beneficial use of public lands occupied under the terms of mineral or grazing leases or permits issued by the United States or the State of Utah or upon any easement unless the lease, permit or easement entitles the lessee or permittee to exclusive possession of the premises to which the lease, permit or easement relates.

(Amended 1959.)

SEC. 59-13-74. *Rate of tax same as ad valorem property tax — Credit against tax on use of federally-owned property.* — The tax imposed upon such possession or other beneficial use of tax-exempt property shall be in the same amount and to the same extent as the ad valorem property tax would be if the possessor or user were the owner thereof; provided that there shall be credited against the tax so imposed upon the beneficial use of property owned by the federal government the amount of any payments which are made in lieu of taxes.

(Amended 1959.)

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SEC. 59-13-77. *Exemptions granted in other sections not limited or repealed.* — Nothing contained herein shall be construed as limiting or repealing the exemptions granted in sections 59-2-4, 59-2-5, 59-2-6, 59-2-7, 59-2-8, 59-2-9, 59-2-12 and 59-2-13 Utah Code Annotated 1953.

(Amended 1959.)