

2003

Intermountain Sports, Inc. v. Utah Department of Transportation : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

INTERMOUNTAIN SPORTS, INC.,)
a Utah Corporation,)
Plaintiff-Appellant,)

Case No. 20031029-CA

v.)

UTAH DEPARTMENT OF)
TRANSPORTATION,)
Defendant-Appellee.)

Court and judge below:
Third Judicial District, Salt Lake County
Judge William B. Bohling

APPELLANT'S OPENING BRIEF

APPEAL

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(Oral Argument and Published Decision Requested)

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

LIST OF PARTIES

The parties to this appeal are identified in the caption herein. Appellant's claims against Murray City were dismissed by stipulation and are not the subject of this appeal. (R. 281)

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JURISDICTION

This case was transferred to the Court of Appeals from the Utah Supreme Court pursuant to Utah Code Ann. § 78-2a-3(2)(j)(2002); the Supreme Court had jurisdiction over this case pursuant to Utah Code Ann. § 78-2-2(3)(j)(2002), as an appeal from final judgment.

ISSUES AND STANDARDS OF REVIEW

A. Inverse Condemnation Claim

1. "Relevant Property" Issue: Did the trial court erroneously conclude that the relevant property for purposes of Appellant's inverse condemnation claim is "access to property," rather than Appellant's "right as to use its land for the operation of a commercial business?" (R. 147-48; 11/10/03 HearingTr. p.23, ll. 9-12, 17-20)

Standard of Review: A grant of a motion for judgment on the pleadings for failure to state a claim is reviewed as a question of law for correctness. No deference is given to the trial court. Factual allegations in the complaint and all reasonable inferences therefrom are accepted as true and are considered in a light most favorable to the Appellant. Affirmance is proper only if Appellant cannot prove any set of facts in support of its claims. Houghton v. Dept. of Health, 2002 UT 101, ¶2, 57 P.3d 1067; Colman v. Utah State Land Board, 795 P.2d 622, 624 (Utah 1990).

2. "Taking" Issue: Did the trial court erroneously conclude that Appellant did not state a "takings" claim, even though Appellant alleged two "takings" claims: (1) a "substantial interference" with the operation of its commercial enterprise which "destroyed or materially lessened its value" in excess of \$2 Million; and (2) a "substantial interference" with the

operation of its commercial enterprise, whereby Appellant's right to the "use and enjoyment" of its commercial enterprise was substantially "abridged or destroyed" in excess of \$2 Million? (R. 148-50; 11/10/03 HearingTr. p.23, ll. 12-14)

Standard of Review: Question of law reviewed for correctness. No deference to trial court. Factual allegations and all reasonable inferences accepted as true and considered in light most favorable to Appellant. Affirmance proper only if Appellant cannot prove any set of facts in support of its claims. Houghton v. Dept. of Health, 2002 UT 101, ¶2, 57 P.3d 1067; Colman v. Utah State Land Board, 795 P.2d 622, 624 (Utah 1990).

3. "Public Use" Issue: Although the trial court did not reach the issue, should this court hold for purposes of remand that UDOT's reconstruction of I-15, causing the taking of Appellant's right to use its land for operation of a commercial enterprise, was for a "public use?" (R. 150; 11/10/03 HearingTr. p. 23, ll. 21-25, p.24, l.1)

Standard of Review: Question of law reviewed for correctness. No deference to trial court. Factual allegations and all reasonable inferences accepted as true and considered in light most favorable to Appellant. Affirmance proper only if Appellant cannot prove any set of facts in support of its claims. Houghton v. Dept. of Health, 2002 UT 101, ¶2, 57 P.3d 1067; Colman v. Utah State Land Board, 795 P.2d 622, 624 (Utah 1990).

4. "Harm" Issue: Did the trial court erroneously conclude that Appellant's loss of business resulting from UDOT's closure of the 45th South offramp for about 4 years during the I-15 reconstruction--which the court characterized as a "temporary denial of access to property" which was not "permanent, continuous, or inevitably recurring"--was not

compensable harm as a matter of law? (R. 150-51; 11/10/03 HearingTr. p.20, ll. 20-23, p.24, ll. 4-6)

Standard of Review: Question of law reviewed for correctness. No deference to trial court. Factual allegations and all reasonable inferences accepted as true and considered in light most favorable to Appellant. Affirmance proper only if Appellant cannot prove any set of facts in support of its claims. Houghton v. Dept. of Health, 2002 UT 101, ¶2, 57 P.3d 1067; Colman v. Utah State Land Board, 795 P.2d 622, 624 (Utah 1990).

5. "Causation" Issue: Did the trial court erroneously conclude that UDOT's closure of the 45th South offramp for about 4 years during the I-15 reconstruction did not "cause" Appellant's harm as a matter of law? (R. 151; 11/10/03 HearingTr. p.24, ll. 4-12)

Standard of Review: Question of law reviewed for correctness. No deference to trial court. Factual allegations and all reasonable inferences accepted as true and considered in light most favorable to Appellant. Affirmance proper only if Appellant cannot prove any set of facts in support of its claims. Houghton v. Dept. of Health, 2002 UT 101, ¶2, 57 P.3d 1067; Colman v. Utah State Land Board, 795 P.2d 622, 624 (Utah 1990).

B. Uniform Operation of Laws Claim

1. Identity of "Law" Issue: Did the trial court erroneously conclude that the statutes from which UDOT draws its power to construct freeways and authorize UDOT to dictate the manner in which such construction will be performed are not "laws" applied non-uniformly by UDOT? (R. 152; 11/10/03 HearingTr. p.25, ll.3-7)

Standard of Review: Question of law reviewed for correctness. No deference to trial court. Factual allegations and all reasonable inferences accepted as true and considered in light most favorable to Appellant. Affirmance proper only if Appellant cannot prove any set of facts in support of its claims. Houghton v. Dept. of Health, 2002 UT 101, ¶2, 57 P.3d 1067; Colman v. Utah State Land Board, 795 P.2d 622, 624 (Utah 1990).

2. Identity of "class" Issue: Did the trial court erroneously conclude that Appellant's allegation that UDOT unlawfully discriminated against Appellant by arbitrarily and capriciously providing other businesses similarly situated to Appellant with accommodations not provided to Appellant did not allege membership in an identifiable class? (R. 152; 11/10/03 Hearing Tr. p.24, ll.24-25; p.25, ll.1-2)

Standard of Review: Question of law reviewed for correctness. No deference to trial court. Factual allegations and all reasonable inferences accepted as true and considered in light most favorable to Appellant. Affirmance proper only if Appellant cannot prove any set of facts in support of its claims. Houghton v. Dept. of Health, 2002 UT 101, ¶2, 57 P.3d 1067; Colman v. Utah State Land Board, 795 P.2d 622, 624 (Utah 1990).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF CENTRAL IMPORTANCE TO THIS APPEAL

UTAH CONST. ART. I, §22.

Private Property shall not be taken or damaged for public use without just compensation.

UTAH CONST. ART. I, §24.

All laws of a general nature shall have uniform operation.

UTAH CODE ANN. §§ 72-6-101--119, inclusive. (Addendum Exhibit 1)

STATEMENT OF THE CASE

Nature of the case, course of proceedings, disposition in court below

For over 15 years Appellant worked hard to develop his Recreational Vehicle (RV) sales business in order to provide for his family and enjoy the fruits of his labors. Then over a period of 4 years, from 1997 through 2001, UDOT rebuilt the I-15 freeway and effectively ran Appellant out of business. UDOT's position is that the project "require[d] the breaking of eggs," and that Appellant's loss of his livelihood is just too bad. (11/10/03 HearingTr. p.8, ll. 19-20)

This case is about whether a jury should be given the opportunity to decide whether fairness and justice demand that the approximately \$2 Million in losses suffered by Appellant as a result of the I-15 reconstruction should be borne by the people of the State as a whole, rather than being left as a burden on Appellant alone. The trial court granted UDOT's motion for judgment on the pleadings and entered final judgment dismissing Appellant's claims as a matter of law. (R. 286, Addendum Exhibit 2, p.2)

Statement of Facts

a. For over 15 years Appellant owned and operated an RV sales company on a parcel of land located at 4225 South 500 West in Murray, Utah, near the 4500 South offramp from the I-15 freeway. (R. 2-3, Addendum Exhibit 3, ¶8; 11/10/03 HearingTr. p.27, ll. 4--20)

b. For about 4 years, from July 1997 to May 2001, UDOT conducted a massive reconstruction of the I-15 freeway in order to benefit the people of Utah. (R. 5, Addendum Exhibit 3, ¶¶19-22)

c. In July 1997, UDOT closed the 4500 South offramp adjacent to Appellant's RV business as part of the I-15 reconstruction project. (R. 5, Addendum Exhibit 3, ¶19)

d. From July 1997 through December 1998--a period of 1½ years--access to Appellant's RV business was closed. (R. 5, Addendum Exhibit 3, ¶¶19-20)

e. From January 1999 through May 2001--an additional period of about 2½ years--UDOT placed periodic closures on traffic at the 4500 South Street offramp. (R. 5, Addendum Exhibit 3, ¶21)

f. Thus, from July 1997 until May 2001--a total period of nearly 4 years--UDOT effectively closed the 4500 South offramp, as well as the streets for East and West traffic adjacent to the 4500 South offramp. (R. 5, Addendum Exhibit 3, ¶22)

g. Instead of direct access off the 4500 South offramp, Appellant was left with a circuitous, 2.5-mile loop that snaked behind and around the area, thereby confusing, frustrating, and ultimately eliminating Appellant's potential customers. (R. 5-6, Addendum Exhibit 3, ¶23)

h. The net impact on Appellant from UDOT's I-15 reconstruction was that traffic flow on I-15 in the area of 4500 South Street dropped two-thirds from the traffic flow prior to such reconstruction, and the bulk of the remaining 1/3 of Appellant's potential customers ended up getting lost and never arriving at Appellant's RV business. (R. 6, Addendum Exhibit 3, ¶24)

i. As a direct result of UDOT's reconstruction of I-15, Appellant suffered losses in excess of \$2 Million. (R. 6, 9, Addendum Exhibit 3, ¶¶25, 36, 37)

j. UDOT provided other similarly situated businesses in the area with accommodations for direct access to 4500 South offramp traffic, and did not provide such accommodations to Appellant, thereby unlawfully discriminating against Appellant. (R. 6, 10, Addendum Exhibit 3, ¶¶26, 39, 40)

SUMMARY OF ARGUMENT

For over 15 years Appellant worked hard to develop his Recreational Vehicle (RV) business in order to provide for his family and enjoy the fruits of his labors. Then over a period of 4 years, from 1997 through 2001, UDOT rebuilt the I-15 freeway and effectively ran Appellant out of business. UDOT's position is that the project "require[d] the breaking of eggs," and that Appellant's loss of his livelihood is just too bad. (11/10/03 HearingTr. p.8, ll. 19-20)

This case is about whether a jury should be given the opportunity to decide whether fairness and justice demand that the approximately \$2 Million in losses suffered by Appellant as a result of the I-15 reconstruction should be borne by the people of the State as a whole, rather than being left as a burden on Appellant alone. Appellant is not seeking a windfall or to raid the public treasury. As is well established in the analogous area of city and county improvement districts, the jury may offset any special benefits conferred on Appellant from the special harm suffered by Appellant as a result of the I-15 reconstruction.

Appellant asserts two constitutional claims against UDOT: Inverse Condemnation and Uniform Operation of Laws. On its Inverse Condemnation claim, Appellant makes 6 contentions: (1) The relevant property is Appellant's "right to use its land for the operation

of a commercial business," not physical "access to property" as the trial court held. (2) Appellant properly stated two types of "takings," by alleging a "substantial interference" with the operation of its commercial enterprise which "destroyed or materially lessened its value" in excess of \$2 Million, and by alleging a "substantial interference" with the operation of its commercial enterprise whereby Appellant's right to "use and enjoyment" of its commercial enterprise was substantially "abridged or destroyed" in excess of \$2 Million. (3) UDOT's reconstruction of I-15 caused a taking for a "public use" of Appellant's right to use its land for operation of a commercial enterprise. (4) Appellant's loss of business resulting from UDOT's closure of the 45th South offramp for about 4 years during the I-15 reconstruction was legally cognizable "harm" which, if a jury so determines, is compensable. (5) UDOT's closure of the 45th South offramp for about 4 years during the I-15 reconstruction "caused" Appellant's harm which, if a jury so determines, renders UDOT liable for the resulting harm. (6) A jury may offset any special benefits Appellant derived from the reconstruction project.

On its Uniform Operation of Laws claim, Appellant makes 2 contentions: (1) The statutes from which UDOT draws its power to construct freeways and authorize UDOT to dictate the manner in which such construction will be performed are "laws" which were applied non-uniformly by UDOT, violating Appellant's right to Uniform Operation of Laws. (2) Appellant's allegation that UDOT unlawfully discriminated against Appellant by arbitrarily and capriciously providing other businesses similarly situated to Appellant with accommodations not provided to Appellant sufficiently alleges membership in an identifiable class for purposes of Appellant's Uniform Operation of Laws claim.

ARGUMENT

I. INVERSE CONDEMNATION CLAIM:

UDOT INVERSELY CONDEMNED APPELLANT'S RIGHT TO USE ITS LAND FOR THE OPERATION OF A COMMERCIAL BUSINESS

Introduction

The Just Compensation Clause of the Utah Constitution provides: "Private property shall not be taken or damaged for public use without just compensation." UTAH CONST. art. I, Sec. 22. Samuel R. Thurman, who introduced the Clause at the 1895 Constitutional Convention, set out most eloquently its importance in protecting private property from governmental harm:

"I believe that the right of property is a sacred right, and no matter if it is the widow's mite, I believe that the man who owns just one little ewe lamb has just as much right to that as the man has to his cattle that graze on a thousand hills... ."

....

[G]entlemen, this is a serious question we are dealing with. There is nothing more sacred than the right of property, unless it be the right to live and enjoy your liberty."

Proceedings and Debates of the Constitutional Convention, 336-37, 625-26 (1898)(Addendum Exhibit 4); see also id., 333 ("I don't believe there is a question to come up before this Convention that will be of greater importance to it than the one that is being discussed right now.")(William F. James).

The Just Compensation Clause protects against two general types of "condemnations:"

(1) "Direct condemnation," as when a private home that lies in the path of a proposed freeway is purchased "directly" by UDOT. There is no question that (A) "private property" (the home), (B) a "taking" (expropriation of the home), and (C) a "public use" (freeway), are

all present. In that setting, UDOT clearly is required to initiate a direct condemnation proceeding and pay fair market value to the owner. UTAH CODE ANN. §§ 78-34-1--78-34-20.

(2) "Inverse condemnation," in contrast, occurs when private property is taken or damaged for public use *without* initiation of direct condemnation proceedings by the governmental entity doing the "taking or damaging." Thus, if UDOT were to build a freeway mistakenly believing it already had title to land which was actually owned by a private party, the owner could bring an *inverse condemnation* action to require UDOT to pay just compensation. Such an owner would be required to allege and prove: (A) a property interest, (B) had been taken or damaged (C) for public use. Farmers New World Life Insurance Co. v. Bountiful City, 803 P.2d 1241, 1243-44 (Utah 1990); for discussion of takings analysis, see 3 Sands, Libonati & Martinez, LOCAL GOVERNMENT LAW, §§ 16.53.10--16.53.50; Martinez & Libonati, STATE AND LOCAL GOVERNMENT LAW, A Transactional Approach 312-39 (2000).

Inverse condemnation law in Utah has followed a tortuous path. The Utah Supreme Court initially held a claim could be brought directly under the Just Compensation Clause without implementing legislation. Webber v. Salt Lake City, 40 Utah 221, 224, 120 P. 503, 504 (1911). The court later reversed itself, holding no such claim could be brought. Fairclough v. Salt Lake County, 10 Utah 2d 417, 354 P.2d 105 (1960). Then in 1990, the Court reversed itself again, holding such a claim can be brought. Colman v. Utah State Land Board, 795 P.2d 622, 630-34 (Utah 1990). Accordingly, constant resort to first principles is indispensable to keeping one's bearings in the field.

The foundational principle of inverse condemnation law is that "The tendency under our system is too often to sacrifice the individual to the community." Stockdale v. Rio Grande Western Ry. Co., 28 Utah 201, 203, 77 P. 849, 852 (1904). Like the analogous federal provision in the Fifth Amendment, the Utah Just Compensation Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." U.S. CONST. AMEND. V; Armstrong v. United States, 364 U.S. 40, 49 (1960).

Appellant has the right under the Utah Constitution to have a jury decide whether fairness and justice require that the costs Appellant suffered as a direct result of the I-15 reconstruction should be borne by the public, and not shouldered by Appellant alone.

A. The relevant property is Appellant's "right to use its land for the operation of a commercial business," not physical "access to property"

The trial court characterized Appellant's property as "convenient access to the freeway". (R. 291, Addendum Exhibit 2, p.7, ¶17.) The trial court thereby misconceived the relevant property as physical access, rather than the legal right to use land.

1. "Property" in the legal sense means legal *rights*

"The word "property" although in common parlance applied to a tract of land or a chattel, to a physical thing, means in its legal signification only the *rights* of the owner in relation to it. Property is the right of any person to possess, use, enjoy and dispose of a thing. The term "property" is often used to indicate the *res*, or subject of the property rather than the property itself. "

McGrew v. Industrial Commission, 96 Utah 203, 204, 85 P.2d 608, 610 (1938). See also Colman 795 P.2d at 625 ("some protectible interest").

The types of rights protected under Article I Section 22 are "practically unlimited." Farmers New World Life Insurance Co. v. Bountiful City, 803 P.2d at 1244, quoting Lund v. Salt Lake County, 58 Utah 546, 200 P. 510, 512 (1921). Inverse condemnation protects "every species of property . . . including legal and equitable rights of every description." Bagford v. Ephraim City, 904 P.2d 1095, 1098 (Utah 1995).

2. The right to use land is a distinct protected right

Appellant alleges it owns an RV sales company on a parcel of land located at 4225 South 500 West in Murray, Utah. (R. 2-3, Addendum Exhibit 3, ¶¶3, 8) The *right to use* land is a distinct and separate component in the bundle of rights we call "ownership." U.S. v. District Court, 121 Utah 18, 29, 242 P.2d 774, 779 (1952)(Wolfe, C.J., concurring in denial of petition for rehearing); see also Provo City Corp. v. Knudsen, 558 P.2d 1332, 1334 (Utah 1977)(right to use land affected by overflight easement on adjacent land must be "dealt with separately" and is separately compensable); Monetaire Mining Co. v. Columbus Rexall Consol. Mines Co., 53 Utah 413, 174 P. 172 (1918)(right to use a tunnel).

The drafters of the Utah Constitution clearly understood the significance of protecting the right to use land, and fully intended the Just Compensation Clause to cover it. See Proceedings and Debates of the Constitutional Convention, 326-27 (1898)(protection extends to circumstances "where an elevated road was erected upon a street and while it did not touch the property of the abutting owner, did not destroy a brick, did not take a foot of his ground, it did affect his use and occupation of his premises very disastrously.")(Charles S. Varian)(Addendum Exhibit 4); see also id., 328 ("I believe ... that when the public use a

man's property or make an improvement that virtually destroys the use of that property, that they should pay for it as much as if the property itself were taken.")(Franklin S. Richards).

This court also has recognized the critical distinction between physical access and the *right* to use land. In Carpet Barn v. State, 786 P.2d 770 (Utah Ct App 1990), UDOT had tried unsuccessfully to buy a strip of land along the frontage of Carpet Barn's land in order to widen Redwood Road. Carpet Barn refused to sell, so UDOT widened the road without buying the strip of land. UDOT built a retaining wall which ranged from sixteen inches to two feet high, topped by a four-foot chain link fence, across the front of Carpet Barn's land. The finished project limited Carpet Barn's access to a twenty-foot wide driveway running from Redwood Road to the rear of Carpet Barn's facility, even though the minimum requirement for such driveways was twenty-five feet. The wall built by UDOT also prevented parking in front of the building, eliminating fifteen to twenty diagonal parking spaces. Finally, the footings built by UDOT encroached six inches onto Carpet Barn's land. This court held that "the State's construction of the wall extending along the legal right-of-way line deprived [Carpet Barn of its] long-standing right to utilize part of [its] property for store-front parking, thus entitling [it] to compensation for any decrease in value caused by the loss of parking spaces." Carpet Barn v. State, 786 P.2d at 774 (emphasis added).

Similarly, in Three D Corporation v. Salt Lake City, 752 P.2d 1321 (Utah Ct App 1988) the City tried unsuccessfully to buy a part of Three D's land in order to widen the street. The City nevertheless extended the street surface to the existing legal boundary and built a solid curb along the length of Three D's land, where before there had been continuous

and accessible frontage along the street, thereby depriving Three D of most of its former parking spaces. This court held Three D was entitled to compensation because the City had "substantially impaired [Three D's] long-standing right to utilize [its] property for store-front parking and [had caused Three D] direct, peculiar injury" and consequent devaluation of its commercial property. Three D Corp. v. Salt Lake City, 752 P.2d at 1326.

And as recently as April 29, 2004, this court once again held that the right to use is a distinct, constitutionally-protected property right. In Diamond B-Y Ranches v. Tooele County, 2004 UT App 135, the County refused Diamond a conditional use permit to operate a gravel pit because of neighbors' opposition. Diamond alleged that its economically viable use had been "taken" under the federal and state Just Compensation Clauses. The County argued Diamond had no protected property right in the issuance of a conditional use permit. Rejecting that contention, this court held that Diamond had stated a takings claim if all--or only some--of its beneficial uses had been deprived, and that "Diamond's constitutionally protected property interest ... is the beneficial use of its property in general." Id. at ¶¶14, 18.

And in The View Condominium Owners Ass'n v. MSICO, L.L.C., 2004 UT App 104, 497 Utah Adv. Rep. 3, this court also recently held that the *right to use* is a distinct property right entitled to constitutional protection--even if interference with such use is of limited duration. Sorenson Resources Company was developing 25 acres in the Town of Alta. The View Condo Owners Association ("The View") bought lot 8, and Alta approved its development, but on condition that lot 9, still owned by Sorenson, was designated as a snow storage site for lot 8. Afterward, MSICO bought lot 9, then sued Alta, seeking to free lot 9

from the burden of The View's snow storage use right. Alta settled with MSICO, and purported to remove the burden on lot 9. Alta also threatened to prohibit "occupancy of The View or portions thereof during snow periods." *Id.*, ¶9. The View then sued Alta for an unconstitutional "taking" of The View's snow storage use right appurtenant to lot 8. First, this court held there was "no dispute as to The View's property interest in the continued use and development of Lot 8," and that "the protectible property interest at the heart of the takings claim is the interest that The View asserts in Lot 8 itself." *Id.*, ¶36 n.3. Moreover, this court also held that if proved at trial, the prohibition against occupancy of some or all of The View condos would be constitutionally compensable. *Id.*, ¶36.

UDOT similarly deprived Appellant of the right to use its land for operation of a commercial enterprise. Appellant properly alleged a constitutionally protected property right and is entitled to have a jury determine the compensable harm thereby caused.

The trial court misconstrued Appellant's claim as one for deprivation of physical access. By focusing on physical access rather than on the legal *right* to use land, the trial court made the same mistake as UDOT in Carpet Barn, and the City in Three D. The gravamen of Appellant's complaint is not that its physical access has been impaired, but rather that UDOT has substantially impaired Appellant's *right to use* its land for the operation of a business, and has caused Appellant direct, peculiar injury and consequent devaluation of its commercial property. Carpet Barn v. State, 786 P.2d at 773-74; Three D Corporation v. Salt Lake City, 752 P.2d at 1326.

B. Appellant properly alleged two types of "takings": "substantial interference" with the operation of its commercial enterprise which "destroyed or materially lessened its value" in excess of \$2 Million, and "substantial interference" with the operation of its commercial enterprise whereby Appellant's right to "use and enjoyment" of its commercial enterprise was substantially "abridged or destroyed" in excess of \$2 Million

The trial court held Appellant had not properly alleged a takings claim because "temporary denial of access to property does not constitute a taking." (R. 290, Addendum Exhibit 2, p.6, ¶16) The trial court thereby compounded its erroneous characterization of the relevant property as physical access, (addressed in Part I.A. above), with a misconception about what is a sufficient *allegation* of a taking under the Utah Just Compensation Clause.

Article I Section 22 prohibits "takings" of private property for public use without payment of just compensation. UTAH CONST. ART. I, §22. 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."

Colman v. Utah State Land Board, 795 P.2d at 626 (citations omitted). Appellant alleged:

¶18. After reconstruction of I-15 began, traffic flow on I-15, in the area of 4500 South Street, dropped two thirds from the traffic flow figures prior to the Reconstruction Project.

¶19. In July 1997, UDOT began reconstruction on I-15 [a]ffecting 4500 South Street, by closing the off-ramp to the Affected Property. . . .

¶20. Access to the Affected Property was closed until December 1998, a period of 18 months instead of the 12 months promised by UDOT in its construction contract.

¶21. The City and UDOT placed periodic closures on traffic at the 4500 South Street off-ramp over the following 2 1/2 years.

¶22. The State and City were effectively closing access to freeway exits and entrances, as well as access for East and West traffic at the 4500 South Street off-ramp, from July 1997 until May 2001, nearly a period of four years.

¶23. The access provided by Defendants, in lieu of direct access off the 4500 South off-ramp, involved a circuitous 2.5-mile loop . . . behind the Affected Property, which frustrated and eliminated potential customers. The Circuitous Loop was impractical

and unreasonable for purposes of bringing prospective customers from the freeway to Plaintiff's business. Not only was the critical line of sight lost, but also the route was lengthy and confusing.

¶24. Upon information and belief, the already significantly diminished number of potential customers from drive-by traffic, now 1/3 of what it was prior to reconstruction, ended up getting lost and never arriving at Intermountain.

¶25. The closure of the off-ramp, coupled with the change in configuration, denied reasonable access to the Affected Property and substantially damaged the value of Plaintiff's property in an amount to be proven at trial but currently calculated to be in excess of \$2,000,000.00.

¶26. The City constructed the Circuitous Loop in such a manner that other businesses obtained direct access to 4500 South off-ramp traffic, who otherwise benefitted from the loss to Intermountain.

¶27. Such action by the Defendants became tantamount to a taking of the property for the good of others and at the expense of Intermountain without just compensation.

....

¶31.... Defendants took or impaired Plaintiff's substantial property right for a public use without just compensation."

(R. 5-7, 8, Addendum Exhibit 3, ¶¶18-27, 31)

Appellant thereby alleged two types of "takings: (1) a "substantial interference" with the operation of its commercial enterprise which "destroyed or materially lessened its value" in excess of \$2 Million; and (2) a "substantial interference" with the operation of its commercial enterprise by which Appellant's right to the "use and enjoyment" of its commercial enterprise was substantially "abridged or destroyed" in excess of \$2 Million.

First, the trial court erred by not applying the proper standard for motions for judgment on the pleadings--and then it went on to mis-read Appellant's complaint as alleging merely a temporary denial of physical access. The court should have accepted all factual allegations and all reasonable inferences therefrom as true, and should have denied UDOT's motion. Houghton v. Dept. of Health, 2002 UT 101, ¶2, 57 P.3d 1067; Colman v. Utah State Land Board, 795 P.2d 622, 624 (Utah 1990).

Second, the trial court erred by relying on Rocky Mountain Thrift Stores, Inc. v. Salt Lake City Corp., 784 P.2d 459 (Utah 1989), in which the closing of North Temple to re-route floodwaters caused loss of business to abutting commercial enterprises. Reliance on that case was inappropriate on several grounds: (1) In Rocky Mountain, plaintiffs merely alleged interference with physical access, not interference with the right to use. Id. at 464-65. In fact, the Supreme Court in Rocky Mountain cited favorably to this court's Three D decision, discussed in Part I.A. above, which made that critical distinction. Id. Appellant here, in contrast, claims recompense for the taking of the right to use. (2) The plaintiffs in Rocky Mountain did not allege, and therefore the court did not consider, a narrow characterization of the relevant property. By comparison, in Colman, the court upheld the narrow characterization of the relevant property as *300 feet* of the 5-mile long canal. Thus, it is up to the claimant to properly allege a narrow definition of the relevant property--whether physically defined as in Colman, or conceptually defined as the right to use, as Appellant alleged here. (3) In Rocky Mountain, the city responded to an emergency; the city had to act quickly to save plaintiffs and the public from imminent flooding damage. See Colman v. Utah State Land Board, 795 P.2d 622, 628-29 (Utah 1990)(distinguishing "emergency" cases). In contrast, UDOT here was engaged in highway reconstruction that was years in the planning and execution. (4) In Rocky Mountain, plaintiffs' harm was mitigated by the fact that the city blocked off physical access only for 6 months. In contrast, UDOT interfered with Appellant's right to use its land for 4 years. (5) Rocky Mountain is fundamentally suspect because it relied on Springville Banking Co. v. Burton, 10 Utah 2d 100, 349 P.2d 157 (1960),

which held that Art. I, §22 was not self-executing, a determination expressly overruled by Colman v. Utah State Land Board, 795 P.2d 622, 632 (Utah 1990). (6) Rocky Mountain also is suspect because it relied on Bailey Service & Supply Corp. v. State Road Commission, 533 P.2d 882 (Utah 1975), in which the court held that if construction occurred entirely on public property, no taking could occur. In Colman, which involved the state's breach of a causeway owned by a public utility (railroad) to reduce the level of the Great Salt Lake, the Supreme Court overruled that foundation for Bailey Service.

C. UDOT's reconstruction of I-15 caused a taking for a "public use" of Appellant's right to use its land for operation of a commercial enterprise

The trial court concluded Appellant had no constitutionally protected property right and that there was no "taking," so it did not determine whether the taking alleged was for a "public use." Since it will be an issue on remand, however, this court should address it. Parkside Salt Lake Corp. v. Insure-Rite, Inc., 2001 UT App 347, ¶26, 37 P.3d 1202 (court has duty to pass on issues that may become material on remand).

A "public use" for purposes of a "taking" claim is one which "will promote the public interest, and which use tends to develop the great natural resources of the commonwealth." Nash v. Clark, 27 Utah 158, 75 P. 371 (1904)(irrigation ditches); see also Highland Boy Gold Min. Co. v. Strickley, 28 Utah 215, 78 P. 296 (1904)(roads and tramways for mining industry); cf. Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 240 (1984)("public use" is coterminous with police powers). In Colman v. Utah State Land Bd., 795 P.2d 622 (Utah 1990), the Court equated "public use" with "legitimate governmental objectives," such as flood control or highway reconstruction.

A governmental taking incident to reconstruction of freeways is a "public use." UTAH CODE ANN. §§ 72-5-103(1)(UDOT authority to "acquire any real property or interests in real property necessary for temporary, present, or reasonable future state transportation purposes by gift, agreement, exchange, purchase, condemnation, or otherwise."); 78-34-1(6)(acquisition of property for roads is "public use"); 78-34-3(6)(all classes of private property may be taken for public use). Appellant properly alleged that the taking of its property resulted from UDOT's reconstruction of I-15. (R. 5-7, 8, Addendum Exhibit 3, ¶¶18-27, 32 ("...Defendants' [conduct] was based on a public purpose to expand I-15 to reduce traffic impediments and safety concerns along I-15..."))

D. Appellant's loss of business resulting from UDOT's closure of the 45th South offramp for about 4 years during the I-15 reconstruction was legally cognizable "harm" which, if a jury so determines, is compensable

Appellant alleged business loss as the harm caused by UDOT. (R. 6, 9, Addendum Exhibit 3, ¶¶25, 37) The trial court concluded *as a matter of law* that Appellant's loss of business was not compensable harm. See (R. 290, Addendum Exhibit 2, p.6, ¶16)

First, the trial court again erred by not applying the proper standard for motions for judgment on the pleadings; it should have accepted all factual allegations and all reasonable inferences therefrom as true and denied UDOT's motion. Houghton v. Dept. of Health, 2002 UT 101, ¶2, 57 P.3d 1067; Colman v. Utah State Land Board, 795 P.2d 622, 624 (Utah 1990); cf., The View Condominium Owners Ass'n v. MSICO, L.L.C., 2004 UT App at ¶36 (summary judgment reversed; whether taking occurred is question of material fact).

Second, the trial court erred as a matter of substantive law. The drafters of the Utah

Constitution intended that a *jury* determine whether the state has imposed compensable "harm." 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) (Addendum Exhibit 4). Thus, the question of harm should have been left to a jury.

This court has recently noted that federal Just Compensation law may be instructive in the development of Utah Just Compensation law. Diamond B-Y Ranches v. Tooele County, 2004 UT App 135, ¶14 n.2. The United States Supreme Court has held that a partial taking may be compensable, so that even if land has not been deprived of all economically beneficial use, an analysis of several factors can be used to determine whether an interference is so great that compensation nevertheless is required. See Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) ("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" are factors considered in the latter kind of cases, citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)). The United States Supreme Court also has upheld a jury trial of federal takings claims. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999). Accordingly, the trial court on remand could instruct the jury pursuant to the Penn Central factors for determining the takings question.

Third, it appears that the trial court confused Appellant's property *right* to use its land to run a lawful business, with the *measure of recovery* for harm caused by UDOT's

infringement of that right. Loss of business, typically measured as net lost profits, is the measure of recovery for unlawful infringement of the right to use land to operate a business. See, e.g., Canyon Country Store v. Bracey, 781 P.2d 414 (Utah 1989)(right to use commercial tractor trailer); Sawyers v. FMA Leasing Co., 722 P.2d 773 (Utah 1986)(right to operate business for distribution of coal trailers; net profits not shown); Cook Associates, Inc. v. Warnick, 664 P.2d 1161 (Utah 1983)(right to use explosives plant); State Road Com'n v. Rozzelle, 101 Utah 464, 120 P.2d 276 (1941)(recovery for loss of business denied; no foundational property right alleged).

E. UDOT's closure of the 45th South offramp for about 4 years during the I-15 reconstruction "caused" Appellant's harm which, if a jury so determines, renders UDOT liable for the resulting harm

The trial court did not reach the issue of causation, but since it will arise on remand, this court should address it. Parkside Salt Lake Corp. v. Insure-Rite, Inc., 2001 UT App 347, ¶26, 37 P.3d 1202 (court has duty to pass on issues that may become material on remand).

Appellant properly alleged a "taking" for "public use" *caused* Appellant's harm. (R. 5-7, Addendum Exhibit 3, ¶¶18-27(alleging actions by UDOT and resulting harm to Appellant; ¶35("injury to Intermountain was the unavoidable result of the City and UDOT's action")). As a threshold matter, the trial court erred by not applying the proper standard for motions for judgment on the pleadings. It should have accepted all factual allegations and all reasonable inferences therefrom as true, and should have denied UDOT's motion. Houghton v. Dept. of Health, 2002 UT 101, ¶2, 57 P.3d 1067; Colman v. Utah State Land Board, 795 P.2d 622, 624 (Utah 1990).

As a matter of substance, compensable harm is that which is a "direct and necessary consequence" of the I-15 reconstruction. Pigs Gun Club, Inc. v. Sanpete County, 2002 UT 17, ¶28, 42 P.3d 379. Appellant alleged such a causal connection. (R. 5-7, Addendum Exhibit 3, ¶¶18-27). "Intent is not an element of [an inverse condemnation] action." Farmers New World Life Insurance Co. v. Bountiful City, 803 P.2d at 1246. The drafters of Utah's Just Compensation Clause were well aware that *unintentionally*-caused harm also should be 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)(Addendum Exhibit 4).

In the final analysis, the question of causation is one of fact for the jury, as the drafters also recognized. See id., ("...the means of arriving at the estimate are within the knowledge of men and can be adduced before a jury.")

F. The jury also may offset any special benefits Appellant derived from the project

The drafters of the Utah Constitution were well aware that compensation paid for harm caused by public projects has commensurate fiscal impacts on governments. *Proceedings and Debates of the Constitutional Convention*, 327-28 (1898)(Dennis Clay Eichnor)(Addendum Exhibit 4). Thus, the drafters understood that such projects confer special benefits as well as impose special costs, so the drafters provided that a jury would offset such benefits against such costs. See id., 328 ("Of course, . . . whatever benefit results by reason of [an] improvement is set off against the damage that is caused, and in that way

the public gets absolute justice in relation to the matter... .")(Franklin S. Richards).

The principle of offsetting benefits against harms from public improvements is well established in the law. In the analogous area of county and city improvement districts, special benefits conferred by public projects are traditionally offset against special harm suffered. UTAH CODE ANN. §§ 17A-3-201 et seq. (counties); §§ 17A-3-301 et seq. (cities). Examples of such projects include reconstruction, maintenance and repair of streets, crosswalks and alleys. UTAH CODE ANN. § 17A-3-204(1)(c)(counties); § 17A-3-304(1)(c)(cities). Local governments may impose charges for infrastructure improvements on landowners specially benefitted by those improvements, but only "to the extent of the benefits to the property by reason of the improvements... ." UTAH CODE ANN. § 17A-3-216(1)(counties); § 17A-3-316(1)(cities). A landowner owner may contest before a board of equalization both whether benefits (or harms) have been imposed, and the amount of such benefits (or harms). UTAH CODE ANN. § 17A-3-217(5)(counties); § 17A-3-317(5)(cities). The boards' determinations are subject to judicial review. UTAH CODE ANN. § 17A-3-229(counties); § 17A-3-330(cities).

The issues at the heart of special improvement district settings and in takings settings are strikingly similar: Which of the impacts on the landowner resulting from the public project are properly characterized as "benefits" and which are "harms"? And of such benefits and harms, which are "special"--uniquely affecting the landowner--as opposed to "public"--common to the entire community? See 4 Sands, Libonati & Martinez, LOCAL GOVERNMENT LAW, §§24.23--24.24 (identification of private benefits and apportionment of special assessments). The jury on remand in this case would be required to determine the unique

harm imposed on Appellant from the I-15 reconstruction and to deduct the benefits, if any, uniquely conferred on Appellant from the project. That would simply be the mirror image of the special improvement district setting, in which the special benefits conferred on landowners--and therefore the assessments imposed--are reduced by the special harm suffered as a result of construction of the improvements involved.

II. UNIFORM OPERATION OF LAWS CLAIM:

UDOT UNLAWFULLY DISCRIMINATED AGAINST APPELLANT

- A. The statutes from which UDOT draws its power to construct freeways and authorize UDOT to dictate the manner in which such construction will be performed are "laws" which were applied non-uniformly by UDOT, violating Appellant's right to Uniform Operation of Laws**

The trial court concluded that the statutes from which UDOT draws its power to construct freeways and authorize UDOT to dictate the manner in which such construction will be performed are not "laws" applied non-uniformly by UDOT. (R. 291, Addendum Exhibit 2, p.7, ¶19)

First, it is unequal *treatment* that the right to the Uniform Operation of Laws prohibits. Article I Section 24 embodies the principle that "persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same." UTAH CONST. ART. I, §24("All laws of a general nature shall have uniform operation."); Malan v. Lewis, 693 P.2d 661, 669 (1984). The plain terms of Article I Section 24 provide a right to be free from unlawful discriminatory treatment in the "operation" of laws. State v. Schofield, 2002 UT 132, ¶12, 63 P.3d 667. And the Utah Supreme Court has emphasized that the focus of the Uniform Laws protection is on unequal

treatment: the provision "guards against disparate effects in the application of laws." Gallivan v. Walker, 2002 UT 89, ¶38, 54 P.3d 1069; Lee v. Gaufin, 867 P.2d 572, 577 (Utah 1993)("The legislature has considerable discretion in the designation of classifications but the court must determine whether such classifications operate equally on all persons similarly situated.").

The United States Supreme Court similarly has held that the federal Equal Protection Clause restricts not just legislative action, but also administrative action implementing legislation. Nordlinger v. Hahn, 505 U.S. 1, 16 n.8 (1992)(Equal Protection Clause applicable to both legislative and administrative action); Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster Cty., 488 U.S. 336, 338 (1989)(county tax assessor's administrative action in valuation of real property, pursuant to power conferred by general state tax statutes to conduct such assessments, violated Equal Protection).

Appellant alleged there were other businesses similarly situated to Appellant which also depended on the 45th South offramp. (R. 6, 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, Addendum Exhibit 3, ¶¶39, 40). Such allegations sufficiently state a claim for denial of uniform operation of laws by alleging that

persons situated similarly to Appellant were treated more favorably than Appellant, without a reasonable legislative objective to warrant such discrimination. Arndt v. First Interstate Bank of Utah, N.A., 1999 UT 91, ¶2, 991 P.2d 584 (reasonable inferences must be drawn in favor of Plaintiff); Fishbaugh v. Utah Power & Light, 969 P.2d 403, 406 (Utah 1998)(pleadings need only give fair notice).

Second, discrimination is unlawful under the Uniform Laws prohibition if it is undertaken pursuant to governmental authority. And there is no doubt that UDOT acted under governmental authority here. UDOT is a creature of statute. Cf. Faux v. Mickelsen, 725 P.2d 1372 (Utah 1986)(small claims court is creature of statute). The "law" alleged by Appellant as having nonuniform operation consists of the statutes from which UDOT draws its power to construct freeways and authorize UDOT to dictate the manner in which such construction will be performed. See, e.g., Utah Code Ann. §§ 72-6-101--119("Construction, Maintenance, and Operations" of state highways by UDOT)(Addendum Exhibit 1)

B. Appellant's allegation that UDOT unlawfully discriminated against Appellant by arbitrarily and capriciously providing other businesses similarly situated to Appellant with accommodations not provided to Appellant sufficiently alleges membership in an identifiable class for purposes of Appellant's Uniform Operation of Laws claim

The trial court erroneously concluded Appellant was not a member of an "identifiable class" for purposes of the right to Uniform Laws. (R. 291, Addendum Exhibit 2, p.7, ¶19)

The first type of protection provided by the Uniform Laws provision is that members of the same class--by definition similarly situated--must be treated the same. Malan v. Lewis, 693 P.2d 661, 670 (1984)("Article I, §24 protects against two types of discrimination. First,

a law must apply equally to all persons within a class.") Appellant alleged there were other businesses similarly situated to Appellant which also depended on the 45th South offramp. (R. 6, Addendum Exhibit 3, ¶26). Appellant thereby alleged a "class" whose members were similarly situated.

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, Addendum Exhibit 3, ¶¶39, 40). Appellant thereby alleged an identifiable class--and that UDOT treated the similarly situated members within the class differently. That sufficiently alleges the "first type" of Uniform Laws violation. Malan v. Lewis, 693 P.2d at 670.

The second type of protection provided by the Uniform Laws provision is that if members of the same class--by definition similarly situated--are treated differently, then "the different treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statute." Malan v. Lewis, 693 P.2d at 670. And that protection applies even if only one member of the class is singled out for unfavorable treatment, as in this case. Id. ("When persons are similarly situated, it is unconstitutional to single out one person . . . from among a larger class...").

Appellant alleged that UDOT singled out appellant for less favorable treatment than other similarly situated businesses, and that such discriminatory treatment was "unreasonable and ... not for a legitimate legislative purpose." (R. 10, Addendum Exhibit 3, ¶¶39, 40). Appellant therefore properly stated a claim of the "second type" of Uniform Laws violation. Malan v. Lewis, 693 P.2d at 670 (1984). Appellant's "second type" claim had two alternative components: that there was no legitimate governmental objective for the classification imposing the disparate treatment, and that even if there were, the classification imposing the disparate treatment was unreasonable because it did not "have a reasonable tendency to further" such legitimate governmental objective. Malan v. Lewis, 693 P.2d at 670.

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 12th day of May, 2004.


JOHN MARTINEZ
Attorney for Appellant

ADDENDUM

Exhibit 1: UTAH CODE ANN. §§ 72-6-101--119

Exhibit 2: Final Order of the Honorable **William B.** Bohling entered on December 11, 2003, granting UDOT's Motion for Judgment on the Pleadings

Exhibit 3: Complaint

Exhibit 4: Excerpts: *Proceedings and Debates of the Constitutional Convention* (1898)(pp. 326-29, 333, 336-37, 625-26)

EXHIBIT

EXHIBIT 1

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ADDENDUM EXHIBIT 1

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UTAH CODE ANN. §§ 72-6-101, 110

Utah Code, 1953
Title 72. Transportation Code
Chapter 6. Construction, Maintenance, and Operations

72-6-101 Title.

This chapter is known as the "Construction, Maintenance, and Operations Act."

72-6-102 Uniform plans and specifications for construction and maintenance.

The department shall:

- (1) prepare and adopt uniform standard plans and specifications for the construction and maintenance of state highways; and
- (2) issue a manual containing plans and **specifications** for the information and guidance of officials having supervision of the construction and maintenance of state highways.

72-6-103 Plans, specifications, and estimates for culverts, bridges, and road construction.

The department shall furnish plans, specifications, and estimates for culverts, bridges, road construction, and other related information desired by local highway authorities for use on county roads and city streets on terms mutually agreed upon.

72-6-104 Highways to conform to grade and direction in municipalities.

Except for the highways part of the interstate system, a highway that extends through a municipality shall conform to the direction and grade of other streets in the municipality unless permission is obtained from the highway authorities of the municipality for a variance in the direction and grade.

72-6-105 Contracts for construction and maintenance --Agreements with county or municipality.

The department may enter into written agreements on behalf of the state with any county or municipality for rights-of-way and the construction or maintenance of any part of a state highway:

- (1) at the expense of the state;
- (2) at the expense of any county or municipality; or
- (3) at the joint expense of the state and any county and any municipality.

72-6-106 Use of recycled asphalt.

- (1) In making plans, specifications, and estimates, and in advertising for bids under this chapter, the department shall allow up to 25% but may allow up to 60% reclaimed asphalt pavement to be incorporated into hot asphaltic concrete used for road construction and

maintenance.

(2) The department shall ensure that hot asphaltic concrete incorporating reclaimed asphalt pavement meets or exceeds the department quality standards for roads constructed or maintained with hot asphaltic concrete not containing reclaimed asphalt pavement.

(3) If the department rejects any hot asphaltic concrete containing reclaimed asphalt pavement, the department shall give a written statement to the provider indicating the specific reasons the hot asphaltic concrete was rejected.

(4) This section does not authorize the state to directly or indirectly subsidize the production of hot asphaltic concrete containing reclaimed asphalt pavement.

72-6-107 Construction or improvement of highway --Contracts --Retainage.

(1) (a) The department shall make plans, specifications, and estimates prior to the construction or improvement of any state highway.

(b) Except as provided in Section 63-56-36.1 and except for construction or improvements performed with state prison labor, a construction or improvement project with an estimated cost exceeding the bid limit as defined in Section 72-6-109 for labor and materials shall be performed under contract awarded to the lowest responsible bidder.

(c) The advertisement for bids shall be published in a newspaper of general circulation in the county in which the work is to be performed, at least once a week for two consecutive weeks, with the last publication at least ten days before bids are opened.

(d) The department shall receive sealed bids and open the bids at the time and place designated in the advertisement. The department may then award the contract but may reject any and all bids.

(e) If the department's estimates are substantially lower than any responsible bid received, the department may perform any work by force account.

(2) If any payment on a contract with a private contractor for construction or improvement of a state highway is retained or withheld, the payment shall be retained or withheld and released as provided in Section 13-8-5.

(3) If the department performs a construction or improvement project by force account, the department shall:

(a) provide an accounting of the costs and expenditures of the improvement including material and labor;

(b) disclose the costs and expenditures to any person upon request and allow the person to make a copy and pay for the actual cost of the copy; and

(c) perform the work using the same specifications and standards that would apply to a private contractor.

(4) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the department shall establish procedures for:

- (a) hearing evidence that a region within the department violated this section; and
- (b) administering sanctions against the region if the region is found in violation.

72-6-108 Class B and C roads --Improvement projects --Contracts -- Retainage.

(1) A county executive for class B roads and the municipal executive for class C roads shall cause plans, specifications, and estimates to be made prior to the construction of any improvement project, as defined in Section 72-6-109, on a class B or C road if the estimated cost for any one project exceeds the bid limit as defined in Section 72-6-109 for labor, equipment, and materials.

(2) (a) All projects in excess of the bid limit shall be performed under contract to be let to the lowest responsible bidder.

(b) If the estimated cost of the improvement project exceeds the bid limit for labor, equipment, and materials, the project may not be divided to permit the construction in parts, unless each part is done by contract.

(3) The advertisement on bids shall be published in a newspaper of general circulation in the county in which the work is to be performed at least once a week for three consecutive weeks. If there is no newspaper of general circulation, the notice shall be posted for at least 20 days in at least five public places in the county.

(4) The county or municipal executive or their designee shall receive sealed bids and open the bids at the time and place designated in the advertisement. The county or municipal executive or their designee may then award the contract but may reject any and all bids.

(5) The person, firm, or corporation that is awarded a contract under this section is subject to the provisions of Title 63, Chapter 56, Utah Procurement Code.

(6) If any payment on a contract with a private contractor for construction or improvement of a class B or C road is retained or withheld, the payment shall be retained or withheld and released as provided in Section 13-8-5.

72-6-109 Class B and C roads --Construction and maintenance -- Definitions -- Estimates lower than bids --Accountability.

(1) As used in this section and Section 72-6-108:

(a) "Bid limit" means:

(i) for the year 2003, \$125,000; and

(ii) for each year after 2003, the amount of the bid limit for the previous year, plus an

amount calculated by multiplying the amount of the bid limit for the previous year by the lesser of 3% or the actual percent change in the Consumer Price Index during the previous calendar year.

(b) "Consumer Price Index" means the Consumer Price Index for All Urban Consumers as published by the Bureau of Labor Statistics of the United States Department of Labor.

(c) (i) "Construction" means the work that would apply to:

(A) any new roadbed either by addition to existing systems or relocation;

(B) resurfacing of existing roadways with more than two inches of bituminous pavement; or

(C) new structures or replacement of existing structures, except the replacement of drainage culverts.

(ii) "Construction" does not include maintenance, emergency repairs, or the installation of traffic control devices as described in Section 41-6-20.

(d) "Improvement project" means construction and maintenance as defined in this section except for that maintenance excluded under Subsection (2).

(e) "Maintenance" means the keeping of a road facility in a safe and usable condition to which it was constructed or improved, and includes:

(i) the reworking of an existing surface by the application of up to and including two inches of bituminous pavement;

(ii) the installation or replacement of guardrails, seal coats, and culverts;

(iii) the grading or widening of an existing unpaved road or flattening of shoulders or side slopes to meet current width and safety standards; and

(iv) horizontal or vertical alignment changes necessary to bring an existing road in compliance with current safety standards.

(f) "Project" means the performance of a clearly identifiable group of associated road construction activities or the same type of maintenance process, where the construction or maintenance is performed on any one class B or C road, within a half-mile proximity and occurs within the same calendar year.

(2) The following types of maintenance work are not subject to the contract or bid limit requirements of this section:

(a) the repair of less than the entire surface by crack sealing or patching; and

(b) road repairs incidental to the installation, replacement, or repair of water mains, sewers, drainage pipes, culverts, or curbs and gutters.

(3) (a) (i) If the estimates of a qualified engineer referred to in Section 72-6-108 are substantially lower than any responsible bid received or in the event no bids are received, the county or municipality may perform the work by force account.

(ii) In no event shall "substantially lower" mean estimates that are less than 10% below the lowest responsible bid.

(b) If a county or municipality performs an improvement project by force account, it shall:

(i) provide an accounting of the costs and expenditures of the improvement including material, labor, and direct equipment costs to be calculated using the Cost Reference Guide for Construction Equipment by Dataquest Inc.;

(ii) disclose the costs and expenditures to any person upon request and allow the person to make a copy and pay for the actual cost of the copy; and

(c) perform the work using the same specifications and standards that would apply to a private contractor.

(4) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the department shall establish procedures for:

(a) hearing evidence that a region within the department violated this section; and

(b) administering sanctions against the region if the region is found in violation.

72-6-108 Class B and C roads --Improvement projects --Contracts -- Retainage.

(1) A county executive for class B roads and the municipal executive for class C roads shall cause plans, specifications, and estimates to be made prior to the construction of any improvement project, as defined in Section 72-6-109, on a class B or C road if the estimated cost for any one project exceeds the bid limit as defined in Section 72-6-109 for labor, equipment, and materials.

(2) (a) All projects in excess of the bid limit shall be performed under contract to be let to the lowest responsible bidder.

(b) If the estimated cost of the improvement project exceeds the bid limit for labor,

equipment, and materials, the project may not be divided to permit the construction in parts, unless each part is done by contract.

(3) The advertisement on bids shall be published in a newspaper of general circulation in the county in which the work is to be performed at least once a week for three consecutive weeks. If there is no newspaper of general circulation, the notice shall be posted for at least 20 days in at least five public places in the county.

(4) The county or municipal executive or their designee shall receive sealed bids and open the bids at the time and place designated in the advertisement. The county or municipal executive or their designee may then award the contract but may reject any and all bids.

(5) The person, firm, or corporation that is awarded a contract under this section is subject to the provisions of Title 63, Chapter 56, Utah Procurement Code.

(6) If any payment on a contract with a private contractor for construction or improvement of a class B or C road is retained or withheld, the payment shall be retained or withheld and released as provided in Section 13-8-5.

**72-6-109 Class B and C roads --Construction and maintenance -- Definitions --
Estimates lower than bids --Accountability.**

(1) As used in this section and Section 72-6-108:

(a) "Bid limit" means:

(i) for the year 2003, \$125,000; and

(ii) for each year after 2003, the amount of the bid limit for the previous year, plus an amount calculated by multiplying the amount of the bid limit for the previous year by the lesser of 3% or the actual percent change in the Consumer Price Index during the previous calendar year.

(b) "Consumer Price Index" means the Consumer Price Index for All Urban Consumers as published by the Bureau of Labor Statistics of the United States Department of Labor.

(c) (i) "Construction" means the work that would apply to:

(A) any new roadbed either by addition to existing systems or relocation;

(B) resurfacing of existing roadways with more than two inches of bituminous pavement;
or

(C) new structures or replacement of existing structures, except the replacement of drainage culverts.

(ii) "Construction" does not include maintenance, emergency repairs, or the installation of traffic control devices as described in Section 41-6-20.

(d) "Improvement project" means construction and maintenance as defined in this section except for that maintenance excluded under Subsection (2).

(e) "Maintenance" means the keeping of a road facility in a safe and usable condition to which it was constructed or improved, and includes:

(i) the reworking of an existing surface by the application of up to and including two inches of bituminous pavement;

(ii) the installation or replacement of guardrails, seal coats, and culverts;

(iii) the grading or widening of an existing unpaved road or flattening of shoulders or side slopes to meet current width and safety standards; and

(iv) horizontal or vertical alignment changes necessary to bring an existing road in compliance with current safety standards.

(f) "Project" means the performance of a clearly identifiable group of associated road construction activities or the same type of maintenance process, where the construction or maintenance is performed on any one class B or C road, within a half-mile proximity and occurs within the same calendar year.

(2) The following types of maintenance work are not subject to the contract or bid limit requirements of this section:

(a) the repair of less than the entire surface by crack sealing or patching; and

(b) road repairs incidental to the installation, replacement, or repair of water mains, sewers, drainage pipes, culverts, or curbs and gutters.

(3) (a) (i) If the estimates of a qualified engineer referred to in Section 72-6-108 are substantially lower than any responsible bid received or in the event no bids are received, the county or municipality may perform the work by force account.

(ii) In no event shall "substantially lower" mean estimates that are less than 10% below the lowest responsible bid.

(b) If a county or municipality performs an improvement project by force account, it shall:

(i) provide an accounting of the costs and expenditures of the improvement including material, labor, and direct equipment costs to be calculated using the Cost Reference Guide for Construction Equipment by Dataquest Inc.;

(ii) disclose the costs and expenditures to any person upon request and allow the person to make a copy and pay for the actual cost of the copy; and

(iii) perform the work using the same specifications and standards that would apply to a private contractor.

72-6-110 Supervision and standards of construction for class B and C roads.

(1) All construction plans, specifications, and estimates and all construction work under Section 72-6-108 shall be prepared and performed under the direct supervision of a registered professional engineer.

(2) The supervising engineer shall certify to the county legislative body or the municipal executive that all road construction projects conform to design and construction standards as currently adopted by the American Association of State Highway and Transportation officials.

72-6-111 Construction and maintenance of appurtenances --Noise abatement measures.

(1) The department is authorized to construct and maintain appurtenances along the state highway system necessary for public safety, welfare, and information. Appurtenances include highway illumination, sidewalks, curbs, gutters, steps, driveways, retaining walls, fire hydrants, guard rails, noise abatement measures, storm sewers, and rest areas.

(2) A noise abatement measure may only be constructed by the department along a highway when:

(a) the department is constructing a new state highway or performing major reconstruction on an existing state highway;

(b) the Legislature provides an appropriation or the federal government provides funding for construction of retrofit noise abatement along an existing state highway; or

(c) the cost for the noise abatement measure is provided by citizens, adjacent property owners, developers, or local governments.

(3) In addition to the requirements under Subsection (2), the department may only construct noise abatement measures within the unincorporated area of a county or within

a municipality that has an ordinance or general plan that requires:

(a) a study to be conducted to determine the noise levels along new development adjacent to an existing state highway or a dedicated right-of-way; and

(b) the construction of noise abatement measures at the expense of the developer if required to be constructed under standards established by a rule of the department.

(4) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the department shall make rules establishing:

(a) when noise abatement measures are required to be constructed, including standards for decibel levels of traffic noise;

(b) the decibel level of traffic noise which identifies the projects to be programmed by the commission for the earliest construction of retrofit noise abatement measures funded under Subsection (2)(b) based on availability of funding; and

(c) a priority system for the construction of other retrofit noise abatement measures that meet or exceed the standards established under this section and are funded under Subsection (2)(b) which includes:

(i) the number of residential dwellings adversely affected by the traffic noise;

(ii) the cost effectiveness of mitigating the traffic noise; and

(iii) the length of time the decibel level of traffic noise has met or exceeded the standards established under this section.

72-6-112 Traffic Noise Abatement Program --Uses.

(1) There is created the Traffic Noise Abatement Program.

(2) The program consists of monies generated from the following revenue sources:

(a) any voluntary contributions received for traffic noise abatement; and

(b) appropriations made to the program by the Legislature.

(3) The department shall use program monies as prioritized by the commission and as provided by law for the study, design, construction, and maintenance of noise abatement measures.

(4) All funding for the Traffic Noise Abatement Program shall be nonlapsing.

72-6-113 Acquisition and improvement of land for preservation of scenic beauty -- Authority of department.

(1) The department is authorized to acquire and improve strips of land necessary for the

restoration, preservation, and enhancement of scenic beauty within and adjacent to a federal-aid highway of this state, including acquisition of publicly owned and controlled rest and recreation areas, sanitary, and other facilities within or adjacent to the highway right-of-way reasonably necessary to accommodate the traveling public.

(2) Acquisition may be by gift, purchase, or exchange but may not be by condemnation.

(3) The interest in any land authorized to be acquired and maintained under this section may be fee simple or any lesser interest, as determined by the department to be reasonably necessary to accomplish the purposes of this section.

(4) (a) Real property, or any interest in real property, acquired under this section is part of the adjacent or nearest highway and is under the jurisdiction of the department.

(b) The department may enter into an agreement with any state agency for maintenance of land acquired in accordance with this section.

72-6-114 Restricting use of or closing highway --Penalty for failure to observe barricade, warning light, etc.

(1) A highway authority may close or restrict travel on a highway under their jurisdiction due to construction, maintenance work, or emergency.

(2) If a highway or portion of a highway is closed or restricted to travel, a highway authority shall cause suitable barriers and notices to be posted and maintained in accordance with Section 41-6-20.

(3) A person who willfully fails to observe any barricade, warning light, sign, or flagman, used in accordance with this section, is guilty of a class B misdemeanor.

72-6-115 Traffic Management Committee --Appointment --Duties.

(1) As used in this section, "committee" means the Traffic Management Committee created in this section.

(2) (a) There is created within the Department of Transportation the Traffic Management Committee comprising up to 13 members knowledgeable about traffic engineering, traffic flow, air quality, or intelligent transportation systems as follows:

(i) two members designated by the executive director of the department;

(ii) one member designated by the Utah Association of Counties;

(iii) one member designated by the Department of Environmental Quality;

- (iv) one member designated by the Wasatch Front Regional Council;
- (v) one member designated by the Mountainland Association of Governments;
- (vi) one member designated by the Commissioner of Public Safety; and
- (vii) one member designated by the Utah League of Cities and Towns;
- (viii) one member designated by the general manager of a public transit district with more than 200,000 people residing within the public transit district boundaries;
- (ix) up to four additional members designated by the committee for one-year terms; and
- (x) a designating entity under Subsections (2)(a)(i) through (viii) may **designate** an alternative member to serve in the absence of its designated member.

(b) The committee shall:

- (i) advise the department on matters related to the implementation and administration of this section;
- (ii) make recommendations to law enforcement agencies related to traffic flow and incident management during heavy traffic periods;
- (iii) make recommendations to the department, counties, and municipalities on increasing **the** safety and efficiency of highways using current traffic management systems, including traffic signal coordination, traffic monitoring, freeway ramp metering, variable message signing, and incident management; and
- (iv) evaluate the cost effectiveness of implementing a specific traffic management system on a highway considering:
 - (A) existing traffic volume in the area;
 - (B) the necessity and potential of reducing vehicle emissions in the area;
 - (C) the feasibility of the traffic management system on the highway; and
 - (D) whether traffic congestion will be reduced by the system.

(c) The committee shall annually elect a chair and a vice chair from its members.

(d) When a vacancy occurs in the membership for any reason, the replacement shall be appointed.

(e) The committee shall meet as it determines necessary to accomplish its duties.

(f) Reasonable notice shall be given to each member of the committee prior to any meeting.

(g) A majority of the committee constitutes a quorum for the transaction of business.

(h) (i) (A) Members who are not government employees shall receive no compensation or benefits for their services, but may receive per diem and expenses incurred in the performance of the member's official duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.

(B) Members may decline to receive per diem and expenses for their service.

(ii) (A) State government officer and employee members who do not receive salary, per diem, or expenses from their agency for their service may receive per diem and expenses incurred in the performance of their official duties from the committee at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.

(B) State government officer and employee members may decline to receive per diem and expenses for their service.

(iii) (A) Local government members who do not receive salary, per diem, or expenses from the entity that they represent for their service may receive per diem and expenses incurred in the performance of their official duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.

(B) Local government members may decline to receive per diem and expenses for their service.

(3) (a) The Department of Transportation shall implement and administer traffic management systems to facilitate the efficient flow of motor vehicle traffic on state highways to improve regional mobility, and to reduce motor vehicle emissions where those improvements are cost effective, as determined by the committee in accordance with criteria under Subsection (2)(b).

(b) A traffic management system shall be designed to allow safe, efficient, and effective:

(i) integration of existing traffic management systems;

(ii) additions of highways and intersections under county and city administrative jurisdiction;

(iii) incorporation of other traffic management systems; and

(iv) adaptation to future traffic needs.

(4) (a) The cost of implementing and administering a traffic management system shall be shared pro rata by the department and the counties and municipalities using it.

(b) The department shall enter into an agreement or contract under Title 11, Chapter 13, Interlocal Cooperation Act, with a county or municipality to share costs incurred under this section.

(5) Additional highways and intersections under the administrative jurisdiction of a county or municipality may be added to a traffic management system upon application of the county or municipality after:

(a) a recommendation of the committee;

(b) approval by the department;

(c) determination of the appropriate cost share of the addition under Subsection (4)(a); and

(d) an agreement under Subsection (4)(b).

(6) The committee may establish technical advisory committees as needed to assist in accomplishing its duties under this section.

72-6-116 Regulation of utilities --Relocation of utilities.

(1) As used in this section:

(a) "Cost of relocation" includes the entire amount paid by the utility company properly attributable to the relocation of the utility after deducting any increase in the value of the new utility and any salvage value derived from the old utility.

(b) "Utility" includes telecommunication, gas, electricity, cable television, water, sewer, data, and video transmission lines, drainage and irrigation systems, and other similar utilities located in, on, along, across, over, through, or under any state highway.

(c) "Utility company" means a privately, cooperatively, or publicly owned utility, including utilities owned by political subdivisions.

(2) (a) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the department may make rules for the installation, construction, maintenance, repair, renewal, system upgrade, and relocation of all utilities.

(b) If the department determines under the rules established in this section that it is necessary that any utilities should be relocated, the utility company owning or operating the utilities shall relocate the utilities in accordance with this section and the order of the department.

(3) (a) The department shall pay 100% of the cost of relocation of a utility on a state highway if the:

(i) utility is owned or operated by a political subdivision of the state; or

(ii) utility company owns the easement or fee title to the right-of-way in which the utility is located.

(b) Except as provided in Subsection (3)(a) or (c), the department shall pay 50% of the cost of relocation of a utility on a state highway and the utility company shall pay the remainder of the cost of relocation.

(c) This Subsection (3) does not affect the provisions of Subsection 72-7- 108(5).

(4) If a utility is relocated, the utility company owning or operating the utility, its successors or assigns, may maintain and operate the utility, with the necessary appurtenances, in the new location.

(5) In accordance with this section, the cost of relocating a utility in connection with any project on a highway is a cost of highway construction.

(6) (a) The department shall notify affected utility companies whenever the relocation of utilities is likely to be necessary because of a reconstruction project.

(b) The notification shall be made during the preliminary design of the project or as soon as practical in order to minimize the number, costs, and delays of utility relocations.

(c) A utility company notified under this Subsection (6) shall coordinate with the department and the department's contractor on the utility relocations, including the scheduling of the utility relocations.

72-6-117 Limited-access facilities and service roads --Access --Right-of- way acquisition --Grade separation --Written permission required.

(1) A highway authority, acting alone or in cooperation with the federal government,

another highway authority, or another state may plan, designate, establish, regulate, vacate, alter, improve, maintain, and provide a limited-access facility including a service road to the limited-access facility.

(2) A highway authority may regulate, restrict, or prohibit the use of a limited-access facility by pedestrians, animals, or by the various classes of vehicles or traffic.

(3) A highway authority may divide and separate any limited-access facility into separate roadways by the construction of raised curbing, central dividing sections, or other physical separations, or by designating separate roadways by signs, markers, stripes, and other appropriate devices.

(4) A person may not enter, exit, or cross a limited-access facility, except at designated points at which access is permitted by the highway authority.

(5) A highway authority may acquire, by gift, devise, purchase, or condemnation, private or public property and property rights for a limited-access facility and service road, including rights of access, air, view, and light. All property rights acquired under this section may be in fee simple or in any lesser estate or interest. A highway authority may acquire an entire lot, block, or tract of land, if needed, even though the entire lot, block, or tract is not immediately needed for the right-of-way of the limited-access facility or service road.

(6) A highway authority may designate and establish limited-access highways as new facilities or may designate and establish an existing highway as part of a limited-access facility.

(7) (a) A highway authority may provide for the **elimination** of at grade intersections of a limited-access facility and an existing highway by grade separation, service road, or by closing the intersecting highway.

(b) A highway authority may not connect or intersect a limited-access facility without the written consent and previous approval of the highway authority having jurisdiction over the limited-access facility.

(8) Highway authorities may enter into agreements with each other, or with the federal government, on the financing, planning, establishment, improvement, maintenance, use, regulation, or vacation of limited-access facilities or other public ways in their respective jurisdiction, to facilitate the purposes of this section.

72-6-118 Definitions --Establishment and operation of tollways --Imposition and collection of tolls --Amount of tolls --Rulemaking.

(1) As used in this section:

- (a) "Toll" means any tax, fee, or charge assessed for the specific use of a tollway.
- (b) "Tollway" means a highway, highway lane, bridge, path, tunnel, or right-of-way designed and used as a transportation route that is constructed, operated, or maintained through the use of toll revenues.

(2) Subject to the provisions of Subsection (3), the department may:

- (a) establish and operate tollways and related facilities for the purpose of funding in whole or in part the acquisition of right-of-way and the design, construction, reconstruction, operation, and maintenance of or impacts from a transportation route for use by the public;
- (b) enter into contracts, agreements, licenses, franchises, or other arrangements to implement this section; and
- (c) impose and collect tolls on any tollway established under this section.

(3) (a) The department or other entity may not establish or operate a tollway on a state highway, except as approved by the commission and the Legislature.

(b) Between sessions of the Legislature, a state tollway may be designated or deleted if:

(i) approved by the commission in accordance with the standards made under this section; and

(ii) the tollways are submitted to the Legislature in the next year for legislative approval or disapproval.

(c) In conjunction with a proposal submitted under Subsection (3)(b)(ii), the department shall provide a description of the tollway project, projected traffic, the anticipated amount of tolls to be charged, and projected toll revenue.

(4) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the commission shall set the amount of any toll imposed or collected on a tollway on a state highway.

(5) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the department shall make rules necessary to establish and operate tollways on state highways. The rules shall include minimum criteria for having a tollway.

(6) The commission may provide funds for public or private tollway pilot projects from General Fund monies appropriated by the Legislature to the commission for that purpose.

72-6-119 "511" traveler information services --Lead agency -- Implementation -- Cooperation --Rulemaking --Costs.

(1) As used in this section, "511" or "511 service" means three-digit telecommunications

dialing to access intelligent transportation system -- traveler information service provided in the state in accordance with the Federal Communications Commission and United States Department of Transportation.

(2) The department is the state's lead agency for **implementing** 511 service and is the state's point of contact for coordinating 511 service with telecommunications service providers.

(3) The department shall:

(a) implement and administer 511 service in the state;

(b) coordinate with **the highway** authorities and public transit districts to provide advanced multimodal traveler information through 511 service and other means; and

(c) in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, make rules as necessary to implement this section.

(4) (a) In accordance with Title 11, Chapter 13, Interlocal Cooperation Act, the department shall enter into agreements or contracts with highway authorities and public transit districts to share the costs of implementing and administering 511 service in the state.

(b) The department shall enter into other agreements or contracts relating to the 511 service to offset the costs of implementing and administering 511 service in the state.

ADDENDUM EXHIBIT 2

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FILED DISTRICT COURT
Third Judicial District

DEC 11 2003

By [Signature]
SALT LAKE COUNTY
Deputy Clerk

IN THE THIRD DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, SALT LAKE DEPARTMENT, STATE OF UTAH

INTERMOUNTAIN SPORTS, INC.

Plaintiff,

vs.

MURRAY CITY and UTAH
DEPARTMENT OF TRANSPORTATION,

Defendants.

**ORDER GRANTING UTAH
DEPARTMENT OF
TRANSPORTATION'S MOTIONS
FOR JUDGMENT ON THE
PLEADINGS**

Civil No.: 030917322 CD

Judge: William B. Bohling

On November 10, 2003, this Court heard oral argument on Defendant Utah Department of Transportation's motions for judgment on the pleadings. Joni J. Jones, Assistant Utah Attorney General, appeared on behalf of Utah Department of Transportation ("UDOT") and argued the motion to dismiss Plaintiff's claims for tortious interference with economic relations. Randy S. Hunter, Assistant Utah Attorney General, appeared on behalf of UDOT and argued the

motion to dismiss Plaintiff's remaining claims for inverse condemnation, breach of contract, breach of the covenant of good faith and fair dealing, and violation of Article I, § 22 of the Utah Constitution (labeled "Inverse Condemnation" in the Complaint). B. Ray Zoll appeared on behalf of Plaintiff Intermountain Sports, Inc. ("Intermountain"), and argued the tort claims. John Martinez also appeared on behalf of Intermountain and argued the remaining claims.

The Court, having reviewed the briefs submitted by the parties and the case law cited therein, and having considered counsel's argument, and good cause appearing, hereby **GRANTS UDOT'S 12(c) MOTIONS FOR JUDGMENT ON THE PLEADINGS**, dismissing all of Intermountain's claims against UDOT with prejudice.

The Court bases its decision on the facts alleged in Intermountain's complaint and facts alleged in Intermountain's memoranda opposing UDOT's motion, as well as on the legal reasons in UDOT's memoranda, which are discussed below.

RELEVANT FACTUAL ALLEGATIONS

1. Intermountain is a recreational vehicle sales company located at 4225 South 500 West, Murray, Utah. (Compl. ¶¶ 3, 8.)
2. UDOT is a State agency. (Complaint ¶ 5.)
3. As part of its I-15 Reconstruction Project (the "Project"), UDOT rebuilt the 4500 South interchange with I-15. During construction beginning in July 1997, off-ramps and on-ramps to and from 4500 South, and 4500 South itself, were periodically closed. (Complaint ¶¶ 10, 19, 21.)
4. Intermountain claims that as a result of the Project, its customers and vendors were

denied reasonable access to its property, which substantially damaged its value. (Complaint ¶ 25.)

5. Intermountain also claims that other businesses along the Project, located further south, were not denied access to 4500 South and had a more direct access to I-15 during construction. (Compl. ¶ 39.)

6. Intermountain alleges that UDOT negligently planned and executed the traffic flow around plaintiff's property during construction, which interfered with its contractual relationships with customers and vendors. (Complaint ¶¶ 45, 47.)

7. According to Intermountain, UDOT represented that its I-15 access through 4500 South would be closed only one year, and that it would address Intermountain's concerns during the Project. Intermountain claims that, based on these representations, it did not sue UDOT during the Project. (Compl. ¶¶ 55-57.)

8. Intermountain has sued UDOT for inverse condemnation (Article I, Section 22 of the Constitution); denial of uniform operation of laws (Article I, Section 24 of the Utah Constitution); breach of contract, breach of covenant of good faith and fair dealing, negligence, and intentional interference with economic relations.

CONCLUSIONS OF LAW

1. In determining whether Intermountain's Complaint must be dismissed under Rule 12(c) of the Utah Rules of Civil Procedure, this Court accepts the factual allegations in the complaint as true and draws all reasonable inferences in favor of the plaintiff. *See, e.g., Arndt v.*

First Interstate Bank of Utah, N.A., 1999 UT 91 ¶ 2, 991 P.2d 584 (quoting *Golding v. Ashley*

Cent. Irr. Co., 793 P.2d 897, 898 (Utah 1990)). A motion for judgment on the pleadings should be granted when if, as a matter of law, the plaintiff could not recover under the facts alleged. *Id.*

2. The Court finds that under the 12(c) standard all of Intermountain's claims are barred as a matter of law for the following reasons.

INTERMOUNTAIN'S TORT CLAIMS

3. Intermountain's tort claims are barred under the Governmental Immunity Act. (the "Immunity Act").

4. To determine whether a governmental entity is immune from suit under the Immunity Act, this Court must engage in a three-step analysis: (1) Is the activity at issue a governmental function, for which the legislature has granted blanket immunity in Utah Code Ann. § 63-30-3? (2) If so, then is blanket immunity waived in another section of the Immunity Act? (3) If blanket immunity has been waived, is there an exception to that waiver which retains immunity? *See, e.g., Pigs Gun Club, Inc. v. Sanpete County*, 2002 UT 17, ¶ 11, 42 P.3d 379.

5. Intermountain does not dispute that blanket immunity applies under the first step because it agrees that the activity at issue, reconstruction of I-15, is a governmental function.

6. Under the second step, immunity is waived for Intermountain's negligence claim under Section 63-30-10, which waives immunity "for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment." Utah Code Ann. 63-30-10 (1997 & Supp. 2001).

7. Under the third step, however, immunity is retained because under § 63-30-10 immunity for negligence is waived "*except* if the injury arises out of, in connection with, or

results from . . . *interference with contract rights.*” *Id.* § 63-30-10(2) (emphasis added).

8. Because Intermountain alleges in its complaint that UDOT’s negligence interfered with its contractual relationships with vendors and customers (compl. ¶ 47), the negligence claim is barred.

9. Even if, as Intermountain argues, it sustained other injuries, such as diminution in the value of its business, that injury would nonetheless “arise out of, in connection with or result from” the interference with contractual relations. The exception under § 53-30-10(2) is broad enough to cover the additional injuries Intermountain alleges.

10. Even if Intermountain could allege some injury that was entirely unrelated to interference with its contractual relations, this Court concludes the negligence claim would still fail under the economic loss doctrine, which bars negligence claims that seek to recover only economic damages. *See, e.g., SME Industries, Inc. v. Thompson*, 2001 UT 34 ¶ 32, 28 P.3d 669.

11. The Court also concludes Intermountain’s intentional interference with economic relations claim is barred under the Immunity Act.

12. Applying the three-step analysis to the intentional interference claim, the Court concludes that blanket immunity applies for the reason stated in paragraph 5, above. Under the second step, blanket immunity is not waived, because the Immunity Act does not contain a provision that waives immunity for intentional torts generally or interference with economic relations specifically.

13. The Court rejects Intermountain’s argument that other provisions of the Immunity Act allow its negligence and intentional interference claims to proceed. According to

Intermountain, these tort claims can be brought pursuant to § 63-30-8 and 63-30-10.5.

14. Intermountain's tort claims cannot proceed under § 63-30-8 because immunity under that provision applies only to "a **dangerous or defective condition** of any highway." Utah Code Ann. § 63-30-8 (1997) (emphasis added). Intermountain has not alleged UDOT's acts resulted in a dangerous or defective condition on a highway and thus § 63-30-8 does not apply. *See also Smith v. Weber Co. Sch. Dist.*, 877 P.2d 1276, 1279 (Utah Ct. App. 1994).

15. Intermountain also cannot bring its tort claims under § 63-30-10.5, which applies when a governmental entity takes or damages private property for a public purpose. *See Utah Code Ann. § 63-30-10.5 (1) (1997)*. Intermountain has alleged a claim for inverse condemnation in its First Cause of Action, and § 63-30-10.5 does waive immunity for this claim. However, an express waiver of immunity for a government taking simply cannot be construed to include a waiver for negligence claims or intentional interference with economic relations claims.

INTERMOUNTAIN'S INVERSE CONDEMNATION CLAIM

16. Intermountain's inverse condemnation claim fails because the Utah Supreme Court has previously held that temporary denial of access to property does not constitute a taking. *See e.g., Rocky Mountain Thrift Stores, Inc. v. Salt Lake City Corp.*, 784 P.2d 459, 465 (Utah 1989) (denying inverse condemnation claim for city's interference with access to store because temporary drainage system that interfered with access was not "permanent, continuous, or inevitably recurring").

17. This Court finds that Intermountain's allegations that UDOT's I-15 Project temporarily denied Intermountain and its customers convenient access to the freeway fails to state an inverse condemnation claim under controlling Utah case law.

INTERMOUNTAIN'S UNIFORM OPERATION OF LAWS CLAIM

18. The Court also finds that Intermountain has not stated a claim sufficient to establish that UDOT's activities during the Project amounted to a violation of the Utah Constitution's Uniform Operation of Laws provision.

19. Intermountain has not identified any law that UDOT has not applied uniformly. Nor has Intermountain alleged that UDOT discriminated against it because of its membership in an identifiable class. Intermountain has therefore failed to state a claim under Article 1, Section 24 of the Utah Constitution.

BREACH OF CONTRACT

20. The Court finds the factual allegations in Intermountain's complaint fail to state the elements of a contract claim.

21. Plaintiff has failed to plead facts sufficient to establish the existence of a contract. Notably absent are the establishment of offer, acceptance, consideration, or any terms of the agreement.

22. The Court rejects Intermountain's argument that it has stated a quasi contract claim based on promissory estoppel. The facts Intermountain has alleged are insufficient to place this case outside the general rule that promissory estoppel cannot be asserted against the government.

BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

23. Intermountain's claim for breach of the covenant of good faith and fair dealing fails because Intermountain has failed to allege facts sufficient to show it had a contract with Intermountain.

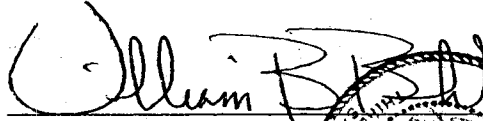
24. It is well settled that the covenant of good faith and fair dealing cannot be used to establish new rights and duties not agreed to by the parties. *See, e.g., Bethany v. Nordstrom*, 812 P.2d. 49 (Utah 1991).

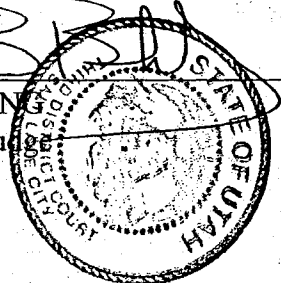
ORDER

Based on the foregoing, the Court **GRANTS** UDOT's motions to dismiss Intermountain's claims **WITH PREJUDICE**, the parties to bear their own costs.

DATED this 11 day of December, 2003.

BY THE COURT:


WILLIAM B. BOHLIN
Third District Court Judge



CERTIFICATE OF SERVICE

I hereby certify that on the 20 day of November, 2003, a true, correct and complete copy of the foregoing was delivered upon the following attorneys as indicated below:

Steven C. Tycksen
B. Ray Zoll
ZOLL & TYCKSEN, L.C.
5300 South 360 West, Suite 360
Murray, UT 84123
Def

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Diffini Moss

1. *Chlorophyll a* and *Chlorophyll b* were determined by the method of Arar and Collins (1971).

the β phase of the polymer. The β phase is the most important phase in the polymer, as it is the phase that is most responsible for the mechanical properties of the polymer. The β phase is the phase that is most responsible for the mechanical properties of the polymer.

100

[illegible]

the 1990s, the number of people in the world who are under 15 years of age is expected to increase from 1.1 billion to 1.5 billion. The number of people aged 65 and over is expected to increase from 250 million to 450 million. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion.

the 1990s, the number of people in the world who are illiterate has increased from 1.2 billion to 1.5 billion. The number of illiterate people in the world is expected to reach 1.7 billion by the year 2015. The number of illiterate people in the world is expected to reach 1.7 billion by the year 2015.

1. *Adaptation* – the process by which an organism becomes better suited to its environment.

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FILED
THIRD DISTRICT COURT
SANDY DEPT.
JUN - 3 2002

Steven C. Tycksen (#3300)
B. Ray Zoll (#3607)
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5300 South 360 West, Suite 360
Murray, Utah 84123
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Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY,
STATE OF UTAH, SANDY DEPARTMENT

Intermountain Sports, Inc.

Plaintiff,

vs.

UTAH DEPARTMENT OF
TRANSPORTATION AND
MURRAY CITY,

Defendants.

COMPLAINT
(JURY DEMAND)

Case No. 020406041

Honorable _____

COMES NOW the Plaintiff, Intermountain Sports, Inc.
("Intermountain"), by and through its attorneys, Zoll & Tycksen, and
complains against the Defendants as follows:

JURISDICTION, VENUE AND PARTIES

1. This Court has subject matter jurisdiction over this lawsuit
pursuant to Utah Code Ann. § 78-3-4(1).

2. Venue of this claim is properly in this Court pursuant to Utah Code Ann. § 78-13-1, in that the cause of action arose in Salt Lake County, and the property at issue is located in Salt Lake County.
3. Plaintiff Intermountain is a business operating in Murray, Utah as a recreational vehicle sales company.
4. Defendant Murray City (the "City") is a municipal corporation organized pursuant to the laws of the State of Utah.
5. Defendant Utah Department of Transportation ("UDOT") is an agency or instrumentality of the State of Utah.
6. Intermountain has a right to sue the defendants pursuant to Article I, Sections 22 and 24 of the Utah Constitution, Utah Code Ann. §§ 63-30-10.5 and 63-30-10, and other legal and equitable remedies.
7. The claims alleged in this complaint arise in Salt Lake County, State of Utah.

GENERAL ALLEGATIONS

8. John Ashby ("Ashby") is the owner and operator of Intermountain located at 4225 South 500 West, Murray, Utah,

on the west frontage road at I-15 and north of 4500 South Street ("the Affected Property").

9. Intermountain has had a longstanding easement of access on the Affected Property, giving it access to the I-15 southbound off-ramp to 4500 South and to 4500 South Street. The Affected Property is shown on the map attached hereto as Exhibit A and incorporated herein by this reference.
10. On July 14, 1997, Intermountain received a letter and flyer from Carol Provenzano with Wasatch Constructors giving open house meeting information and the beginning date, on or about August 6, 1997, of the I-15 Reconstruction Project. See Letter attached as Exhibit B.
11. Upon information and belief, the open house meetings served only for information and instruction, not for hearing and meeting the needs of local businesses.
12. Prior to construction, Ashby performed extensive due diligence to determine whether or not there would be little effect to his business from the Reconstruction Project.
13. While serving as President of the I-15 Coalition, a non-profit

group of business owners representing over 850 businesses along the freeway corridor, Ashby testified at a meeting addressing the Reconstruction Project at the request of Senator Howell.

14. Ashby, acting for Intermountain Sports RV and the 1-15 Coalition, contacted UDOT with respect to their plan for the 4500 South interchange. In response to his query, he was provided a copy of a letter and drawing. These show a full closure of the Affected Property at the 4500 South interchange for a period of one year at the most.
15. UDOT represented to Intermountain that the Affected Property would be closed for one year.
16. UDOT officials met with business owners, including Ashby, and represented to said business owners that their concerns would be taken into consideration, but no action was taken nor remuneration made for the anticipated taking of Intermountain's property rights.
17. In direct reliance on the statements, representations and drawings of the City and UDOT, Intermountain did not pursue

action against UDOT or the City and has only now been able to determine its ascertainable damages, making its claims ripe for adjudication.

18. After reconstruction of I-15 began, traffic flow on I-15, in the area of 4500 South Street, dropped two thirds from the traffic flow figures prior to the Reconstruction Project.
19. In July 1997, UDOT began reconstruction on I-15 effecting 4500 South Street, by closing the off-ramp to the Affected Property. See Exhibit A.
20. Access to the Affected Property was closed until December 1998, a period of 18 months instead of the 12 months promised by UDOT in its construction contract.
21. The City and UDOT placed periodic closures on traffic at the 4500 South Street off-ramp over the following 2 ½ years.
22. The State and City were effectively closing access to freeway exits and entrances, as well as access for East and West traffic at the 4500 South Street off-ramp, from July 1997 until May 2001, nearly a period of four years.
23. The access provided by Defendants, in lieu of direct access off

the 4500 South off-ramp, involved a circuitous 2.5-mile loop (the "Circuitous Loop") (Attached as Exhibit "C") behind the Affected Property, which frustrated and eliminated potential customers.

The Circuitous Loop was impractical and unreasonable for purposes of bringing prospective customers from the freeway to Plaintiff's business. Not only was the critical line of sight lost, but also the route was lengthy and confusing.

24. Upon information and belief, the already significantly diminished number of potential customers from drive-by traffic, now 1/3 of what it was prior to re-construction, ended up getting lost and never arriving to Intermountain.
25. The closure of the off-ramp, coupled with the change in configuration, denied reasonable access to the Affected Property and substantially damaged the value of Plaintiff's property in an amount to be proven at trial but currently calculated to be in excess of \$2,000,000.00.
26. The City constructed the Circuitous Loop in such a manner that other businesses obtained direct access to 4500 South off-ramp traffic, who otherwise benefited from the loss to Intermountain.

27. Such action by the Defendants became tantamount to a taking of the property for the good of others and at the expense of Intermountain without just compensation.
28. In the alternative, the City and/or UDOT, their agents, and employees who planned directed the traffic flow surrounding the Affected Property failed to exercise reasonable care, which directly resulted in the loss of business incurred by Intermountain.
29. Further, UDOT, its employees, and agents failed to exercise reasonable care in the planning and execution of the reconstruction of I-15 and the 4500 South Street interchange, which directly resulted in the loss of business incurred by Intermountain.

FIRST CAUSE OF ACTION
(INVERSE CONDEMNATION – UDOT & MURRAY CITY)

30. Plaintiff re-alleges each of the allegations contained in paragraphs 1 through 29 of the Complaint as if fully set forth herein.

31. In violation of § 63-30-10.5 of the Utah Code and Article I Section 22 of the Utah Constitution, Defendants took or impaired Plaintiff's substantial property right for a public use without just compensation.
32. Upon information and belief, Defendants' determination to block and/or take the Plaintiff's easement of access over the Affected Property, allowing access to the I-15 Southbound off-ramp at 4500 South and to 4500 South Street was based on a public purpose to expand I-15 to reduce traffic impediments and safety concerns along I-15, as well as enhancing the 4500 South off-ramp.
33. In closing the off-ramp and otherwise blocking and/or taking the Plaintiff's easement of access, Defendants substantially and materially impaired Plaintiff's right of access to the I-15 off-ramp at 4500 South and to 4500 South Street as well as Plaintiff's customers' right of access to 4500 South Street and the Affected Property.

34. In blocking and/or taking the Plaintiff's easement of access over the Affected Property, Defendants substantially diminished the value of Plaintiff's private property.
35. This injury to Intermountain was an unavoidable result of the City and UDOT's action and was continuous for a period of almost four years.
36. Defendants' shutting down, blocking, and/or taking the Plaintiff's easement of access to the I-15 Southbound off-ramp at 4500 South and to 4500 South Street was damaging to Plaintiff's private property interest for a public use without just compensation.
37. Plaintiff is entitled to actual, economic, special and compensatory damages to be proven at trial and believed to be at least \$2,000,000.00.

SECOND CAUSE OF ACTION
(DENIAL OF UNIFORM OPERATION OF LAWS –
UDOT & MURRAY CITY)

38. Plaintiff re-alleges each of the allegations contained in paragraphs 1 through 37 of the Complaint as if fully set forth herein.

39. The City and UDOT have discriminated against Plaintiff in violation of Article I, § 24 of the Utah Constitution, by, among other things, arbitrarily and capriciously providing other businesses with direct and beneficial access to 4500 South Street and by configuring such access so as to direct traffic flow to those businesses, south of the Affected Property and north and west of the Affected Property, while at the same time refusing to offer such accommodations to Plaintiff who paid substantial taxes to the City and State and who relied on the City and UDOT's representations.

40. The City's and UDOT's accommodation of other businesses and the diversion of traffic through State and Municipal regulations from the Affected Property towards those other businesses was unreasonable and was not for a legitimate legislative purpose.

THIRD CAUSE OF ACTION
(BREACH OF THE COVENANT OF GOOD FAITH
AND FAIR DEALING – UDOT & MURRAY CITY)

41. Plaintiff re-alleges each of the allegations contained in paragraphs 1 through 40 of the Complaint as if fully set forth herein.

42. Defendant City and UDOT in determining to block and/or take Plaintiff's substantial property interest in the Affected Property, denying reasonable access to I-15, and thereby stifling the commercial development in the area effectively destroyed or injured Intermountain's rights to receive its justified expectations.
43. Plaintiff Intermountain has been seriously injured as a result of the City and UDOT's conduct in an amount to be proven at trial but currently calculated to be in excess of \$2,000,000.00.

FOURTH CAUSE OF ACTION
(NEGLIGENCE – UDOT & MURRAY CITY)

44. Plaintiff re-alleges each of the allegations contained in paragraphs 1 through 43 above as if fully set forth herein.
45. Plaintiff alleges that in the planning and execution of the traffic flow surrounding the Affected Property the City and/or UDOT, their employees, and agents failed to exercise reasonable care when creating the circuitous route.
46. Plaintiff further alleges that UDOT, its employees, and agents failed to exercise reasonable care in the planning, design, and

execution of the reconstruction of I-15 and the 4500 South interchange.

47. Upon information and belief, the Defendants negligently interfered with the contractual relationships and potential relationships Intermountain had with vendors and customers, by (1) causing vendors to discontinue doing business with Intermountain, (2) making it impossible for Intermountain to satisfy customers, and (3) jeopardizing the value of Intermountain's business.
48. The Defendants have negligently and proximately, caused damages to Intermountain. Intermountain is entitled to damages in an amount to be proven at trial for the Defendants' interference.

FIFTH CAUSE OF ACTION
(INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS –
UDOT AND MURRAY CITY)

49. Plaintiff re-alleges each of the allegations contained in paragraphs 1 through 48 above as if fully set forth herein.
50. Upon information and belief, the Defendants intentionally interfered with the economic relationship Intermountain had with

its potential buyers, the buyers choosing to not come by the property and to not do any further business with Intermountain.

51. Upon information and belief, the Defendants' interference was for an improper purpose, which was to have Intermountain's customers and vendors avoid the property voluntarily and discontinue or avoid any business relationship with Intermountain.
52. Upon information and belief, the Defendants' interference was by an improper means, as Defendants, contrary to law, requested that Intermountain and other businesses not bring claims against them and did not conduct condemnation hearings.
53. The Defendants' interference was the proximate and immediate cause of Intermountain's economic injuries. Intermountain is entitled to damages in an amount to be proven at trial.

SIXTH CAUSE OF ACTION
(BREACH OF CONTRACT - UDOT)

54. Plaintiff re-alleges each of the allegations contained in paragraphs 1 through 53 above as if fully set forth herein.
55. Defendant UDOT made representations to Intermountain that

the closed access to I-15 at 4500 South would last one year.

56. UDOT made representations to Intermountain that it would address the concerns of the local businesses along I-15, including those of Intermountain.
57. Intermountain relied upon those representations and did not bring an action during the reconstruction of I-15.
58. Such forbearance, based on UDOT's representations and promises to address the needs of business owners, constituted consideration for that promise.
59. Defendant UDOT breached this contract by never addressing the business' concerns, including those of Intermountain.
60. UDOT further breached this contract by closing access to I-15 at 4500 South for a period of nearly four years, and not one year as represented to Intermountain by Defendant UDOT.
61. Plaintiff Intermountain has been seriously injured as a result of the Defendant's conduct in an amount to be proven at trial but currently calculated to be in excess of \$2,000,000.00.

PRAYER FOR RELIEF

NOW THEREFORE, Plaintiff demands judgment against the Defendants as follows:

1. On its First Cause of Action, Intermountain requests that this Court award it damages in an amount to be proven at trial but calculated to be at least \$2,000,000.00.
2. On its Second Cause of Action, Intermountain requests that this Court award it damages in an amount to be proven at trial but currently calculated to be in excess of \$2,000,000.00.
3. On its Third Cause of Action, Intermountain requests that this Court award it damages in an amount to be proven at trial but currently calculated to be in excess of \$2,000,000.00.
4. On its Fourth Cause of Action, Intermountain requests that this Court award it damages for the City and State's negligent interference with the contractual relationships Intermountain had and still has with its vendors as well the lost potential relationships with future customers and vendors in an amount to be proven at trial and calculated at \$2,000,000.00.

5. On its Fifth Cause of Action, Intermountain requests that this Court award it damages for the Defendants' negligent and intentional interference with the prospective economic relationships Plaintiff had and still has with its buyers, in an amount to be proven at trial and calculated at \$2,000,000.00.
6. On its Sixth Cause of Action, Intermountain requests that this Court award it damages in an amount to be proven at trial but currently calculated to be in excess of \$2,000,000.00.
7. For costs and attorney fees as allowed by law.
8. For such other and further legal and equitable relief as the court may find just and proper.

DATED and SIGNED this 29 day of May 2002.

ZOLL & TYCKSEN, L.C.

B. Ray Zoll

B. Ray Zoll
Attorneys for Plaintiff

EXHIBIT A

4500 South Alternate Routes

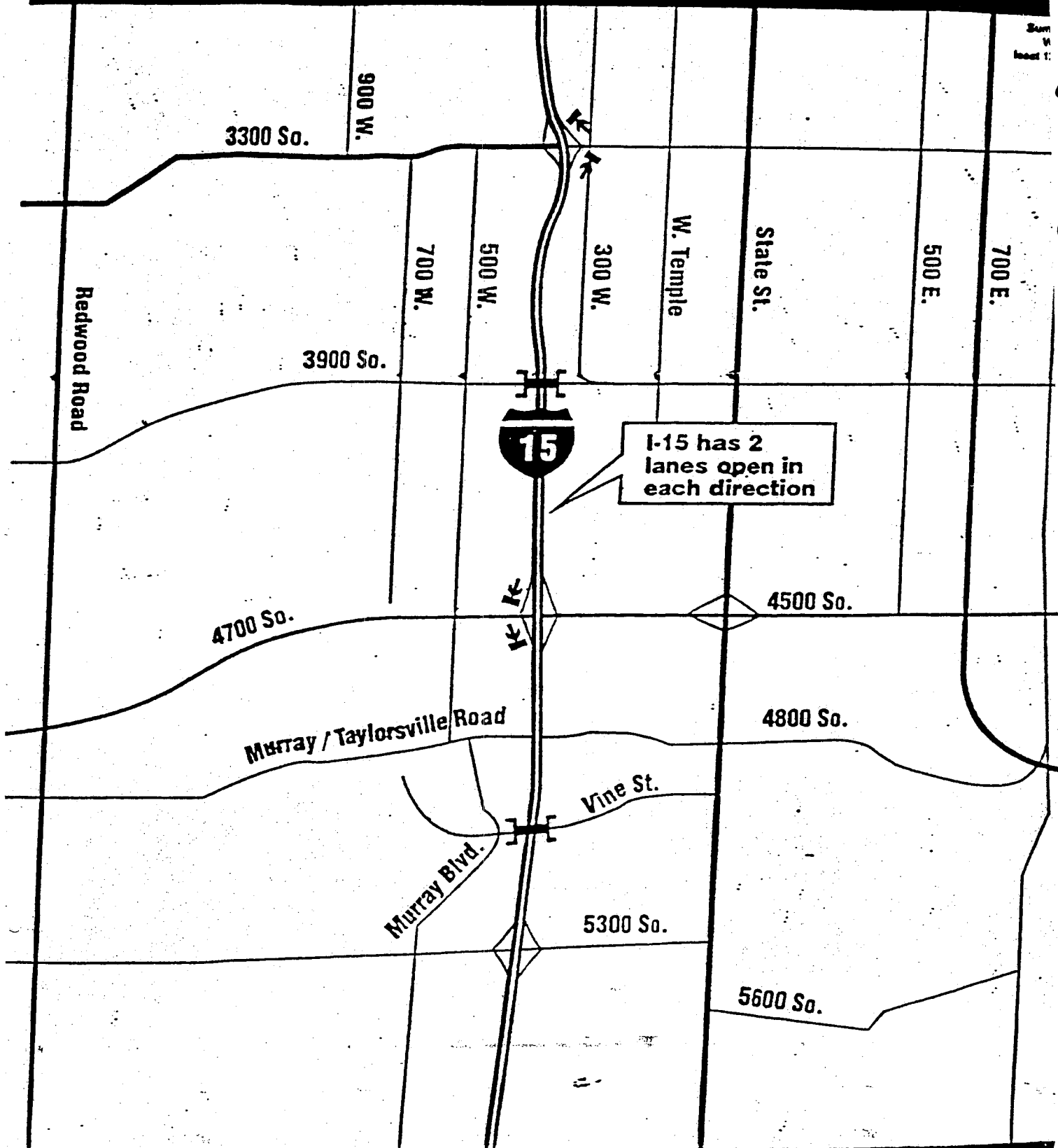


EXHIBIT B



INTERSTATE 15 RECONSTRUCTION

July 14, 1997

Dear Resident or Business Owner:

On or around August 6, the I-15 Reconstruction Project will begin to affect residents, commuters and businesses using the 4500 South interchange. This action is one of many that make up the largest design-build highway project in the United States.

For you, it means planning your trips to address closure of I-15 Southbound off-ramp at 4500 South and the 4500 South on-ramp to I-15 Southbound. Both closures will last approximately one year.

Access to 4500 South from I-15 Southbound

- Exit at 3300 South and take State Street or Redwood Road
- Exit at 5300 South and take State Street or Redwood Road

Access to Points South from 4500 South

- Take State Street to 5300 South on-ramp to I-15 Southbound
- Take 4500 South to I-215

An alternate for all North/South travel is I-215. This roadway has been expanded to four lanes in each direction. The additional capacity and easy access to east/west surface streets makes this a good alternate to include in your trip planning. During 4500 South ramp closures, southbound ramps will remain open at 3300 South and 5300 South. Ramps at 4500 South will re-open in approximately 12 months.

Drivers can expect quicker and easier access to and from I-15 when reconstruction is complete. Until construction is complete, staying informed is your key to getting through the I-15 reconstruction with as little impact as possible to your schedule and your lifestyle. Call the information line at 888-INFO-I15. Access the Web site at www.I-15.com. Find and use traffic reports in the local media. Consider changing your travel patterns by combining trips or talking with your employer about flex-time scheduling. Think about riding a bike, taking the bus to work or eliminating some trips altogether by telecommuting - you'll be reducing traffic (and your stress level!).

Included with this letter, is a flyer addressing issues specific to the 4500 South areas. Flyer information includes an announcement for business and community open house meetings. These meetings are an opportunity to obtain more information on planned closures, alternate routes, and project process and schedule - we hope you will come.

Thank you in advance for your active participation.

Sincerely,

Carol Provenzano
Business and Community Affairs
Program Manager

Wasatch Construction Co., Inc. Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.

Machine-generated OCR, may contain errors.



INTERSTATE 15

ROAD TO THE FUTURE

July.

Ramps close at 4500 South

4500 South Interchange Ramp Closures

The reconstruction of 4500 South interchange means quicker, easier access to and from I-15. In addition to rebuilding bridge footings, the bridges themselves and expanding the decks, this intersection will be rebuilt with an improved interchange. The new Single Point Urban Interchange (SPUI) system will make traffic flow more effective and efficient.

SEEING IS BELIEVING

Reconstruction activities will bring with them barriers blocking closed ramps, detour signs and some increased truck traffic. Working with construction impacts may be difficult at first, but driver planning and regular use of alternate routes will make your trips easier.

CLOSURE SCHEDULE

August 6:

I-15 Southbound off-ramp to 4500 South.

August 6:

4500 South on-ramp to I-15 Southbound.

East to west travel on 4500 South will remain open during ramp closures. Infrequent closures may be necessary during bridge removal activities - the community, affected businesses and services will be notified. The northbound on-and off-ramps will remain open during this approximately one-year closure.

ALTERNATE ROUTES

Access to 4500 South from I-15 Southbound

- Exit at 3300 South and

Access to Points South from 4500 South

- Take State Street to 5300 South on-ramp
- Take 4500 South to I-215

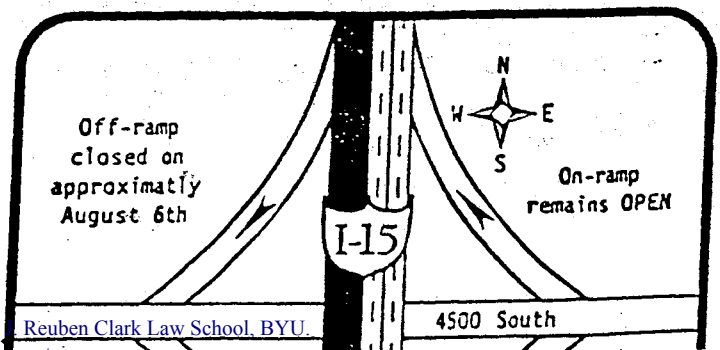
An alternate for all North/South travel is I-215. This roadway has been expanded to four lanes in each direction. The additional capacity and easy access to east/west surface streets makes this a good alternate to include in your trip planning. During 4500 South ramp closures, southbound-off ramps will remain open at 3300 South and 5300 South.

OPEN HOUSE MEETINGS

Wasatch Constructors will host a series of Open House meetings focusing on upcoming ramp closures at 3300 and 4500 South. The meetings will give residents and businesses a chance to:

- Learn about planned closures
- View plans for the reconstructed interchange
- Discuss communications plans
- Review alternate route options

continued on back...



I-15 Reconstruction
480 North 2200 West
Salt Lake City, UT 84116

ON IT! - STAY INFORMED

Information: Where to get it

OPEN HOUSE MEETINGS:

Business Open Houses

Monday, July 28

12:00 - 1:30 p.m.

Quality Inn

4465 Century Dr. (450 W.)

Murray

Wednesday, July 30

12:00 - 1:30 p.m.

Quality Inn

4465 Century Dr. (450 W.)

Murray

Community Open Houses

Tuesday, July 29

6 p.m. - 8 p.m.

Woodrow Wilson Elementary

2825 South 200 East

South Salt Lake

Thursday, July 31

6 p.m. - 8 p.m.

Salt Lake Lutheran School

4020 South 900 East

"PLAN ON IT" - STAY INFORMED

Until construction is complete, staying informed is your key to getting through the I-15 reconstruction with as little impact as possible to your schedule and your lifestyle. Read the newspaper and watch/listen for traffic updates on radio and TV news. You can access information sources at:

Internet: www.I-15.com

Tollfree: 1-888-INFO-I-15

UDOT 964-6000 (recorded information)

QUESTIONS?

Wasatch Constructors 594-6400

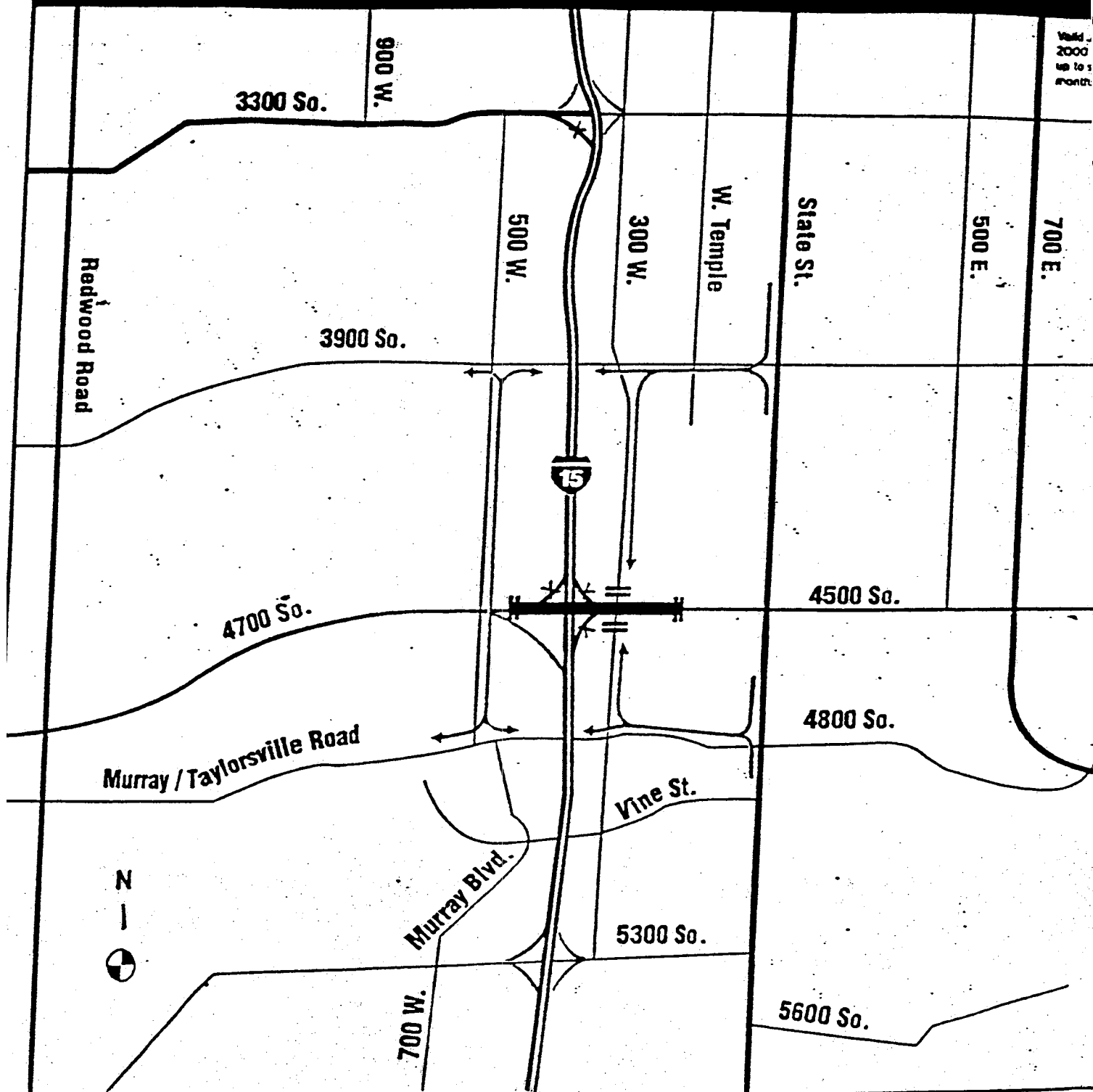
UDOT I-15 Team 281-8167

Construction Noise 322-2378

For UDOT issues not directly related to the I-15 Reconstruction Project, access UDOT's Web site at www.st.ex.state.ut.us and select the Road Conditions icon, or call UDOT at 965-4000.

EXHIBIT C

4500 South Alternate Routes



Closed Ramps:

- 4500 South southbound off-ramp
- 4500 South northbound on and off-ramps
- 3300 South southbound on-ramp

East/West Closure:

- 4500 South between 500 West and 100 West
(4500 South eastbound to I-15 southbound remains open)

Alternate East/West Routes:

Open Ramps:

COVER SHEET FOR CIVIL ACTIONS

JUN - 3 2002

PARTY IDENTIFICATION (ATTACH ADDITIONAL SHEETS AS NECESSARY)

PLAINTIFF/PETITIONER

Name *Intermountain Sports, Inc.*
Address *4225 South 500 West
Murray, UT 84123*

Day Time Telephone
(801) 266-4449

PLAINTIFF/PETITIONER

Name
Address

Day Time Telephone

DEFENDANT/RESPONDENT

Name *Utah Dept. of Transportation*
Address *4501 S. 2700 W.
Salt Lake City, UT*

Day Time Telephone
(801) 965-4026

DEFENDANT/RESPONDENT

Name *Murray City*
Address *5025 S. State St.
Murray, UT 84107*

Day Time Telephone
(801) 264-2600

TOTAL CLAIM FOR DAMAGES

\$ *2,000,000 +*

ATTY FOR PLAINTIFF/PETITIONER

Name *B. Ray Zoll*
Address *Zoll-Tycksen, L.C.
5300 South 360 West, Suite 360
Murray, UT 84123*

Day Time Telephone
(801) 685-7800

ATTY FOR PLAINTIFF/PETITIONER

Name
Address

Day Time Telephone

ATTY FOR DEFENDANT/RESPONDENT

Name *Mark Shurtleff / Utah State AG*
Address *State Capitol Bldg., Rm. 236
Salt Lake City, UT 84114*

Day Time Telephone
(801) 538-9600

ATTY FOR DEFENDANT/RESPONDENT

Name *Frank Nakamura / Murray City Atty.*
Address *5025 S. State St.
Murray, UT 84107*

Day Time Telephone
(801) 538-9600

JURY DEMAND

☒ Yes ☐ No

SCHEDULE OF FEES: §21-1-5. CHECK ANY THAT APPLY. (SEE CASE TYPES FOR FILING FEES FOR COMPLAINTS OTHER THAN CLAIM FOR DAMAGES)

COMPLAINT FOR DAMAGES

- ☐ Civil, Interpleader or Small Claims: \$2000 or less \$37
- ☐ Small Claims: \$2001-\$5000 \$60
- ☐ Civil or Interpleader: \$2001 \$60

☐ Civil Unspecified \$120

MISCELLANEOUS

- ☒ Jury Demand \$50 \$75
- ☐ Vital Statistics §26-2-25 \$2

ADDENDUM EXHIBIT 4

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Machine-generated OCR, may contain errors.

had no such law before. We have had nothing declaring this inequality, but they have been equal just the same. But there may a contingency arise in this country when this power, or rather this limitation upon the power of the state government, will be exceedingly dangerous. I think that it ought to be wiped out and left entirely to the Legislature. For that reason I am in favor of the motion to strike out.

Mr. WELLS. Mr. Chairman, I desire to state—the gentleman has said that this is the same proposition that is in the state of Wyoming. I will say that it is also in North Dakota, Arkansas, Nebraska, South Dakota, Wisconsin—as many as that and I don't know how many others.

Mr. ANDERSON. Mr. Chairman, I would be in favor of the motion for this reason, that there may come a time when the safety and defense of our government might require that there should be a distinction between aliens and citizens, in regard to holding property, and I think that it can be safely left to the Legislature.

The CHAIRMAN. Gentlemen, the motion of Mr. Varian, of Salt Lake, was to strike out section 21. Mr. Wells moves to amend by striking out the word "resident" in line 2.

Mr. THURMAN. Mr. Chairman, I raise a point of order on that; that is not germane.

The CHAIRMAN. If the point of order is raised, I shall have to sustain it.

The question was taken on the motion of Mr. Varian, and on division there were: ayes, 49, noes, 43.

Section 21 was stricken out.

Section 22 was read as follows:

Section 22. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist in this State.

that the word "whereof" be stricken out and the words, "of which" be substituted.

Mr. EICHNOR. I think that is the language of the Constitution of the United States.

Mr. WELLS. Exactly.

Mr. EICHNOR. I believe in adhering to the Constitution of the United States when we copy it.

Mr. WHITNEY. It is a hundred years old.

The question being taken on the motion of Mr. Whitney, the amendment was rejected.

Section 23 was read as follows:

Section 23. Private property shall not be taken or damaged for public use without just compensation.

Mr. THURMAN. Mr. Chairman, I move an amendment by adding the words "first made," so that his compensation shall be made before the property is taken. That is in accord with most of the constitutions.

Mr. ROBERTS. Does that mean before the damage is done?

Mr. THURMAN. No; I move to strike out the words "or damaged."

Mr. VARIAN. Mr. Chairman, I call for a division of that—there are two motions.

The CHAIRMAN. The chair will divide the motion so that the question on striking out "or damaged" will first be voted upon.

Mr. THURMAN. Mr. Chairman, I would like to suggest to the gentleman from Salt Lake, Mr. Varian, that my purpose in offering this amendment is to provide for a compensation being made before the property is taken. If the words "or damaged" are put in there that cannot be very well determined. There ought to be a separate section covering the damage of the property.

Mr. VARIAN. Mr. Chairman, I am

to strike out "or damaged" is a very material matter. I have taken pains to look at it a little to-day in the late works on eminent domain, and I find it is put in other constitutions or statutes to meet the entire case. In some states some courts have held that damage to property of a consequential kind was not necessarily within the meaning of the article of the constitution. For instance, I believe in Pennsylvania—I may have confounded the state—the question arose where an elevated road was erected upon a street and while it did not touch the property of the abutting owner, did not destroy a brick, did not take a foot of his ground, it did affect his use and occupation of his premises very disastrously. It affected the convenience of the inhabitants of a house, and in this particular case, following later, it was held that there was no remedy. There was not the taking of the property. Now, the courts of New York went off in another direction and it is finally settled in that case that such injury as that could be compensated under the law of eminent domain. To make it perfectly clear this word has been put in laws and constitutions, and the text-writers say that it is an equivalent for any kind of injury of that kind.

Mr. THURMAN. Mr. Chairman, I agree that the compensation ought to be made, but the trouble would be to make it first in the case of a consequential damage.

Mr. FARR. I do not see why. Take a case like that. It could be estimated. There could be no subsequent change; there is the railroad; there is the house; there are the windows; there is the deprivation of light and air; there are all the necessary inconveniences of noise and soot and cinders, and disturbing the peace and rest of the family. That

knowledge of men and can be adduced before a jury. I do not care how the gentleman does it. I do not wish to be technical about it; I would like to see those words, "or damaged," kept in some way.

I hope those words, "or damaged," will remain in that section. I do not wish to argue the point, but I can see in a great many instances where it would be very important. For instance, on a sidewalk, a person owning land; they dig down a bank ten or fifteen feet, and damage that lot to a great extent. I think the man should be remunerated for the damage done to his lot. I move that those words remain in that section if they possibly can remain there.

Mr. THURMAN. Mr. Chairman, my objection to the words "or damaged" is the utter impracticability of providing for compensation before the damage is done. Now, I will cite an instance familiar to a great many. A few years ago people in Salt Lake County placed some boards in a dam here at the point of the mountain; they had a right to do that if they did not damage anybody and I don't suppose they thought they would damage anybody, at the same time they did it; but the result was that a great many people in Utah County were damaged, after the act which caused the damage. Now, in a case of that kind how would compensation be made before the act was done which caused the damage? 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. Consequently it seems to me that as to taking property by the law of eminent domain they should have the right to take it when they pay for it, if the necessity for taking it exists. As regards damaging it, why, it ought to be paid for as soon as the damage can be ascer-

understand the gentleman correctly, from Utah County, he would be in favor of striking out the words, "or damaged." Gentlemen, I hope this amendment will prevail. Just for the very reason that the gentleman from Weber County said it should be in the Constitution. Take a city like Salt Lake, where grading is required, or any other city where grading is required, and you will bankrupt those cities if you place this in the Constitution. Every man that owns property in the street—the street will be graded and one or two or three people will claim damages and the result will be it will bring the municipalities into court.

Mr. VARIAN. Would not the compensation benefit always allowed in a case of that kind more than equalize the damage?

Mr. EICHNOR. The law is unsettled at present in regard to the grading of streets whether they can secure damages; it would simply bankrupt Salt Lake City, I tell you that, gentlemen, if you place this in the Constitution.

Mr. PIERCE. Mr. Chairman, I am in favor of retaining the words "or damaged." I recollect a spectacle a few years ago of grading in Salt Lake City. There was a certain street—I believe it was State street—the grade had been established for some years, and the city came in and established a different grade and built the street up some ten feet higher than property abutting on it. There is a spectacle where they could not get any damages for it, and the street as it was built absolutely destroyed the value of their property and they could not get a cent for that. I say that it ought to be fixed so that the city must adjust the grade for the accommodation of people that own property along a certain street and

read a line or two from Lewis in his work upon Eminent Domain:

"When the people of Illinois revised their constitution in 1870, they introduced an important change into the provision respecting the power of eminent domain. The provision reads as follows: 'Private property shall not be taken or damaged for public use without just compensation.' Every other state which has revised its constitution since 1870, except North Carolina, which never had any provision on the subject, has followed the example set by Illinois by adding the word 'damaged' or its equivalent to the provision in question."

And the question not only refers to street grades in cities, but refers to grades of railway property. For instance, it is unfair that a railroad should run right next to a man's front door or almost next to his front door, and that his property should be destroyed or half the value taken away without making some compensation for that property which is really not reached, as no part of the property is taken; that is, the part of the property that is damaged; and I say I am in favor of being liberal in eminent domain act, but whenever we grant this liberty to corporations in any way—public or private corporations, we should make them pay for whatever they take, and I believe the words "or damaged" should remain in the Constitution.

Mr. RICHARDS. Mr. Chairman, I am opposed to the motion to strike out the words "or damaged." I believe, as has been said already in this discussion, that when the public use a man's property or make an improvement that virtually destroys the use of that property, that they should pay for it as much as if the property itself were taken. Of course, as has been suggested by the gentleman from Salt Lake, whatever benefit results by reason of this improvement is set off against the damage that is caused, and in that way the

raising of a grade or by the lowering of a grade or by any other kind of improvement to injure private property and because they don't actually enter upon and take the property itself, although they do destroy the use of the property, that they should be liable for damage; I think it is unjust and unfair and I am therefore opposed to this motion.

Mr. RALEIGH. Mr. Chairman, I propose a slight amendment, "Private property shall not be taken for public use or damage without just compensation first be made." Simply a reconstruction of the section, that is all.

The CHAIRMAN. The chair rules that that would be a proper question on revision and compilation.

Mr. THURMAN. Mr. Chairman, I will withdraw the motion to amend as far as "or damaged" is concerned if it is not objected to.

Mr. PIERCE. Mr. Chairman, I don't think that "first made" should be put in there. If I recollect the statute correctly now, whenever a corporation is permitted to enjoy the benefits of the eminent domain act and desires to take property at all, before they can do it they have to apply to the court, and it is within the discretion of the court to fix a bond and require good sureties before that property is taken, and I believe it should be left to the Legislature as to how it shall be taken. This is simply a declaration of principles that it shall not be taken. The Legislature can require any corporation either private or public, to put up a bond before they take anybody's property or damage it, without any constitutional provision.

Mr. CREER. Mr. Chairman, I am in favor of the motion of the gentleman from Utah, that the amendment shall be added to the section for the reason that notwithstanding the gentleman from Salt Lake says compensation may

erty has been taken and the party dispossessed and that the property be litigated for for considerable length of time and the party kept out of possession, notwithstanding there may be a bond there, and at the same time probably he would have to sue upon the bond afterwards. I think it is a very strong proposition anyway to give the public a right to dispossess a private person of his property summarily and it seems to me he ought to be compensated before that is done, because he may be put to a great inconvenience and loss of time. He may have to sue even upon the bond after he should vindicate his rights in the court. Therefore, I am in favor that if that should be required, he should be first compensated before his property is taken.

Mr. GOODWIN. Mr. Chairman, I do not believe the committee can pass such an amendment. Emergencies may arise when it would be simply impossible to carry it out. What there ought to be is a law (and that belongs to the Legislature) to compel fair treatment both ways. It is true that railroad companies have had the right of way, and they own and have owned for thirty years where they have gone through. It is just as true that if you try to build a railroad through some back street in Provo, or up to some mining camp, you would find yourself confronted with the most ridiculous property values you ever heard of, and every man in that town that you would get as an appraiser would raise the price. It is all right as it is; let the Legislature fix it sometime within a year that the property shall be paid for and that the party taking the property shall give ample bonds. In this bill of rights it is simply foolish to put something that cannot be executed, because emergencies would arise in the mines, in the cities, and in the fields, where there are floods that would make it im-

it exactly, and I say that if I don't adopt this method—if you adopt the other method, then you put a block in the way of progress and of development in this country, and in this new State, that the people of the State do not want to have there; that is what I say. I instanced it in the very example I have stated. I can point to cases now that are pending in the district court in this district that have been pending there over a year—just such cases as I am speaking of where companies have entered upon the property of people, who refused to enter into negotiations with them or to agree with them on a fair compensation for that property; they entered upon it and gave their bonds, and from that day to this the court has not reached that case and they haven't been able to litigate it. Now, would you say that railroad should not have been constructed—that that public improvement, whatever it might be, ought not to be made. Why, if you say that, you will not have railroads, and many other public improvements will not be made, for the reason, as I have stated, that when men enter into these undertakings that involve the expenditure of large amounts of capital, they do it because the time is ripe when they enter upon the enterprise for the accomplishment of it, and if they cannot accomplish it within a reasonable time, if they have got to wait two or three years before they can commence the construction of the road, they are not going to build a railroad, they are not going to project it. For that reason, I say I am opposed to it and I say that the individual has ample protection, when the owner of the property and the company that desires to take it cannot agree upon its value and upon the damage that will be incurred, and a sufficient bond is put up, as soon as the matter is determined he gets his money.

Mr. JAMES. Mr. Chairman, I hope

up before this Convention that will be of greater importance to it than the one that is being discussed right now. I am heartily in accord, Mr. Chairman, with the remarks of the gentleman who has just been on the floor, Mr. Richards; I don't believe we can afford in this Convention to take that matter out of the hands of the Legislature. I am in favor of the Legislature meeting and arranging how this shall be done. I say that we can afford to be as liberal as the great state of Illinois. There is a state that is almost one solid garden. It is said that there is not one point in the state of Illinois that is ten miles from a railroad. Now, what do they do? They leave it to the Legislature, and as it has been read on this floor already during this debate, they simply say that damages and compensation shall be allowed by a jury or fixed by the state. They leave it to the Legislature. Now, why cannot we be as liberal as they are? Mr. Chairman, I can tell you why we cannot be more liberal than they are, for the very reason that the lands that our railroads are built over into this great vast desert country are far less valuable than they are in the state of Illinois.

This is a country of the most difficult kind to build railroads and maintain them in. We have long hauls, and the most heavy grades that are to be found anywhere in the world, and in order to build railroads we must give them an opportunity and a fair show. Now, the gentlemen that are familiar with the construction of railroads through these canyons and these mountains all know what the builder of a railroad has to contend with. I have seen it myself, within twenty-five miles of this town. I have seen a railroad blockaded for three months and our men behind their breastworks to prevent that railroad from passing over a

little piece of land that was not worth

even if they say they shall have just compensation, without some manner to be indicated how that compensation shall be arrived at, I think that the rights of the individual will be infringed upon as the experience of the past has shown that they have been infringed upon. I am in favor of the amendment of the substitute. I should have liked to have seen it drawn a little farther and provide how the farmer whose right is taken from him should be compensated. I find that in California, Colorado and other states, that in their constitutions they have provided that the amount shall be paid into court for the owner before the right of way shall be appropriated. They have also provided, in some states, for a jury or a number of commissioners to decide what the damage or the compensation shall be before ever the right of way accrues. I think that that is just. It is humane, and I don't think any law ought to compel the farmer or the citizen to litigate for his natural, inalienable and indefeasible rights, and I think a right of property is just as useful, just as good, and just as near to the individual in many cases as life itself, for life is dependent upon those rights of property. I am in favor of the amendment or the substitute; I don't care which prevails, as I believe either will arrive at the point that we wish to see obtained.

Mr. CUNNINGHAM. Mr. Chairman, I am surprised at many gentlemen here in their remarks that they have made. We must have a very wicked people—people that own little pieces of land where the railway companies go through—and very holy, just, and righteous railway corporations. It must be all in favor of the corporation and nothing in favor of the people. Now, I believe people have rights, and we are here to protect the rights of the majority of the people and all the

the other side, that if we want this Constitution voted for we must protect the rights of the masses, even if it does not suit the righteous corporations.

Mr. MURDOCK (Wasatch). Inasmuch as this discussion has got down to the laymen, I feel that I ought to say a word or two, inasmuch as I disagree with the gentlemen that have spoken upon the question. As it has been stated by our legal men, the laws of Utah make provisions for damage to parties who are injured by railroads and by other corporations passing over their lands. I think we can safely trust this to the Legislature to protect the man, to protect private individuals from corporations trespassing upon them, but I think that if this substitute of the amendment prevails it will place an obstruction in the way not only of railroads, but of enterprises like irrigation companies. In my short experience, had this law been the law without any other legislation, it certainly would have stopped several irrigation companies from building their canals for three or four years, long enough to have prohibited the owners of the land from raising enough grain to have paid the expenses of building those canals. Now, I am opposed to the substitute and to the amendment, and I trust that this committee will vote them down, and that we will leave it in the hands of the Legislature of this future State to make such laws that shall be necessary for the protection of property owners.

Calls for the question.

Mr. THURMAN. Mr. Chairman, I don't know whether this committee desires to hear me or not. I made this motion and have not had a single chance to speak to it. I made it in good faith. I believe that the right of property is a sacred right, and no matter if it is the widow's mite, I believe that the man who owns just one little acre of land has just as much right to

graze on a thousand hills; having a sacred and absolute right to his property, having paid for it and the company owner; it may be his home—it may be all he has and the proposition here now advanced is that a railroad company may come along and stake out this lot and tell him to get off and await the slow process of the law in litigation; and we know what it is when you come to litigation with the railroad company; they just simply have the advantage at every turn. They have their attorneys paid by the year; they have money to bring forward all the witnesses they want, and to secure every advantage that the law possibly gives. And if delay is of any benefit to them in that case they insist on the delay and they get it. In the meantime, the man is deprived of his property, his home is taken away from him, and because his home is only a matter of three or four hundred dollars—it did not amount to much anyway as the gentleman from Salt Lake in front of me here intimated, very much in the language of a corporation attorney—it was not worth anything anyway—land that was not worth a cent. Now, the facts are, gentlemen, that this proposition will not retard the development of the country. It will not retard the progress of the country, but as suggested by one of the gentlemen on this floor if railroad companies understood that they must determine this compensation in advance, they will see to it that instead of ceaseless and endless litigation, they will be anxious to bring their cases to the front, if it comes to a case, and have them disposed of, and if a man does ask them what they may think is a little bit extraordinary in its terms, had not they better, in view of the fact that they had this extraordinary right to take away a man's property, without his consent—had not

their work, than to have the poor man kept without the use of his property and sitting by and seeing another man reveling in the possession of it, while he has not anything in return for it? Now, Mr. Chairman, I am about as much surprised as my colleague from Utah County to hear men talking just as if this provision of the law which stands to-day in two-thirds of the modern constitutions in the United States was an innovation here. As if the progress of the whole country was going to be stopped, because we want to get into the Constitution a provision which says that before a person using the power of the State can take from a man the property that belongs to him he must first pay for it. I say there are two-thirds of them. I will not take the time to read the clauses in the various constitutions, but nearly all the modern constitutions provide that this payment must be made in advance; and I believe the constitution in the state of Washington has been referred to more than any constitution in the United States—has been referred to more by members on this floor than any other constitution, and I am going to read that paragraph as it will only take a moment:

Private property shall not be taken for public use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money or ascertained and paid into court for the owner.

Now, I ask what could be more just than that? That is all that is demanded in this, and gentlemen, it does seem to me for the protection of the individual as against corporations we

tain manipulations and negotiations in order to secure the money for the enterprise, but if men who desire to engage in business enterprises see this provision in our Constitution and see that they can not go upon an individual's land without first paying for it, would not it have a tendency to retard this progress which we all so much desire? I say that the corporation ought to secure the individual for the value of his land, but I say the Legislature has already done that and it always will do it, and if in the good judgment of the people who compose the next Legislature, they deem it necessary and proper to require payment first to be made, let them do it, but let us not put a rigid, unyielding thing of this kind in our Constitution, which is so hard to amend. Leave it as it has been left by other states. Leave it as it is left by the Constitution of the United States. That is a good model with respect to a matter of this kind, and I do not believe that any injury would result from it.

Mr. SQUIRES. Mr. President, I would like to ask that this section and the following section, 23, pass over without action for the present, and for this reason. Mr. Varian informed me on yesterday that he had been making a careful examination of this subject and he is satisfied that the action already taken on section 23 is in violation of the law of eminent domain.

The PRESIDENT. No question about it.

Mr. SQUIRES. And the proposition which he has, I presume would be to strike out one of these sections and have the two sections consolidated, and for that reason and in his absence, I would like to have the Convention pass over these two sections, or further consideration of them, for the present.

Mr. EVANS (Weber).

Mr. President,

for private use. I understand he is preparing an argument on it.

Mr. SQUIRES. He might want to strike out one and amend the other.

Mr. EVANS (Weber). No; he talked to me about it.

The proposed amendment of Mr. Evans was read.

Mr. PIERCE. Are you going to put in the words, "or damaged?"

Mr. EVANS (Weber). I am willing to as far as I am concerned.

Mr. PIERCE. Well, I am in favor of the motion with those words in.

Mr. ELDREDGE. With the consent of the gentleman I would suggest it read as follows: "Private property shall not be taken or damaged for public or private use without just compensation," and leave all the balance to the Legislature.

Mr. EVANS (Weber). Section 23 provides that it shall not be taken or damaged.

Mr. KIMBALL (Weber). Mr. President, I offer this as a substitute for section 22:

Private property shall not be taken for public use, or damaged, without just compensation as determined by a jury, which shall be paid as soon as it can be ascertained and before possession is taken. No benefit which may accrue to the owner as a result of an improvement made by any private corporation shall be considered in fixing the compensation for property taken or damaged.

Mr. THURMAN. Mr. President, if any of these proposed amendments prevail, I hope it will be the last one proposed. There is something in that that has the true ring. I cannot say that I am exactly in full sympathy with it to the extent to which it goes, but, gentlemen, this is a serious question we are dealing with. There is nothing more sacred than the right of property, unless it be the right to live and enjoy

over the straw again that was threshed in committee of the whole. That is right. These men have a right to do that, but in the committee of the whole the vote was, very emphatic and it was overwhelming that if this principle of the right of the public by the strong arm of the law was to be exercised to the extent of taking a man's property away from him, it is as little as the public could be expected to do to pay the owner of the property in advance. Now, to show that I do not wish enterprises to be obstructed or stubborn men to have the chance to annoy, harass, or prevent them, I do not care how summary the proceedings may be provided by law as long as it is an impartial method by which the compensation may be ascertained, but I say let it be ascertained and the party who proposes to take the property be compelled to pay for it before possession is taken. If the ordinary course of the law is too tedious and too slow and may retard private enterprises, I do not care if you make a summary method by which a jury of three men may be picked up from the neighborhood of the owner—men acquainted with the property, and let them appraise the value, and when they have appraised the value, demand that payment be made in advance or hands off. No matter who it is, no matter how grand and how mighty and how all pervading the power may be that proposes to lay its hands upon the property of the individual, I say compel it to pay for the privilege, or hands off. Has it come to pass that here in free America we attach less importance to this than they did in old England a hundred years ago? Why, if I were an eloquent man, I might repeat to you the words of Lord Chatham, spoken upon the floor of the house of commons when he says, "The poorest man in his cottage may bid defiance to all the

here we propose to give a railroad corporation, and I speak of that, because the trouble always is with those—

Mr. JAMES. May I ask Mr. Thurman a question? Do you know in the last fifteen years in Utah Territory where the railroads have taken a piece of property from any individual and not paid for it?

Mr. THURMAN. Yes, sir.

Mr. JAMES. Would you name a case?

Mr. THURMAN. I will name the instance.

Mr. JAMES. Will you name the company and the case?

Mr. THURMAN. Yes, I will name the company; I do not suppose it will be giving away secrets.

Mr. EVANS (Weber). Without the consent of the owner, Mr. Thurman?

Mr. THURMAN. Why, of course it was without the consent of the owner. I will name an instance under the law which exists in the Territory of Utah to-day, in which a man was cited to appear in court and have the question of the necessity of taking the property determined and also appraise the value of it. That corporation had offered the man \$300 for his property. They were willing to pay him \$300 and rather than go to law he offered to take \$800 for his property, though protesting all the time that it was worth more than that. At last when we reached a jury the jury gave the man \$1500 for his property. There was this righteous corporation that my friend from Utah County referred to the other day, and this same question, when the committee of the whole overwhelmingly voted to place this measure in the article as we find it here. There was the righteous corporation exercising a power under a constitutional law. In that case it was unconstitutional.

Mr. RICHARDS. Will the gentleman

CERTIFICATE OF SERVICE

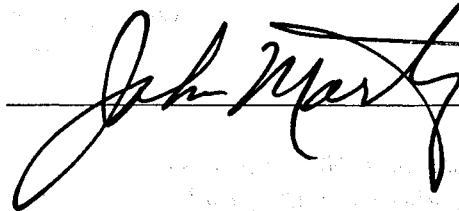
Filed eight copies of the foregoing, one containing an original signature, as well as a CD containing an electronic version of the same in WordPerfect format, with the Clerk of the Utah Court of Appeals:

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

and served two copies of the foregoing upon the following:

Attorney for Defendant Utah Department of Transportation
Randy S. Hunter
Assistant Attorney General
160 East 300 South, 5th Floor
Salt Lake City, Utah 84114-0857

via first class mail, postage pre-paid, this 12th day of May, 2004, addressed as set forth above.

A handwritten signature in black ink, appearing to read "John Marty", is written over a horizontal line.