

2004

K.J. Achter, Ruth Achter v. Utah Department of Transportation : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

K. J. and RUTH ACHTER et. al.

Plaintiffs/Appellants

vs.

THE UTAH DEPARTMENT OF
TRANSPORTATION, an agency of the
State of Utah,

Defendant/Appellee

BRIEF OF APPELLEES

Case No. 20040050-CA

BRIEF OF APPELLEE

AN APPEAL FROM AN ORDER OF DISMISSAL
THE HON. SHEILA K. McCLEVE PRESIDING
THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
TRIAL COURT CASE NO. 030912759

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BRIEF OF APPELLEES

Case No. 20040050-CA

Defendant/Appellee, Utah Department of Transportation, by and through counsel,
submits the following Brief in response to the Brief of Appellants.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2 (2003). This
appeal has been reassigned to the Court of Appeals by the Utah Supreme Court pursuant
to Utah Code Ann. § 78-2-2(4) (2003).

ISSUES TO BE DECIDED

(1) What is the statutory meaning of “proceeding” as used in 49 CFR § 24.107,
and

(2) Whether the Plaintiffs in this case (Appellants) were ever parties to the relevant
“proceeding.”

STANDARD OF REVIEW

A ruling on a motion to dismiss for failure to state a cause of action is an issue of law, and as a result is reviewable on appeal by the *de novo* standard of review.

STATEMENT OF FACTS

1. During the 1980s the Utah Department of Transportation (“UDOT”) determined that the Highway 89 corridor between Farmington and South Ogden needed widening and other improvements to increase public safety. As required by the National Environmental Policy Act (“NEPA”), UDOT prepared an Environmental Impact Statement (“EIS”), published September 9, 1996, which identified that approximately 136 homes and 22 businesses would be affected by the widening of the Highway 89 corridor.

2. Subsequent to the publication of the EIS, certain property owners along the Highway 89 corridor became concerned that because their property had been identified in the EIS, it had diminished in value.

3. On November 18, 1997, 14 months after the publication of the EIS, three property owners identified as Robinson, Scadden, and Reichel filed an inverse condemnation case against UDOT in the Second District Court, hereinafter referred to the “Robinson case.” (Robinson v. State, Civil No. 970700784, Second Judicial District Court, Davis County.)

4. During the 1998 General Legislative Session, the Utah Legislature appropriated \$10 million to UDOT for the purpose of “corridor preservation,” which monies were to be applied to hardship cases along the Highway 89 corridor.

5. In February, 1998, UDOT began settlement negotiations with affected property owners along the Highway 89 corridor.

6. A “Stipulation to Dismissal” of the Robinson case was signed by counsel for UDOT on March 19, 1998, and by counsel for the plaintiffs case on March 24, 1998. The Stipulation dismissed the Robinson case, but preserved the issue of attorneys fees to be awarded to plaintiffs’ counsel and the issue of future potential class action litigation. (Stipulation of Dismissal is attached hereto as Exhibit A.)

7. On March 16, 1998, Plaintiff’s counsel filed an Amended Complaint in the Robinson case with the Second District Court entitled “Amended Complaint for Inverse Condemnation along the Highway 89 Corridor, a Class Action.” No motion was filed with the Amended Complaint requesting leave of the Court to amend, pursuant to Rule 15 Utah Rules of Civil Procedure (“URCP”), nor was a motion filed seeking a class certification, pursuant to Rule 23, URCP.

8. On March 24, 1998, Defendant UDOT filed an objection to the Amended Complaint, citing Rule 15, URCP, as the basis for the objection.

9. Neither the Amended Complaint nor the class certification issue was ever acted upon by the Second District Court.

10. The issue of Plaintiffs’ attorneys fees in the Robinson case subsequently became a matter before the Utah Supreme Court in Robinson v. Utah Dept. of Transportation, 20 P.3d 396 (Utah 2001). The Supreme Court remanded the case to the Second District for determination of appropriate attorneys fees. (Attached as Exhibit B.)

11. In the remanded case, UDOT filed a Motion in Limine to preclude evidence of attorneys fees other than the named plaintiffs in the Robinson case.

12. Pursuant to the Motion in Limine, Judge Glenn R. Dawson, of the Second District Court, signed an Order on March 19, 2002, stating that “this court has no jurisdiction in this action over any person except the four property owners bound by the stipulation,” and that “attorneys fees are recoverable in this matter, only on behalf of the four property owners . . .” (Order on Motion in Limine, p. 2.) (Attached hereto as Exhibit C.)

13. Having been precluded by Judge Dawson’s Order, from presenting evidence as to attorneys fees for parties not named in the Robinson case – though that Order is subject to appeal – Plaintiffs’ counsel filed the subject lawsuit.

14. Plaintiffs’ Complaint was dismissed by the Honorable Sheila McCleve, by Order dated December 12, 2003, resulting in this appeal.

SUMMARY OF ARGUMENT

Having been precluded from presenting evidence in the Second District Court as to attorneys fees for parties not named in the Robinson case, Plaintiffs’ counsel wants a second bite at the apple, resulting in this case.

On its face, the obvious first question is whether Plaintiffs’ claim even rises to the level of a regulatory inverse condemnation case, given that an EIS is part of the UDOT planning process, and mere planning in anticipation of condemnation, without more, does not constitute a taking.

However, that issue does not have to be decided, however, because the language of the regulation governing, upon which Plaintiffs rely, is so clear, and the cases deciding this issue are so consistently uniform, that the determination can easily be made that because the Plaintiffs in this action were never parties to an inverse condemnation lawsuit, they are not entitled to an award of attorneys fees.

ARGUMENT

I. DO THE FACTS EVEN WARRANT THE PLAINTIFFS' PROPERTY BEING A SUBJECT OF INVERSE CONDEMNATION?

Plaintiffs' entire case is based on the assumption that Plaintiffs' properties were the subject of an inverse condemnation by UDOT. Yet no court has made that determination and UDOT strenuously denies it. The question is, whether a 14-month lapse between the publication of the EIS and the filing of the lawsuit constitutes a sufficient delay to warrant a finding of inverse condemnation. But it is not necessary to answer that question given the language of the regulation upon which Plaintiffs rely and the cases interpreting that regulation, as set forth hereinafter.

Nonetheless, to put the matter in perspective, UDOT is a state agency responsible for the construction and maintenance of federal and state highways in the state of Utah. It engages in road widening on a continual basis and condemns approximately 1,200 to 1,300 parcels of property each year. All road construction or road widening cases using federal funds require the publication of an EIS prior to the commencement of construction. An EIS is part of the planning activities mandated by NEPA, which UDOT

is subject to following. The publication of an EIS is not a final decision by UDOT.

Based upon the EIS, UDOT may decide to alter a project, abandon it, or proceed. The EIS is just one step in the planning process for the widening of a highway.

The rule has long been established that mere planning in anticipation of condemnation does not, without more, constitute a taking.¹ The United States Supreme Court has explicitly held that pre-condemnation activities do not constitute takings. The Court has stated:

Appellants also claim that the city's precondemnation activities constitute a taking. The State Supreme Court correctly rejected the contention that the municipality's good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellants' enjoyment of their property as to constitute a taking. Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. *Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are incidents of ownership. They cannot be considered as a taking in the constitutional sense.* (Emphasis added.)

Agin v. City of Tiburon, 447 U.S. 255, 263 n. 9 (1980) (citations and internal quotation marks omitted). See also Danforth v. United States, 308 U.S. 271, 285, 60 S.Ct. 231, 84 L.Ed. 240 (1939) (stating that "[a] reduction or increase in the value of property . . . by reason of legislation for or the beginning or completion of a project" does not constitute a

¹See the annotation entitled "Plotting or Planning in Anticipation of Improvement as Taking or Damaging Property Affected," 37 A.L.R. 3d 127 (1971).

taking). The Supreme Court later cited Agins and Danforth with approval for the proposition that “depreciation in value of property by reason of preliminary activity is not chargeable to the government.” First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 320 (1987).

There is a long standing legal distinction between physical takings and regulatory takings. In the subject case, there was no physical taking of any of the property owners’ properties. There was only an identification that a potential taking was possible at some time in the future. Frankly, any property adjacent to a major thoroughfare is subject to a potential taking at some time in the future. Defendant does not question, though, that there became a cloud of uncertainty over the status of Plaintiffs’ properties once the EIS was published. But that happens every time government contemplates a project requiring condemnation.

Though not entirely analogous, the United States Supreme Court held in Tahoe-Sierra Preservation Council Inc., et. al. v. Tahoe Regional Planning Agency et. al., 535 U.S. 302 (2002), that a moratoria totaling 32 months, while the Regional Planning Agency formulated a comprehensive land use plan for the Lake Tahoe area, did not constitute a taking of the property owners’ property without just compensation. As the Court stated: “a rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decision making.” Id. at 343.

As Justice Holmes noted in Pennsylvania Co. v. Mahon, 260 U.S. 393 (1922)

“government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” Id. at 413.

II. THE LANGUAGE OF 49 CFR 24.107 CLEARLY INDICATES THAT “PROCEEDING” MEANS LITIGATION AS THAT TERM IS USED IN THE REGULATION.

The basis of Plaintiffs’ claim for the award of attorneys fees is 49 CFR Part 24.107.² (Attached hereto as Exhibit D.) In its entirety, the regulation reads:

§ 24.107 Certain litigation expenses.³

The owner of the real property shall be reimbursed for any reasonable expenses, including reasonable attorney, appraisal, and engineering fees, which the owner actually incurred because of a condemnation proceeding, if:

(a) The *final judgment of the court* is that the Agency cannot acquire the real property by condemnation; or

(b) The condemnation proceeding is abandoned by the Agency other than under an agreed-upon settlement; or

(c) *The court having jurisdiction* renders a *judgment* in favor of the owner in an inverse condemnation *proceeding* or the Agency effects a settlement of *such* proceeding. (Emphasis added.)

²49 CFR § 24.107 has been adopted wholesale as part of UDOT’s state regulatory scheme, see Rule 933-1-1, Utah Admin. Code.

³Though not controlling, even the title of the regulation suggests that the reimbursement of attorneys fees are for “litigation expenses.”

Because a final judgment of the court was not rendered in the Robinson case and UDOT agency did not abandon the project, neither subsection (a) or (b) apply. However, subsection (c) would be applicable. According to subsection (c), an owner of real property can only recover attorneys fees if one of two outcomes occurs. First, the owner can recover attorneys fees if a court having jurisdiction over an inverse condemnation *proceeding* renders a judgment in favor of the owner. For a court to have jurisdiction over, or to render a judgment in a condemnation *proceeding*, that *proceeding* must be a lawsuit. Defendant cannot conceivably think of a situation in which a court would have jurisdiction over a matter that was not a lawsuit. Secondly, an owner can recover attorneys fees if the agency affects a settlement of *such* proceeding. “Such proceeding” inescapably refers to the “proceeding” previously mentioned – which proceeding is clearly a lawsuit because it is before a court.

The issue here is not what is the dictionary definition of “proceeding.” The question is how is that term used in the regulation. Plaintiffs want to say that the term “proceeding” has a broad definition in the law. Defendant does not dispute that point. But it goes without saying that for a court to have jurisdiction over a matter requires a lawsuit. Clearly “proceeding” in subsection (c) means litigation if the court is to have any jurisdiction at all.

Because the Second District Court never granted leave to amend Plaintiffs’ Complaint, and never certified the case as a class action, Plaintiffs in this case were not party plaintiffs in the Robinson case. Therefore, the Plaintiffs in this case have never

been parties to an inverse condemnation “proceeding” as that term is used in 49 CFR 24.107.

III. CASES INTERPRETING “PROCEEDING” UNDER 42 U.S.C.A. 4654(c) HOLD THAT PRE-LITIGATION ATTORNEY’S FEES ARE NOT RECOVERABLE.

Plaintiffs’ Brief takes the position that Defendants, by interpreting “proceeding” to mean a lawsuit, are defining the term too narrowly (Brief at 21), or being too “hyper-technical” (Brief at 15), or engaging in “procedural maneuvering” (Brief at 17). To support their position they cite a 1951 New Jersey case (interpreting a New Jersey statute), a 1913 Territory of Hawaii case (interpreting a Hawaii statute), and a 1980 Minnesota case (interpreting a Minnesota statute), none of which deal with 49 CFR § 24.107 or inverse condemnation (Plaintiffs’ Brief at 17).

Conversely, Defendants, in equating the term “proceeding” with an actual “lawsuit” or “action,” have relied upon court decisions dealing with inverse condemnation actions under § 4654(c) of the Uniform Relocation Property Acquisitions Act (“URA”).⁴ Section 4654(c) reads:

The *court rendering judgment* for the plaintiff in a *proceeding* brought under section 1346(a)(2) or 1491 of title 28, awarding compensation for the taking of property by a Federal agency, or the Attorney General effecting a settlement of any *such* proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will in the opinion of the court or the Attorney General reimburse such plaintiff for his reasonable costs,

⁴ 42 U.S.C.A. 4601-4655.

disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of *such proceeding*. (Emphasis added.)

The regulation found at 49 CFR § 24.107, which Plaintiffs rely upon for recovery of their fees, was enacted by the office of the Secretary of Transportation to comply with § 4654(c) of the URA. Court cases interpreting § 4654(c) of the URA, have unanimously held that pre-litigation expenses are not recoverable. As Plaintiffs note in their brief, “wholesale adoption, by one jurisdiction, of legislative language from another jurisdiction also presumptively adopts statements of underlying legislative purpose and judicial interpretations of legislative intent, see De Baritault v. Salt Lake City Corp., 913 P.2d 743 (Utah 1996); State v. Powasnik, 918 P.2d 146 (Utah App. 1996).” (Plaintiffs’ Brief at 16 n.5.)

In Swisher v. United States, plaintiffs petitioned under the URA to recover costs and attorney’s fees incurred for such litigation. 262 F. Supp. 2d. 1203, 1206 (D. Kan. 2003). Initially, plaintiffs’ counsel sought to bring a class action on behalf of several plaintiffs. Id. at 1209. However, the Court subsequently severed the claims of the original plaintiffs, leaving only the Swishers as parties to the action. The District Court held specifically that legal services rendered on behalf of clients prior to class certification could not be attributed to the claim later settled on behalf of the named clients. The Court reasoned that to be reasonable and hence recoverable, attorneys’ fees must “accurately reflect expenses attributable to plaintiffs’ counsel’s work on behalf of plaintiffs in this case.” Id. at 1210 (emphasis added). Therefore, the Court reasoned that although there

may be charges (incurred before the parties were severed) which would have been incurred had the named plaintiffs brought the instant action only, such charges should be reduced by one-ninth (the proportion of named to unnamed plaintiffs). *Id.* at 1209. The Court further stated that “pre-litigation expenses are precluded from reimbursement under 42 U.S.C. § 4654 (c),” (quoting *Emeny v. United States*, 526 F.2d 1121, 1124 (Ct. Cl. 1975)).

In a similar case, *City of Austin v. Travis County Landfill, Co.*, a landowner brought an action against the city, alleging that the city’s operation of civilian flights through his property’s airspace constituted a taking. 25 S.W.3d. 191, 194-97 (Tex. App. 1999) (*reversed on other grounds*). The Texas Court of Appeals affirmed the lower court, holding that there was a taking but that there was no statutory authority through which to award such fees because “[r]ecovery of attorneys’ fees is adverse to the common law and penal in nature, and statutes providing for such recovery must be strictly construed.” *Id.* at 201, 206. The Court reasoned that the “[URA] is a federal statute that provides for the recovery of *litigation* expenses, including attorney’s fees, by plaintiffs who *instigate* inverse condemnation proceedings under section 1346(a)(2) or 1491 of Title 28 of the United States Code.” *Id.* at 207 (emphasis added). Therefore, the Court pointed out, § 4654 provides authority for the award of expenses and attorney’s fees “in *actions* brought in either federal court or the Court of Federal Claims.” *Id.* (emphasis added).

In *Emeny v. United States*, owners of property sought to recover expenses incurred in an action which awarded them compensation for the United States’ storage of helium

in a structure located on their property. 526 F.2d 1121, 1123 (Ct. Cl. 1975). The United States Court of Claims held that the Plaintiffs were not entitled to recover costs and attorney fees incurred in ascertaining the nature and extent of their property rights in the gas storage capacity of the structure. Id. at 1124. The Court said that “the plain language of 42 U.S.C. § 4654 (c) precludes the court from including in its award to the plaintiffs any reimbursement for expenses incurred by the plaintiffs before they decided to file suit in the Court of Claims under 28 U.S.C. § 1491.” Id.

In Preseault v. United States, property owners petitioned for attorney’s fees and expenses pursuant to the URA after prevailing on a takings claim. 52 Fed. Cl. 667, 669-70 (2002). The Court held that “Section 4654(c) does not provide for the reimbursement of expenses incurred by plaintiffs before their decision to file suit in the Court of Federal Claims.” Id. at 671. The Court reasoned that “[l]ike the plaintiff who unsuccessfully attempts to negotiate a resolution of his controversy with the Government prior to bringing a takings claims, see Emeny, 526 F.2d at 1124, a plaintiff who seeks to reverse the taking on other grounds cannot recover compensation for expenses incurred to that end under the URA.” Id. at 672. The Court further reasoned that although it usually does not second-guess plaintiffs determination of what costs are reasonable, where a large proportion of the allowable fees are incurred after liability is determined and recovery under the URA is triggered, the Court cannot defer to the discipline of the market and must analyze such fees for reasonableness. See, id. at 680.

In Grantwood Village v. United States, a town which settled a suit it brought against the United States claiming that the National Trails System Act effected a taking from the town, requested expenses and attorney's fees for such litigation. 55 Fed. Cl. 481, 483 (2003). The Court held that the plaintiffs could not be reimbursed for costs associated with the quiet title action prior to filing their complaint, saying that "[o]nly those costs attributable to the litigation itself are compensable under the URA." Id. at 484-486. The Court further held that the "URA permits a plaintiff to be reimbursed for reasonable fees and costs which are 'actually incurred because of *such proceeding* [referring to the taking law suit]." Id. at 484 (citing 42 U.S.C. § 4654(c). The Court also noted that "[t]his can include expenses incurred in preparation of a complaint." Id. (citing Yancey v. United States, 915 F.2d 1534, 1543 (Fed. Cir. 1990).

In Yancey, turkey farmers filed suit for reimbursement of healthy turkey breeder stock which was sold at a reduction in value as a result of a quarantine imposed by USDA. 915 F.2d at 1536. The Court cited Emeny, 526 F.2d at 1124 for the proposition that "pre-litigation expenses are precluded from reimbursement under 42 U.S.C. § 4654(c)" and cited Clovenport Sand & Gravel Co. v. United States, 10 Cl. Ct. 121, 124 (1986) for the proposition that "'the significant effort expended' in 'the filing of the petition' may be compensable under the statute if proper documentation were provided." Id. at 1543.

Like most of the original plaintiffs in Swisher who were never certified as a class and therefore were not parties to the relevant proceeding, none of the Appellants were

certified as members of a class to the Highway 89 takings proceeding (the Robinson case), and consequently never became plaintiffs in such litigation. Therefore, any “expenses attributable to the plaintiffs’ counsel’s work on behalf of” the Appellants, who are “not plaintiffs to *this case*,” are neither reasonable nor recoverable. The Court in Swisher made a particular point of excluding any fees attributable to unnamed plaintiffs. It even reduced attorney’s fees (incurred before the claims were severed), which the Court acknowledged may have been incurred *even if* the plaintiffs “sought to bring the instant action only.”

Each of the courts in the authorities cited herein use the term “proceeding” interchangeably with “action,” “litigation,” “suit,” “case,” etc. There is no precedence for an award of attorney’s fees to persons who were not parties to the inverse condemnation *action*. In fact the nature of the Robinson inverse condemnation proceeding was defined by the Utah Supreme Court in its award of attorney’s fees to the named plaintiffs in the proceeding: “[t]he Utah Administrative Code mandates an award of plaintiff’s attorney fees where UDOT settles the plaintiff’s inverse condemnation *action*.” Robinson at 402.

IV. PLAINTIFFS ERR IN ALLEGING THAT “THE LOWER COURT ERRED IN APPLYING THE DOCTRINE OF *RES JUDICATA*.”

Plaintiffs want to make hay out of the fact that the trial court addressed the issue of *res judicata*. Plaintiffs err. The issue of *res judicata* was raised by Defendant in its original “Motion to Dismiss,” as an alternative theory. Defendant felt so strongly about its position regarding the language of 49 CFR § 24.107 and the cases cited above

interpreting the term “proceeding,” that it wanted to preclude Plaintiffs from responding by saying “oops, maybe we were parties in the Robinson case.”

If they took that position, then Defendant wanted to make it clear that the matter had already been ruled upon by the Second District Court, and was not a matter to be reconsidered by the Third District Court. Defendant said in its Motion to Dismiss:

It is Defendants’ firm position that the Plaintiffs in this action are not entitled to the recovery of attorneys fees because they were never certified as class members in the 1997 inverse condemnation proceeding, and therefore have never brought a lawsuit and were never part of the settlement of the 1997 case. However, were this Court to find that for some reason Plaintiffs in this case were to be treated as plaintiffs in the earlier action, then Plaintiffs claims are also precluded by *res judicata*. Judge Dawson has already heard and ruled on the claims brought by Plaintiffs in this action.

(Motion to Dismiss at 8).

The order of the court likewise follows the *alternative* theory. The order says: “If the Plaintiffs though not certified as a class and not named in the previous action, were parties to that action, then they are bound by the Second District Court’s ruling by the doctrine of *res judicata* and the appropriate remedy is an appeal of that ruling.” (Order of Dismissal at 4).

The point is Plaintiffs are trapped either way: If the term “proceeding” as used in the regulation actually means “lawsuit,” and Plaintiffs were not parties to the original Robinson lawsuit, then they cannot recover attorneys fees under the regulation.

Alternatively, if they then claim to be parties in the Robinson case in the present lawsuit, then the Second District Court ruling applies.

No error was made by the Third District Court in following that logic.

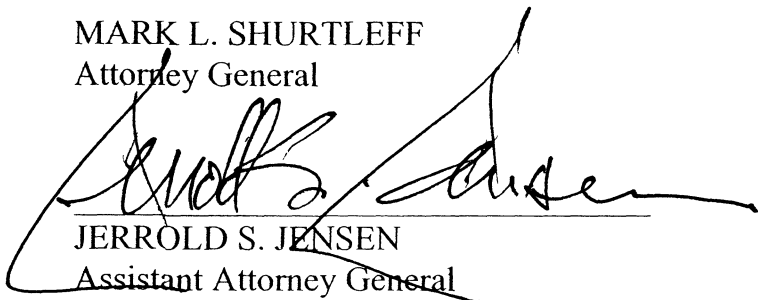
CONCLUSION

The term “proceeding” as used in 49 CFR 24.107 clearly references a lawsuit, and the court cases interpreting the same concur.

Therefore, Plaintiffs complaint does not state a cause of action upon which relief can be granted, and should be dismissed. The Third District Court’s ruling should be affirmed.

DATED this 26 day of July, 2004.

MARK L. SHURTLEFF
Attorney General



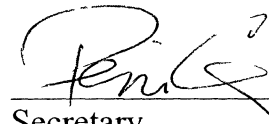
JERROLD S. JENSEN
Assistant Attorney General

CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing BRIEF OF APPELLEES was served by mailing the same, first class postage prepaid, on this 26 day of July, 2004, to the following:

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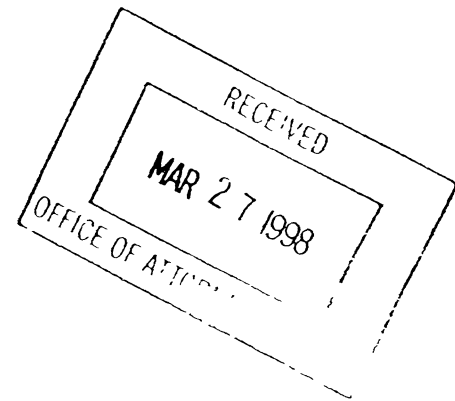
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Secretary

ADDENDA

EXHIBIT A

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SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

FARMINGTON DEPARTMENT, STATE OF UTAH

KAY K. ROBINSON; VANE R. and
MARILEE L. SCADDEN; BENJAMIN E.
and LE JOIE REICHEL; acting in their own
behalf and for all other parties interested or
otherwise similarly situated,

Plaintiffs,

vs.

STATE OF UTAH and its agency THE
UTAH DEPARTMENT OF
TRANSPORTATION,

Defendant.

STIPULATION TO DISMISSAL

Case No. 970700484

Judge

Come Now the PLAINTIFFS and the DEFENDANT, and STIPULATE TO
DISMISSAL of Plaintiffs' Complaint as follows.

1. The Parties to the above entitled action desire by this STIPULATION to fully resolve
all issues raised in the Complaint and to settle all claims and defenses which are the subject

matter of this dispute. This STIPULATION should be construed in the nature of an offer to compromise and settle the claims Plaintiffs assert against Defendant. As such, the relevant portions of Rule 408 of the Rules of Evidence are applicable.

2. This STIPULATION shall be binding upon the plaintiffs and Harland and Ardena Taylor, which constitute the names identified by Plaintiff's counsel at a meeting on December 16, 1997, in which Defendant agreed to a resolution of the above captioned case. All references to Plaintiffs or parties in this Stipulation shall include the named Plaintiffs and Mr. and Mrs. Taylor. No other parties shall be added to this litigation, or be governed by the terms of this Stipulation other than those listed in this paragraph.

3. Any possible class action claims or possible class members will not be affected or prejudiced by this Stipulation, and this Stipulation is not intended to preclude subsequent litigation being brought by any person concerning the same or similar alleged class of claims.

4. Pending the completion of the obligations of each party as set forth hereafter, all rights, defenses and obligations of each Plaintiff and the Defendant under the Utah Rules of Civil Procedure, and the laws of Utah shall be held in abeyance without waiver or prejudice to either party.

5. This Stipulation to Dismissal shall be subject to court approval pursuant to the Utah Rules of Civil Procedure, and shall be submitted to the Court for approval prior to further implementation of the terms herein.

6. Upon the successful implementation and completion of all duties and actions required of the parties in this Stipulation, each Plaintiff and the Defendant shall make a joint motion for dismissal of this action indicating to the court that the Stipulation has been fully implemented as to that Plaintiff, and asking the Court to dismiss the matter with prejudice.

7. The Plaintiffs have done the following:

A. Requested that the Defendant (UDOT) acquire the Plaintiffs' properties due to hardships which are individual and particular to them and which they allege are a result of their need to sell their property and potential for future condemnation and which they allege make it difficult to obtain a fair value for their properties; and

B. Submitted to the Defendant the addresses and legal descriptions of the properties owned by each Plaintiff, and the names and address of the owners of record.

B. Met with their counsel to review the amount of the appraisal.

8. The Defendant (UDOT) has done the following:

A. The Plaintiffs' properties have been approved for acquisition by the State Transportation Commission (Commission) at its regular meeting held December 17, 1997, to be acquired as far as money in the existing funds (available from rental car sales tax) for hardship acquisitions permits.

B. The Defendant has met with each of the Plaintiffs at the properties, and the properties have been appraised in accordance with the requirements of the Uniform Relocation

Assistance and Real Property Acquisition Act (Uniform Act).

C. All of the Plaintiffs have been advised that the appraisals are completed.

9. The Defendant (UDOT) shall do the following:

A. Present the appraisal and offer to purchase to the Plaintiffs, with counsel. A copy of the appraisal and offer will be left with the Plaintiff and counsel. The offer shall be made at a time and place convenient to Plaintiffs and their counsel.

B. UDOT shall determine if relocation and other assistance will be available for each of the Plaintiffs, and shall offer to the Plaintiffs the amount of assistance available. The amount of relocation assistance will be determined based on the criteria for assistance under the Uniform Act, although the payments will be made by UDOT without regard to the amount of assistance, if any, that may be received by UDOT.

C. In the event of an agreement with Plaintiffs on the amount of the offer, the amount of relocation expenses and other expenses, fees, moving expenses or other payments offered by UDOT, Defendant shall agree to pay to the Plaintiff the agreed upon amount for the property within 30 days of the agreement unless a another time is separately agreed.

10. The Plaintiffs shall do the following:

A. Following receipt of the appraisal and offer from UDOT, the Plaintiffs shall review the appraisals for accuracy and consistency and shall notify UDOT of any objections or errors that are believed to occurred.

B. After UDOI has responded to these objections, if any, the Plaintiffs shall each have thirty days to either accept the offer, request another appraisal or formal review of the appraisal, or elect to withdraw from the terms of this settlement Stipulation and the acquisition process, in accordance with the following procedures.

i. In the event that the offer is accepted, the Plaintiff will given written notice of acceptance to the Defendant, and a stipulated motion for dismissal shall be executed and submitted to the court prior to payment.

ii. In the event that the Plaintiff elects to have the property re-appraised, or to have the review appraisal prepared, the Plaintiff shall pay for the cost of the re-appraisal or of the new appraisal, and the new or review appraiser shall be selected from a list of approved appraisers provided by the Defendant. Upon receipt of the second appraisal the parties agree to be bound by the average of the two appraisals, or to elect to withdraw from the stipulation process.

iii. In the event that the Plaintiff elects to withdraw from this Stipulation, then neither party shall be bound by this agreement, and the values determined by appraisal, the relocation costs, and all agreements and offers made hereunder shall not be admissible in any subsequent litigation for any purpose without the consent of both parties.

11. Plaintiff's counsel may move the court for a determination of the appropriate fee as

part of the motion for approval of this Stipulation. Defendant reserves the right to contest liability for any attorney's fees.

12. It is the understanding of the parties that if the amount of funds available from that source is inadequate to acquire the properties by the date designated, that this Stipulation may be extended by UDOT for an additional term of 180 days or shall become void and of no effect as to the Plaintiffs and properties that are not able to be purchased within the time designated. If the plaintiffs' properties are not acquired due to the unavailability of funds, this action shall be subject to a motion to reopen and to recommence litigation as to that property or properties without prejudice.

13. This Stipulation represents the entire agreement of the parties and there are no collateral agreements either verbal or written that supplement this Agreement except as referenced herein.

14. This agreement is to be binding and enforceable against the successors and assigns of either party.

15. This entire agreement is intended as a settlement proposal and agreement that shall not be admissible in whole or in part in the event of subsequent litigation between these parties over the subject matter of this dispute or in any other litigation between UDOT and any possible member of the alleged class.

DATED this 24th day of March 1998

JAN GRAHAM
Attorney General
STEVEN F. ALDER
Assistant Attorney General
Attorney for State of Utah

By Steven F. Alder date Mar 19, 1998

Douglas M. Durbano
DURBANO LAW FIRM
Randon W. Wilson
Vincent C. Rampton
JONES, WALDO, HOLBROOK, & McDONOUGH
Attorneys for Plaintiffs

By [Signature] date Mar 24, 1998

EXHIBIT B

Westlaw.

20 P.3d 396

416 Utah Adv. Rep. 10, 2001 UT 21

(Cite as: 20 P.3d 396)

H

Supreme Court of Utah.

Kay K. ROBINSON; Vance R. and Marilee L.
 Scadden; Benjamin E. and Le
 Joie Reichel; Harland G. and Ardena B. Taylor;
 Douglas L. and Janice W.
 Frost; and Harold B. and Charlotte A. Austin, acting
 in their own behalf and
 for all other parties interested or otherwise similarly
 situated, Plaintiffs
 and Appellants,
 v.
 STATE of Utah and its Agency the Utah Department
 of Transportation, Defendants
 and Appellees.

No. 990206.

March 6, 2001.

Rehearing Denied March 2, 2001.

Landowners sought attorney fees after settling inverse condemnation action arising out of federally funded highway project. The Second District Court, Davis County, Glen R. Dawson, J., denied motion. Landowners appealed. The Supreme Court, Durrant, J., held that: (1) DOT was not an "executive department" within the meaning of the separation of powers clause prohibiting one department from exercising powers of another department, and (2) DOT regulation that incorporated by reference federal regulation entitling a landowner to attorney fees incurred in an inverse condemnation case was valid exercise of delegated authority.

Reversed and remanded.

West Headnotes

[1] Appeal and Error ⚡842(2)
30k842(2) Most Cited Cases

The Supreme Court gives no deference to the trial court's legal conclusions, but reviews them for correctness.

[2] Costs ⚡194.16
102k194.16 Most Cited Cases

Attorney fees are recoverable if provided for by statute.

[3] Costs ⚡194.16
102k194.16 Most Cited Cases
 Authorization

Administrative rules are the same as statutory sources for an award of attorney fees.

[4] Eminent Domain ⚡316
148k316 Most Cited Cases

Even a meritless inverse condemnation action entitled the landowners to attorney fees under Department of Transportation (DOT) regulation that incorporated by reference federal regulation entitling a landowner to attorney fees incurred in an inverse condemnation case settled by the DOT. 49 C.F.R. § 24.107; Utah Admin. Code R933-1-1.

[5] Constitutional Law ⚡76
92k76 Most Cited Cases

Department of Transportation (DOT) was not an "executive department" within the meaning of the separation of powers clause prohibiting one department from exercising powers of another department, and, thus, the DOT could engage in rulemaking. Const. Art. 5, § 1; Art. 7, § 1.

[6] Constitutional Law ⚡62(1)
92k62(1) Most Cited Cases

Constitutional provision which vests legislative power in the legislature does restrict the ability of the legislature to delegate legislative functions to administrative agencies. Const. Art. 6, § 1.

[7] Constitutional Law ⚡62(3)
92k62(3) Most Cited Cases

Because the constitution vests the legislative power in the legislature, administrative agencies may only effect policy mandated by statute and cannot exercise a sweeping power to create whatever rules they deem necessary. Const. Art. 6, § 1.

[8] Constitutional Law ⚡62(2)
92k62(2) Most Cited Cases

Where the legislature delegates to an administrative agency power to make rules and regulations, such delegation must be accompanied by a declared policy outlining the field within which such rules and regulations may be adopted. Const. Art. 6, § 1.

[9] Constitutional Law ⚡62(7)
92k62(7) Most Cited Cases

[9] Eminent Domain ⚡316
148k316 Most Cited Cases

Legislature provided adequate direction and properly delegated to the Department of Transportation (DOT) the authority to incorporate federal regulations by reference, including a requirement to pay attorney fees incurred by a landowner in an inverse condemnation case; statutes require the DOT to cooperate with the federal government in all federal-aid projects and allow the DOT to incorporate federal regulations by reference. Const. Art. 6, § 1; U.C.A. 1953, 63-46a-2, 63-46a-3(7)(a), 72-1-201, 72-1-208(2); 49 C.F.R. § 24.107; Utah Admin. Code R933-1-1.

[10] States ⚡215
360k215 Most Cited Cases

An agency rule may impose liability on the state for attorney fees and costs; the potential sources of the state's liability for costs are not limited to statute or court rule.

[11] States ⚡215
360k215 Most Cited Cases

Department of Transportation (DOT) regulation that incorporated by reference federal regulation entitling a landowner to attorney fees incurred in an inverse condemnation case satisfied the standard for clearly expressing the state sovereign's liability for costs; the regulation expressly provided that the owner would be reimbursed for attorney fees where the DOT settled an inverse condemnation action. 49 C.F.R. § 24.107; Utah Admin. Code R933-1-1.

[12] Constitutional Law ⚡62(7)
92k62(7) Most Cited Cases

[12] Eminent Domain ⚡316
148k316 Most Cited Cases

Department of Transportation (DOT) regulation that incorporated by reference federal regulation entitling a landowner to attorney fees incurred in an inverse

condemnation case was consistent with its delegated authority and governing statutes which require cooperation with the federal government in federal aid projects; the DOT had no discretion in determining whether to follow the mandates of the Uniform Relocation Assistance Real Property Acquisition Procedures Act and its regulations. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, §§ 101-305, 42 U.S.C.A. §§ 4601-4655; U.C.A. 1953, 63-46a-2, 63-46a-3(7)(a), 72-1-201, 72-1-208(2).

[13] Constitutional Law ⚡62(2)
92k62(2) Most Cited Cases

The legislature need not specifically address each issue that may arise when an agency actually implements the policy, especially where the administrative agency lacks any real discretion in implementing the policy.

[14] Constitutional Law ⚡281
92k281 Most Cited Cases

[14] Eminent Domain ⚡316
148k316 Most Cited Cases

Department of Transportation (DOT) regulation was not made unconstitutionally vague by its incorporation by reference to federal regulation entitling a landowner to attorney fees incurred in an inverse condemnation case. 49 C.F.R. § 24.107; Utah Admin. Code R933-1-1.

*397 Douglas M. Durbano, George W. Burbidge, II, Layton; Randon W. Wilson, Vincent C. Rampton, Salt Lake City, for plaintiffs.

Jan Graham, Att'y Gen., Steven F. Alder, Asst. Att'y Gen., Salt Lake City, for defendants.

DURRANT, Justice:

¶ 1 Appellants, a group of landowners, filed an inverse condemnation action against the State of Utah and its agency, the Utah Department of Transportation (collectively "UDOT"). The case settled before trial, but the question of whether appellants were entitled to an award of attorney fees was left open. The district court denied appellants' motion for an award of attorney fees, and appellants appeal that decision. We reverse.

BACKGROUND

¶ 2 U.S. Highway 89 spans the length of Utah from Arizona to Idaho, connecting most of this state's populated areas. At some point in the early 1980s, UDOT determined that the Highway 89 corridor

between Farmington and South Ogden needed significant expansion and improvements to increase public safety. To this end, UDOT began exploring potential alternatives, holding public meetings, and conducting a "scoping study." In compliance with the National Environmental Policy Act, UDOT prepared an Environmental Impact Statement (EIS) for the project. An initial draft was completed in December 1995, and the Final EIS was issued on September 9, 1996.

¶ 3 The EIS revealed UDOT's preferred alternative for improvements as well as other options. Further, the EIS specifically "identified *398 136 houses, 22 businesses, and numerous public properties and buildings, that may be impacted to some degree by the preferred alternative." Appellants' homes were among these specifically identified properties.

¶ 4 UDOT anticipated the project would be broken up into several stages as budgetary constraints allowed. Because of the uncertainty of state and federal funding, no dates were set for either the beginning or completion of any stage of the project or for the acquisition of any affected property. The exact extent and nature of improvements remain undetermined. At present, some work has already begun; however, the entire project may not be completed for more than ten years.

¶ 5 After publication of the Final EIS, appellants attempted to sell their homes. The contemplated sales were not prompted by UDOT's proposed expansion of the highway, but rather, by reasons such as job relocations and health concerns. Appellants claim they were unable to sell their properties for market value, however, because, "as a direct and proximate result of [UDOT's] actions in identifying [appellants'] property [in the EIS], the value and marketability of the property ha[d] been negatively impacted." Therefore, appellants asked UDOT to purchase their homes at fair market value. The parties were unable to come to terms, however, and appellants sued UDOT claiming inverse condemnation. Before trial, the parties stipulated that UDOT would purchase appellants' homes at mutually agreeable prices. The stipulation was approved by the trial court. Because the stipulation did not address the question of attorney fees, appellants filed a Motion for an Award of Attorney Fees. The district court denied the motion; appellants appeal that decision.

STANDARD OF REVIEW

[1] ¶ 6 In arguing the motion for an award of attorney fees, the parties relied on their pleadings and also submitted affidavits to the district court. "Where outside matters are 'presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule

56....' " *Swenson v. Erickson*, 2000 UT 16, ¶ 8, 998 P.2d 807 (quoting Utah R. Civ. P. 12(b)). Accordingly, "we consider the evidence in the light most favorable to the nonmoving party and affirm only where it appears that there is no genuine dispute as to any material issues of fact and the moving party is entitled to judgment as a matter of law." *Id.* ¶ 10 (citing *Thayne v. Beneficial Utah, Inc.*, 874 P.2d 120, 124 (Utah 1994)). We give no deference to the trial court's legal conclusions, reviewing them, instead, for correctness. *See id.* (citing *Geisdorf v. Doughty*, 972 P.2d 67, 69-70 (Utah 1998)).

DISCUSSION

¶ 7 Appellants rely upon both federal and state law for their contention that they are entitled to attorney fees. As to federal law, they assert that UDOT is required to pay their fees under the Uniform Relocation Assistance Real Property Acquisition Procedures Act, 42 U.S.C.A. §§ 4601-4655 (1995 & Supp.2000) (the "Uniform Act"), and the federal regulations that implement the Uniform Act. In response, UDOT argues, inter alia, that the Uniform Act and its implementing regulations do not provide individuals with a cause of action for attorney fees, but merely define the relationship between state and federal agencies.

[2][3] ¶ 8 As to state law, appellants argue that even if the Uniform Act and its regulations do not directly entitle them to attorney fees, they are so entitled by virtue of the Utah Administrative Code, [FN1] in which UDOT has adopted wholesale those same federal regulations. [FN2] We agree. Because we rely on state law in deciding this case, we do *399 not reach the question of whether federal law also provides a basis for the award of fees.

FN1. Under Utah law, an award of attorney fees is recoverable if it is provided for by statute. *See Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988). Since state administrative rules are implemented pursuant to statutory authority and have the force and effect of law, *see, e.g., Horton v. State Ret. Bd.*, 842 P.2d 928, 932 n. 2 (Utah Ct.App.1992), we consider them as we would statutory sources for an award of attorney fees.

FN2. The federal regulations were adopted by rule 933-1-1 of the Utah Administrative Code, which provides as follows: "The State of Utah incorporates by reference 49 CFR 24 as amended in the Federal Register, March 2,

1989, as its administrative rules on the acquisition of rights of way."

I. APPLICABILITY OF 49 C.F.R. § 24.107 TO THE SETTLEMENT AT ISSUE

¶ 9 We first consider the question of whether 49 C.F.R. § 24.107, as adopted by Rule 933-1-1 of the Utah Administrative Code, requires, on its face, the payment of attorney fees in circumstances such as are presented in this case. Section 24.107 applies "to any acquisition of real property for ... programs and projects where there is Federal financial assistance [FN3] in any part of project costs...." 49 C.F.R. § 24.101(a) (1995). In this case, the parties stipulated, for the purposes of the motion for an award of attorney fees, that the U.S. Highway 89 expansion and improvement project would be "a federally funded state project."

FN3. "The term *Federal financial assistance* means a grant, loan, or contribution provided by the United States...." 49 C.F.R. § 24.2(j) (1995).

[4] ¶ 10 Section 24.107 provides that "[t]he owner of the real property *shall* be reimbursed for any ... reasonable attorney ... fees, which the owner actually incurred because of a condemnation proceeding, if: ... (c) The court having jurisdiction renders a judgment in favor of the owner in an inverse condemnation proceeding, or the Agency effects a settlement of such proceeding." *Id.* § 24.107 (emphasis added). Appellants' complaint includes a claim that UDOT had inversely condemned their property. That lawsuit was settled and UDOT "agreed to purchase Plaintiffs' homes immediately at mutually agreeable prices." Thus, this case is squarely within the language of section 24.107. [FN4]

FN4. UDOT contests this conclusion by arguing that the inverse condemnation proceeding lacked merit. The settlement of such a proceeding is covered by the plain language of section 24.107, however, regardless of the merit of the underlying claim. Similarly, it is irrelevant whether UDOT planned to acquire appellants' property because of the hardship appellants were under and not because it felt the Uniform Act, the federal regulations implementing the Uniform Act, or the Utah Administrative Code compelled it. It remains a settlement of an inverse condemnation proceeding, and,

therefore, 49 C.F.R. § 24.107 governs.

II. THE CONSTITUTIONALITY OF UDOT'S ADOPTION OF 49 C.F.R. § 24.107

¶ 11 Having concluded that Section 24.107, as adopted by rule 933-1-1, requires the payment of attorney fees, we next address the constitutionality of rule 933-1-1's adoption of section 24.107. UDOT contends that it unconstitutionally exceeded its own authority in adopting the federal regulations that implement the Uniform Act. In so doing, UDOT finds itself in the unenviable position of arguing that it is not bound by its own rule. We disagree and hold that UDOT is bound by Rule 933-1-1.

A. Article V, Section 1

[5] ¶ 12 UDOT contends that article V, section 1 of the Utah Constitution limits UDOT's rulemaking authority. That section provides as follows:

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no *person charged with the exercise of powers properly belonging to one of these departments*, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

Utah Const. art. V, § 1 (emphasis added). In adopting section 24.107, UDOT engaged in the legislative function of rulemaking. UDOT contends that, as an executive branch agency, it was precluded from doing so by article V, section 1. This argument fails, however, because UDOT is not a part of the executive branch for purposes of article V, section 1. The constitution itself defines those "persons" who are deemed to be a part of the Executive Department, and that definition does not include administrative agencies. See Utah Const. art. VII, § 1. Addressing this question in *State v. Gallion*, 572 P.2d 683 (Utah 1977), we held as follows:

*400 Since the inhibitions of the Article V, Section 1, are directed toward specific "persons," there is nothing to restrain the legislative department from creating administrative bodies to exercise legislative functions, viz., rule making. Although administrative bodies are nominally designated a part of the executive branch, they do not fall within the Constitutional definition of the Executive Department and the prohibition of Article V, Section 1 does not apply thereto.

Id. at 687. We see no reason, and UDOT provides none, for departing from this interpretation. Therefore, we hold that article V, section 1 does not limit UDOT's authority, as an administrative body, to make rules.

B. Article VI, Section 1

¶ 13 UDOT further contends that its rulemaking authority is limited by article VI, section 1 of the Utah Constitution, which, in pertinent part, vests "[t]he Legislative power of the State ... [i]n ... the Legislature of the State of Utah...." Utah Const. art. VI, § 1. Under this argument, even if UDOT is not constitutionally a part of the executive branch for purposes of article V, section 1, it is, nevertheless, precluded by article VI, section 1 from exercising legislative power because it is not a part of the legislature either. The first question that arises in this regard is whether the legislative power of rulemaking was properly delegated by the legislature to UDOT.

[6][7][8][9] ¶ 14 Article VI, section 1 does restrict the ability of the legislature to delegate legislative functions to administrative agencies. *See Gallion*, 572 P.2d at 687 (noting that while article V, section 1 does not "proscribe the delegation of legislative power, ... under Article VI, Section 1, there are limitations in this regard ..."). Because the constitution vests the legislative power in the legislature, administrative agencies may only effect policy mandated by statute and cannot exercise a sweeping power to create whatever rules they deem necessary. *See State v. Goss*, 79 Utah 559, 11 P.2d 340, 341-44 (1932). Accordingly, "[w]here the legislature delegates to an administrative agency power to make rules and regulations, such delegation must be accompanied by a declared policy outlining the field within which such rules and regulations may be adopted." *Bird & Jex Co. v. Funk*, 96 Utah 450, 85 P.2d 831, 834 (1939). The question then becomes whether the legislature expressed a policy that adequately directed UDOT in enacting rule 933-1-1. We hold that it did.

¶ 15 Section 72-1-201 of the Utah Code "create[s] the Department of Transportation which shall: ... (8) in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, make policy and rules for the administration of the department, state transportation systems, and programs." Utah Code Ann. § 72-1-201 (Supp.2000). Thus, the legislature specifically granted UDOT the power to enact administrative rules. An agency "rule" is defined as "an agency's written statement that ... (i) is explicitly or implicitly required by state or federal statute or other applicable law; (ii) has the effect of law; (iii) implements or interprets a state or federal legal mandate; and (iv) applies to a class of persons or another agency." Utah Code Ann. § 63-46a-2(16)(a) (1997). Together, these sections evince a legislative intent that UDOT enact rules to comply with federal mandates.

¶ 16 And more specifically, section 72-1-208(2) of the

Utah Code requires that UDOT, "with the approval of the governor, *shall cooperate with the federal government in all federal-aid projects* and with all state departments in all matters in connection with the use of the highways." Utah Code Ann. § 72-1-208(2) (Supp.2000) (emphasis added). In so cooperating, the legislature allows UDOT to "incorporate[] by reference ... regulation[s] that ha[ve] been adopted by a federal agency...." Utah Code Ann. § 63-46a-3(7)(a) (Supp.2000). Read together, these statutes demonstrate a clear delegation by the legislature to UDOT of rulemaking authority, as well as a legislative policy directing UDOT to comply with federal mandates for federal-aid projects.

¶ 17 UDOT's wholesale adoption of the regulations implementing the Uniform Act complies with the federal mandate that, in order to receive federal financial assistance, a state agency must either (1) give assurances *401 to the federal government that it will comply with the Uniform Act and the federal regulations implementing the Uniform Act or (2) certify with the Federal Highway Administration that it will act according to State laws that are equivalent to the Uniform Act in purpose and effect. *See* 49 C.F.R. § 24.4(a)(1) (1995) (requiring assurances); 49 C.F.R. §§ 24.601-.602 (1995) (discussing the certification process). In light of the clear legislative policy of compliance with federal mandates in such a situation, the UDOT rule is not in conflict with Article VI, section 1, of the Utah Constitution. The power to make such a rule was properly delegated by the legislature to UDOT.

III. STANDARD FOR CREATION OF ATTORNEY FEE LIABILITY

¶ 18 UDOT next argues that beyond the normal legislative authorization required by article VI, section 1 of the Utah Constitution for an administrative agency to enact a rule, when the agency seeks to enact a rule creating attorney fee liability its legislative authorization must be explicit or clearly implied. In support of this argument, UDOT relies on *Tracy v. Peterson*, 1 Utah 2d 213, 265 P.2d 393 (1954).

¶ 19 In *Tracy*, the trial court imposed costs on the state pursuant to rule 54(d)(1) of the Utah Rules of Civil Procedure, which allows costs to be awarded to the prevailing party. We concluded that this rule provided an insufficient basis for awarding costs against the state, holding that "[t]he sovereign is not liable for costs unless there is some statute or rule of court which expressly or by clear implication includes it.... The general terms of a statute giving costs to the prevailing party do not include the sovereign." *Id.* at 396.

¶ 20 UDOT contends that *Tracy*'s analysis as to an award of costs would apply *a fortiori* to an award of attorney fees against the sovereign. From this UDOT concludes that it exceeded its own authority in enacting a rule creating attorney fee liability because it did not have "clear and explicit statutory authorization" to do so.

[10] ¶ 21 Assuming, without deciding, that *Tracy* applies *a fortiori* to an award of attorney fees, we nevertheless conclude that UDOT's reliance on *Tracy* is misplaced. *Tracy* does not purport to limit the potential sources of costs liability to statute or court rule, thereby precluding an agency rule as a source of costs liability.

Although *Tracy* referred to statutes and rules of court as the most typical sources of costs liability, it did not address the question of what other sources of law might provide a legitimate basis for an award of costs. Instead, *Tracy* propounds a rule of interpretive construction that limits the role of a court in imposing costs liability on the state, but that does not necessarily limit the role of an administrative agency in enacting a rule imposing such liability on the state. In the case at hand, UDOT has enacted a rule providing for attorney fee liability. The *Tracy* standard is a limitation on our latitude in interpreting that rule, not on UDOT's authority to make the rule. We can impose attorney fee liability on UDOT only if the rule it enacted expressly or by clear implication created such liability. A different standard applies to UDOT's enactment of that rule, however. We have held that an agency's rules need only "be consistent with its governing statutes." *Sanders Brine Shrimp v. Audit Div. of the Utah State Tax Comm'n*, 846 P.2d 1304, 1306 (Utah 1993) (emphasis added). Accordingly, as long as "the policy and purpose of the legislation are clearly expressed, the absence of detailed standards in legislation will not necessarily render it invalid as an unlawful delegation of legislative authority." *Opinion of the Justices to the Senate*, 422 Mass. 1201, 660 N.E.2d 652, 658 (1996) (emphasis added) (quoting *Chelmsford Trailer Park, Inc. v. Chelmsford*, 393 Mass. 186, 469 N.E.2d 1259, 1262 (1984)).

[11] ¶ 22 With these standards in mind, we turn to the statute and administrative rule at issue in the case at hand. Again, assuming that *Tracy* applies *a fortiori* to an award of attorney fees, we first consider the question of whether section 24.107, as adopted by UDOT in rule 933-1-1, satisfies the *Tracy* standard. Clearly, it does.

It expressly provides that the owner of real property shall be reimbursed for attorney *402 fees where an agency settles a condemnation action.

[12][13] ¶ 23 We next consider the question of whether UDOT's adoption of this section was consistent with its governing statutes. Those statutes include a clear

legislative policy to cooperate with the federal government on federal-aid projects. It is unnecessary for the legislature to specifically address each issue that may arise when an agency actually implements the policy. This is especially true where, as here, the administrative agency lacks any real discretion in implementing the policy. The legislature dictated that UDOT must comply with federal mandates and, more specifically, cooperate with the federal government in federal aid projects. See Utah Code Ann. §§ 63-46a-2, 72-1-201, and 72-1-208(2). In light of these directives, UDOT had no discretion in determining whether to follow the mandates of the Uniform Act and its implementing regulations. By adopting a rule that complied with federal requirements, UDOT acted consistently with the legislative directives of sections 72-1-201, 63-46a-2, and 72-1-208(2) of the Utah Code. We decline to apply a more rigorous standard to an agency's rulemaking solely because that rulemaking creates attorney fee liability, and conclude that UDOT's adoption of a rule creating attorney fee liability was consistent with the authority delegated to it by the legislature.

IV. VAGUENESS

[14] ¶ 24 Finally, UDOT contends that the administrative rule itself is too vague to create liability as it only incorporates by reference the federal regulations. We find no merit in this. As incorporated in the Utah Administrative Code, these regulations specifically and clearly create a right to an award of attorney fees in settlements of condemnation proceedings. Therefore, the UDOT regulations are valid.

CONCLUSION

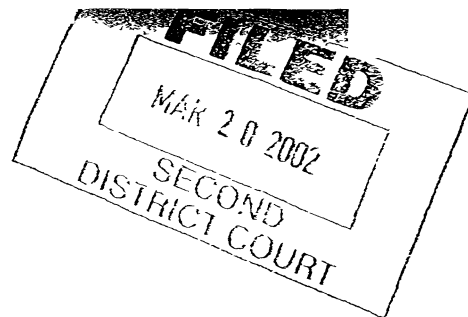
¶ 25 The district court erred in denying appellants' motion for an award of attorney fees. The Utah Administrative Code mandates an award of a plaintiff's attorney fees where UDOT settles the plaintiff's inverse condemnation action. We remand for proceedings consistent with this opinion.

¶ 26 Chief Justice HOWE, Associate Chief Justice RUSSON, Justice DURHAM, and Justice WILKINS concur in Justice DURRANT's opinion.

20 P.3d 396, 416 Utah Adv. Rep. 10, 2001 UT 21

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EXHIBIT C



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IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
DAVIS COUNTY, STATE OF UTAH

KAY K. ROBINSON; VANE R. and
MARILEE L. SCADDEN; BENJAMIN E.
and LE JOIE REICHEL; acting in their own
behalf and for all other parties interested or
otherwise similarly situated,

Plaintiffs,

vs.

STATE OF UTAH and its Agency THE
UTAH DEPARTMENT OF
TRANSPORTATION,

Defendant.

ORDER ON MOTION IN LIMINE

Civil No. 970700484

Judge Glenn R. Dawson

Defendant's Motion in Limine having been heard by the court on February 22, 2002 at
9:00 a.m., and the court having heard argument of counsel and being fully knowledgeable of the
law and the facts makes the following:

Findings of Fact

1. This matter was filed November 18, 1997 by the named Plaintiffs; Kay Robinson, Vane and Marilee Scadden, and Benjamine and LeJoie Reichel; and alleged *inter alia* to be a class action.
2. On March 26, 2001 the parties reached a settlement of the matter on behalf of the named Plaintiffs Kay Robinson, Vane and Marilee Scadden, and Benjamine and LeJoie Reichel and two additional persons, Harland and Ardena Taylor.
3. The Stipulation to Dismissal was presented at a hearing held May 18, 1998 in accordance with Rule 24 of the Utah Rules of Civil Procedure and approved by an Order signed on June 4, 1998.
4. Only four property owners were to be governed by the Stipulation to Dismissal settling this inverse action and all other persons including potential class members were not bound by its terms and were free to pursue any other remedies against the Defendant.

Conclusions of Law

1. This case has been remanded to the trial court by the Utah Supreme Court for a determination of a reasonable attorneys fee to be awarded to the plaintiffs in this matter.
2. This court has no jurisdiction in this action over any person except the four property owners bound by the Stipulation.
3. Attorneys fees are recoverable in this matter, only on behalf of the four property owners, who are parties to the Stipulation, and evidence of attorney fees will be limited to that

evidence that is relevant to the attorney fee claims of the four named property owners.

NOW THEREFORE, it is hereby Ordered as follows:

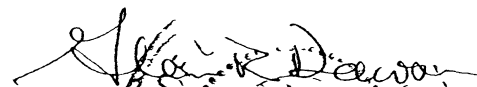
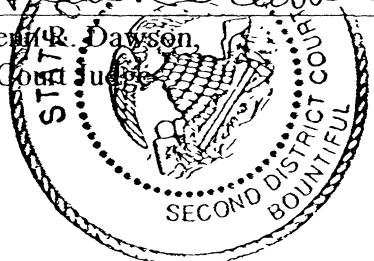
1. The parties are to complete their designation of witnesses and shall limit witnesses to those persons who will testify concerning the legal work and attorney fees on behalf of the four property owners identified in the Stipulation to Dismissal; to wit: Kay Robinson, Vane and Marilee Scadden, Benjamine and LeJoie Reichel, and Harland and Ardena Taylor.

2. The parties are to complete all discovery including the exchange of expert reports and the deposition of expert witnesses or other predicate witnesses to the experts no later than 60 days from this Order.

3. A Final Pretrial Order shall be submitted by April 8, 2002 and a Final Pre-trial Conference shall be held April ³⁰~~16~~, 2002 at 11:00 a.m. at which time a trial date shall be set.

DATED this 19th day of March, 2002.

BY THE COURT


Hon. Glen R. Dawson,
District Court Judge


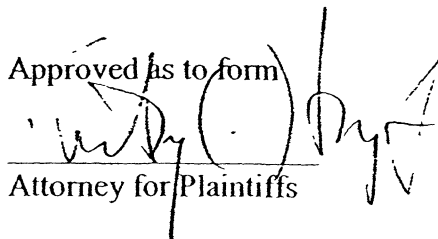
Approved as to form

Attorney for Plaintiffs

EXHIBIT D

Westlaw.

49 CFR § 24.107
49 C.F.R. § 24.107

C

**CODE OF FEDERAL REGULATIONS
TITLE 49--TRANSPORTATION
SUBTITLE A--OFFICE OF THE SECRETARY
OF TRANSPORTATION
PART 24--UNIFORM RELOCATION
ASSISTANCE AND REAL PROPERTY
ACQUISITION FOR
FEDERAL AND FEDERALLY ASSISTED
PROGRAMS
SUBPART B--REAL PROPERTY
ACQUISITION**

Current through July 14, 2004; 69 FR 42274

§ 24.107 Certain litigation expenses.

The owner of the real property shall be reimbursed for any reasonable expenses, including reasonable attorney, appraisal, and engineering fees, which the owner actually incurred because of a condemnation proceeding, if:

- (a) The final judgment of the court is that the Agency cannot acquire the real property by condemnation; or
- (b) The condemnation proceeding is abandoned by the Agency other than under an agreed-upon settlement; or
- (c) The court having jurisdiction renders a judgment in favor of the owner in an inverse condemnation proceeding or the Agency effects a settlement of such proceeding.

<General Materials (GM) - References, Annotations,
or Tables>

49 C. F. R. § 24.107

49 CFR § 24.107

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