

2003

# Intermountain Sports, Inc., a Utah corporation v. Utah Department of Transportation : Appellant's Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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INTERMOUNTAIN SPORTS, INC.,	)	
a Utah Corporation,	)	
Plaintiff-Appellant,	)	Case No. 20031029-CA
	)	
v.	)	
	)	Court and judge below:
UTAH DEPARTMENT OF	)	Third Judicial District, Salt Lake County
TRANSPORTATION,	)	Judge William B. Bohling
Defendant-Appellee.	)	

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**APPELLANT'S REPLY BRIEF**

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**APPEAL**

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(Oral Argument and Published Decision Requested)

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Pursuant to Utah Rule of Appellate Procedure 24(c), Plaintiff-Appellant Intermountain Sports, Inc., (hereinafter "Appellant"), by and through its counsel of record John Martinez and B. Ray Zoll, hereby submits the following Reply Brief:

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## ARGUMENT

### I. INVERSE CONDEMNATION CLAIM

UDOT does not appear to seriously dispute that Appellant indeed suffered economic harm from UDOT's reconstruction of I-15. Appellee's Brief, p.6. Instead, UDOT seeks to avoid paying for that harm because (a) UDOT did not plan to do so, (b) Appellant's right to use its land was not totally destroyed, and (c) Appellant is not entitled to a jury trial. Each of these contentions will be addressed in turn.

**A. Harm Caused by Inverse Condemnation is *by Definition* Unplanned, but is Nevertheless Compensable**

UDOT contends that the state cannot plan for or pay for all losses caused by public projects. Appellee's Brief, pp.6-7. Justice Holmes' response to that contention is as valid today as when he uttered it in 1922 in the seminal case on inverse condemnation:

We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

Pennsylvania Coal v. Mahon, 360 U.S. 393, 416, 43 S.Ct. 158, 67 L.Ed. 322 (1922). This court has acknowledged that principle is applicable in Utah as well. Three D Corporation v. Salt Lake City, 752 P.2d 1321, 1323 n.1 (Utah Ct App 1988)(quoting Justice Holmes).

The drafters of Utah's Just Compensation Clause were well aware that *unintentionally*-caused harm is compensable. *Proceedings and Debates of the Constitutional Convention*, 327 (1898)("Damage is not always--in fact is not often contemplated or expected. It comes unlooked for as the consequence of an act which the party performs.")(Samuel R. Thurman), Opening brief, Addendum Exhibit 4. And Utah law is clear that "Intent is not an element of

[an inverse condemnation] action." Farmers New World Life Insurance Co. v. Bountiful City, 803 P.2d 1241, 1246 (Utah 1990)(interpreting UTAH CONST. art. I, §22).

If a jury determines UDOT caused Appellant's economic harm, the state cannot avoid paying for it on the ground that the state did not plan to do so.

**B. Appellant Can Recover Even Though its Right to Use its Land Was Not Totally Destroyed**

UDOT misinterprets this court's decision in Diamond B-Y Ranches v. Tooele County, 2004 UT App 135, 498 Utah Adv. Rep. 32 as standing for the proposition that a taking occurs only when governmental conduct renders private land "economically idle." Appellee's Brief, p.14. On the contrary, this court emphasized in Diamond B-Y Ranches that a taking occurs when there is:

[denial of] all economically beneficial or productive use of land, or, even if the property has not necessarily been deprived of all economically beneficial use, an analysis of several factors indicates that the interference is so great that a virtual taking has nonetheless occurred.

*Id.* 2004 UT App at ¶14, quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 2893 (1992) and Palazzolo v. Rhode Island, 533 U.S. 606, 617, 121 S. Ct. 2448, 2457 (2001)(emphasis added).

This court recognized in Diamond B-Y Ranches, as did the United States Supreme Court in Palazzolo, that partial takings are compensable. Therefore, a taking can be found if *either* Appellant's right to use its land has been completely destroyed *or* if "an analysis of several factors indicates that the interference is so great that a virtual taking [of Appellant's right to use its land] has nonetheless occurred." Diamond B-Y Ranches v. Tooele County,

2004 UT App at ¶14. Whether a partial taking has occurred depends on application of the Penn Central factors: "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . . [and] the character of the governmental action." Diamond B-Y Ranches v. Tooele County, 2004 UT App 135, ¶14, quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). This is the functional equivalent of the test for a compensable "taking" developed by the Utah Supreme Court under Utah's Just Compensation Clause. UTAH CONST. art. I, §22; Colman v. Utah State Land Board, 795 P.2d 622, 626 (Utah 1990)(A "taking" is "any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed.")

Appellant therefore can recover if it has suffered a partial taking of Appellant's right to use its land.

### **C. Appellant is Entitled to a Jury Trial**

UDOT contends that Appellant is not entitled to a jury trial. Appellee's Brief, p.15. On the contrary, whether a taking has occurred in this case is a question of fact, and Appellant is entitled to have a jury decide that question.

First, the application of the Penn Central factors to determine whether Appellant's right to use its land was substantially impaired is a question of fact. In considering whether an exaction in the land development setting constituted a taking, this court described application of the Penn Central factors as a "fact-intensive inquiry." B.A.M. Development,



L.L.C. v. Salt Lake County, 2004 UT App 34, ¶10, 87 P.3d 710. And in the analogous federal setting, the United States Supreme Court has held that whether a landowner has been deprived of economically viable use is a "predominantly factual question." City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 720, 119 S.Ct. 1624, 1644 (1999)(construing federal Just Compensation Clause, U.S. CONST. amend. V).

Second, Appellant is entitled to have a jury decide the factual question of whether Appellant has suffered a taking. The drafters of the Utah Constitution fully intended that a jury would determine whether the state has committed a compensable taking. *See Proceedings and Debates of the Constitutional Convention* 327 (1898)("...the means of arriving at the estimate are within the knowledge of men and can be adduced before a jury.")(Lorin Farr), Opening Brief, Addendum Exhibit 4. *See also* UTAH CONST. Art. 1, §10 (Trial by Jury); International Harvester Credit Corp. v. Pioneer Tractor, 626 P.2d 418 (Utah 1981)(Utah Const. Art. I, §10 guarantees right to jury trial on legal issues in civil cases); UTAH CODE ANN. §78-21-1 ("In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract or as damages for breach of contract, or for injuries, an issue of fact may be tried by a jury, unless a jury trial is waived or a reference is ordered."); Richards v. Salt Lake City, 49 Utah 28, 161 P. 680 (1916)(whether road debris on private lot warrants compensation is a question for the jury).

Appellant therefore is entitled to a jury trial on the question whether Appellant suffered a taking from UDOT's reconstruction of I-15.

## **II. UNIFORM OPERATION OF LAWS CLAIM**

UDOT contends for the first time in this litigation in its responding brief: (1) that the Uniform Operation of Laws provision in the Utah Constitution provides no private right of action because it is not self-executing, and (2) that even if such a private right of action is provided, damages are not available as a remedy for its violation. Appellee's Brief, pp. 15-16. UDOT further argues (3) that "[a] claim for violation of a state constitutional right requires either a statutory or common law cause of action such as a negligence claim." *Id.* at 15. The first two arguments lack merit and the third is a misinterpretation of the law.

### **A. The Uniform Operation of Laws Clause Provides a Private Right of Action Because it is Self-executing**

A private right of action is available under the Uniform Operation of Laws clause in the Utah Constitution because it is a self-executing provision "that can be judicially enforced without implementing legislation." Spackman v. Board of Education of the Box Elder County School District, 2000 UT 87, ¶7, 16 P.3d 533 (Due Process and Open Education Clauses held self-executing). Utah Constitutional clauses are judicially enforceable if (a) they are mandatory and prohibitory, (b) they are judicially definable and enforceable without enabling legislation and (c) the framers intended them to take effect without enabling legislation. *Id.* at ¶¶10-17. Each of these requirements is met here.

First, the Uniform Laws Clause provides: "All laws of a general nature shall have uniform operation." UTAH CONST. ART. I, §24. All Utah constitutional clauses are "mandatory and prohibitory, unless by express words they are declared to be otherwise." *Id.* art I, §26. No wording in the Uniform Laws Clause states otherwise, therefore the Clause

meets the first requirement for a self-executing provision.

Second, as with the Due Process and Open Education Clauses at issue in Spackman, although the Uniform Laws Clause is expressed in general terms, it has been carefully defined and enforced by Utah courts many times, without implementing legislation. *See, e.g., Pinetree Associates v. Ephraim City*, 2003 UT 6, ¶17, 67 P.3d 462 (assessment of thirty water charges on condominium project while other users with only one meter were assessed only one monthly charge violated Uniform Operation of Laws); Lee v. Gaufin, 867 P.2d 572, 577 (Utah 1993)("For a law to be constitutional under Article I, section 24, it is not enough that it be uniform on its face. What is critical is that the *operation* of the law be uniform."); Malan v. Lewis, 693 P.2d 661, 669 (1984)("[P]ersons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same."). The Uniform Laws Clause therefore is judicially enforceable without legislation.

Third, the historical context in which the framers adopted the Uniform Laws Clause clearly shows that they intended to constitutionalize existing concepts that did not require implementing legislation to become effective. Particularly significant is that the Uniform Laws Clause embodies the same principles as the then-existing Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. U.S. CONST. amend. XIV, §1(Equal Protection Clause); Malan v. Lewis, 693 P.2d at 669 (Uniform Laws and Equal Protection "embody the same general principle: persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same."); *see also* Carrier v. Pro-Tech Restoration, 944 P.2d 346,

355-56 (Utah 1997) (both clauses "embody the same general principles"); Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 888 (Utah 1988) (same); Liedtke v. Schettler, 649 P.2d 80, 81 n. 1 (Utah 1982)(Uniform Laws Clause is "generally considered the equivalent of the Equal Protection Clause of the 14th Amendment, U.S. Constitution"). In fact, the founders reiterated in Article I, Section 2, that the people of Utah are guaranteed the "equal protection" of their state government. UTAH CONST. art. I, § 2.

The Uniform Laws Clause therefore is self-executing and hence creates a private right of action for its enforcement.

**B. Damages are Available as a Remedy for Violation of the Uniform Laws Clause**

The Spackman decision emphasized that the availability of damages as a remedy for a constitutional violation is analytically distinct from whether a constitutional provision is self-executing. Spackman v. Board of Education of the Box Elder County School District, 2000 UT 87, at ¶1, n.1. The court held that since Utah Code Section 68-3-1 adopts the common law of England as the rule of decision for Utah courts, and since under English common law individuals could obtain damages for violations of their rights enumerated in fundamental documents which were the forerunners of our state and federal constitutions, therefore "a Utah court's ability to award damages for violation of a self-executing constitutional provision rests on the common law." *Id.* at ¶20.

The Spackman decision went on to describe the three elements required for Appellant to obtain damages for UDOT's violation of Appellant's right to Uniform Laws, each of which Appellant can establish: First, Appellant's complaint must sufficiently allege a "flagrant"

violation of its constitutional rights. Spackman, at ¶23. Appellant alleged it was not provided with accommodations to alleviate the impact of the I-15 reconstruction which were provided to other similarly situated businesses. (R. 6, Opening Brief, Addendum Exhibit 3, ¶26). Appellant further alleged that "... UDOT ... discriminated against Plaintiff in violation of Article I, Section 24 of the Utah Constitution, by among other things, arbitrarily and capriciously providing [those other similarly situated] businesses" with accommodations not provided to Appellant--including diversion of traffic to provide such businesses with continued access to the 45th South offramp--and that such discriminatory treatment was "unreasonable and ... not for a legitimate legislative purpose." (R. 10, Opening Brief, Addendum Exhibit 3, ¶¶39, 40). Such allegations sufficiently state a claim for a flagrant denial of the right to uniform operation of laws.

Second, Appellant must have no existing remedies to redress its injuries. Spackman, at ¶24. UDOT has not identified any remedy otherwise available to Appellant. On the contrary, UDOT has strenuously contended throughout this litigation that Appellant has no remedy whatsoever.

Third, equitable relief, such as an injunction, must be wholly inadequate to protect Appellant's rights or to redress its injuries. Spackman, at ¶25. Appellant does not contend that I-15 should not have been rebuilt, but only that UDOT should not have treated Appellant discriminatorily, in violation of Appellant's right to Uniform Laws. Accordingly, equitable relief, such as an injunction, was wholly inadequate both at the time of the I-15 reconstruction and today.

Damages therefore are available as a remedy for violation of the Uniform Laws Clause. And as the Spackman decision emphasized, whether Appellant in particular is entitled to damages "depends on the application of the analysis ... to the particular circumstances of the case." Spackman, at ¶27. That determination is for the jury on remand.

**C. A Claim for Violation of the Uniform Laws Clause Does Not Require a Statutory or Common Law Cause of Action**

UDOT contends that Spackman stands for the proposition that "[a] claim for violation of a state constitutional right requires either a statutory or common law cause of action such as a negligence claim." Appellee's Brief, p.15. UDOT goes on to argue that Appellant "is unable to point to an express creation of a private cause of action..." *Id.* at 16.

UDOT's reading of Spackman would make the case a nullity, since the fundamental issue in the case was whether the Uniform Laws Clause *itself* provided a private right of action. The court held that it did. Nowhere in the opinion does the court suggest that a separate, independent source of "right" is necessary.

UDOT goes astray, it appears, in its interpretation of the statement in Spackman that "a Utah court's ability to award damages for violation of a self-executing constitutional provision rests on the common law." Appellee's Brief, pp.15-16, quoting Spackman, at ¶20. As discussed in Part II.B. above, the court was referring to the threshold question of whether courts in Utah have *power as institutions* to award damages for state constitutional violations that are held to be self-executing. The source of that power is the common law of England. Once having made that determination, the court went on to define the elements a trial court must consider in order to award damages for such a violation in any particular case.

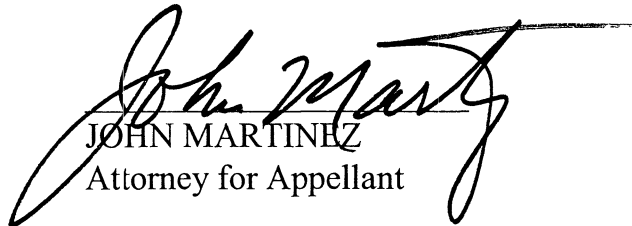
Spackman, at ¶22. At no time did the court say that a claimant needed anything more.

In summary, the Spackman case establishes that the right to be free from discriminatory treatment is embodied in the Uniform Laws Clause. Discriminatory treatment in violation of the Clause by itself gives rise to Appellant's right to relief.

### **CONCLUSION**

This Court should reverse the final judgment by the trial court and remand the case for further proceedings. UDOT should be taxed with costs on appeal.

DATED this 21st day of June, 2004.

  
JOHN MARTINEZ  
Attorney for Appellant

## CERTIFICATE OF SERVICE

Filed **eight** copies of the foregoing, **one containing an original signature**, as well as a CD containing an electronic version of the same in WordPerfect format, with the Clerk of the Utah Court of Appeals:

OFFICE OF THE CLERK OF THE COURT  
UTAH COURT OF APPEALS  
450 SOUTH STATE STREET, FIFTH FLOOR  
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84114-0230

and served **two** copies of the foregoing upon the following:

*Attorney for Defendant Utah Department of Transportation*  
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via first class mail, postage pre-paid, this 21st day of June, 2004, addressed as set forth above.

A handwritten signature in black ink, appearing to read "John Mary", is written over a horizontal line. The signature is stylized with a large, looping initial "J" and a long, sweeping underline.