

2006

Wintergreen Group v. Utah DOT : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

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WINTERGREEN GROUP, LC, a Utah
Limited Liability Company,

Plaintiff-Appellant,

v.

UTAH DEPARTMENT OF
TRANSPORTATION,

Defendant-Appellee.

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Supreme Court Case No. 20060338-SC

Oral Argument Priority No. 15

Trial Court Case No. 050300341
Judge Randall N. Skanchy

APPEAL

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FILED
UTAH APPELLATE COURTS

IN THE UTAH SUPREME COURT

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| WINTERGREEN GROUP, LC, a Utah Limited Liability Company, | : | |
| | : | Supreme Court Case No. 20060338-SC |
| Plaintiff-Appellant, | : | |
| | : | |
| v. | : | |
| | : | Oral Argument Priority No. 15 |
| UTAH DEPARTMENT OF TRANSPORTATION, | : | |
| | : | |
| | : | Trial Court Case No. 050300341 |
| Defendant-Appellee. | : | Judge Randall N. Skanchy |
| | : | |

V.

Defendant-Appellee.

Oral Argument Priority No. 15

Judge Randall N. Skanchy

APPELLANT'S OPENING BRIEF

APPEAL

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(Oral Argument and Published Decision Requested)

IN THE UTAH SUPREME COURT

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| | : | |
| v. | : | |
| | : | Oral Argument Priority No. 15 |
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| TRANSPORTATION, | : | |
| | : | Trial Court Case No. 050300341 |
| Defendant-Appellee. | : | Judge Randall N. Skanchy |
| | : | |

Pursuant to Utah Rule of Appellate Procedure 24(a), Plaintiff-Appellant Wintergreen Group, LC, a Utah Limited Liability Company, (hereinafter "Wintergreen"), by and through its undersigned counsel of record John Martinez, hereby submits the following Opening Brief:

LIST OF PARTIES

The parties to this appeal are identified in the caption herein.

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JURISDICTION OF THE SUPREME COURT

The Utah Supreme Court has jurisdiction in this matter pursuant to Utah Code §78-2-2(3)(j)(2002)(appeal from final judgment).

ISSUES AND STANDARDS OF REVIEW

ISSUE I:

Did the trial court err by dismissing Wintergreen's complaint, since Wintergreen properly alleged all the elements of inverse condemnation claims under the state and federal constitutions? (Issue Preserved: R. 92-93, 88)

Standard of Appellate Review: "When reviewing a dismissal based on rule 12[(b)(6)], an appellate court must accept the material allegations of the complaint as true ... and the trial court's ruling should be affirmed only if it clearly appears that [Plaintiff] can prove no set of facts in support of his claim." Colman v. Utah State Land Bd., 795 P.2d 622, 624 (Utah 1990).

ISSUE II:

Did the trial court err by dismissing Wintergreen's Fourth, Fifth and Sixth Claims for Relief for inverse condemnation under Article I, Section 22 of the Utah Constitution on the ground that UDOT's initiation of direct condemnation proceedings under state statute against *parts* of Wintergreen's land precluded Wintergreen's state constitutional inverse condemnation claims with respect to *all* of Wintergreen's land detrimentally affected by UDOT's conduct? (Issue Preserved: R. 88-92)

Standard of Appellate Review: In reviewing a trial court's grant of a defendant's

12(b)(6) motion to dismiss a complaint for failure to state a claim, an appellate court accepts the factual allegations in the complaint as true and interprets those facts and all inferences drawn from them in the light most favorable to the plaintiff. Such dismissal is a question of law that is reviewed for correctness, giving no deference to the trial court's ruling. Oakwood Village LLC v. Albertsons, Inc., 2004 UT 101, ¶9, 104 P.3d 1226.

ISSUE III:

Did the trial court err by dismissing Wintergreen's First, Second and Third Claims for Relief for inverse condemnation under the Just Compensation Clause of the Fifth Amendment of the United States Constitution on the ground that UDOT's initiation of direct condemnation proceedings under state statute against *parts* of Wintergreen's land precluded Wintergreen's federal constitutional inverse condemnation claims with respect to *all* of Wintergreen's land detrimentally affected by UDOT's conduct? (Issue Preserved: R. 88-92)

Standard of Appellate Review: In reviewing a trial court's grant of a defendant's 12(b)(6) motion to dismiss a complaint for failure to state a claim, an appellate court accepts the factual allegations in the complaint as true and interprets those facts and all inferences drawn from them in the light most favorable to the plaintiff. Such dismissal is a question of law that is reviewed for correctness, giving no deference to the trial court's ruling. Oakwood Village LLC v. Albertsons, Inc., 2004 UT 101, ¶9, 104 P.3d 1226.

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

UNITED STATES CONST. amend. V.

[N]or shall private property be taken for public use, without just compensation.

UTAH CONST. art. I, §22.

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

UTAH CODE § 78-34-10. Compensation and damages -- How assessed.

The court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

- (1) the value of the property sought to be condemned and all improvements thereon appertaining to the realty, and of each and every separate estate or interest therein; and if it consists of different parcels, the value of each parcel and of each estate or interest therein shall be separately assessed;
- (2) if the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff;
- (3) if the property, though no part thereof is taken, will be damaged by the construction of the proposed improvement, the amount of such damages;
- (4) separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiff. If the benefit shall be equal to the damages assessed under Subdivision (2) of this section, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value of the portion taken;
- (5) if the property sought to be condemned consists of water rights or part of a water delivery system or both, and the taking will cause present or future damage to or impairment of the water delivery system not being taken, including impairment of the systems's carrying capacity, an amount to compensate for the damage or impairment;
- (6) if land on which crops are growing at the time of service of summons is sought to be condemned, the value that those crops would have had after being harvested, taking into account the expenses that would have been incurred cultivating and harvesting the crops; and
- (7) As far as practicable compensation must be assessed for each source of damages separately.

STATEMENT OF THE CASE

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

This case presents the question whether the Utah legislature, by enacting a statute, may prohibit a property owner from enforcing individual state and federal constitutional rights in a Utah state court. It is elementary that statutes cannot trump constitutional rights, and yet the trial court below erroneously so held.

Wintergreen owned approximately 121 acres of land in Tooele consisting of several parcels of land on both sides of State Road 36. Wintergreen had assembled the land in order to build the North Town Shopping Center. UDOT embarked on a project to widen SR-36 and brought three separate direct condemnation lawsuits to acquire parts of Wintergreen's land on each side of SR-36. UDOT obtained orders of immediate occupancy in each of the three direct condemnation lawsuits and the reconstruction of SR-36 has proceeded.

As part of the reconstruction project, and in addition to filing the three direct condemnation lawsuits, UDOT also permanently blocked off a street serving Wintergreen's land; transformed another street into a right-in, right-out-only turnoff; and erected barriers to prevent traffic from crossing from Wintergreen's land on one side of SR-36 to Wintergreen's land on the other side of SR-36.

Each of the three direct condemnation lawsuits brought by UDOT treated different individual segments of Wintergreen's total landholding as the relevant "larger parcel." Even as so limited, UDOT refused to provide Wintergreen statutory severance damages in the three direct condemnation lawsuits. Moreover, UDOT also refused to compensate Wintergreen for

harm to Wintergreen's total 121-acre landholding resulting from the fragmentation of that land caused by the direct condemnations. UDOT also refused to compensate Wintergreen for the harm to Wintergreen's assembled land resulting from UDOT's physical actions blocking off and obstructing streets to Wintergreen's land.

Wintergreen therefore filed a fourth, inverse condemnation, lawsuit in order (1) to expand the inquiry to properly focus on the harm resulting from UDOT's direct condemnation and physical conduct to Wintergreen's land as an integrated economic unit; and (2) to assert state and federal constitutional claims in light of that broader focus.

The trial court below granted UDOT's motion to dismiss Wintergreen's inverse condemnation lawsuit in its entirety on the ground that the statutory direct condemnation proceedings brought by UDOT prohibited Wintergreen from asserting state and federal constitutional claims, either in a separate lawsuit or as counterclaims in a consolidated action.

Statement of Facts

1. Plaintiff-Appellant Wintergreen Group, LC is a Utah limited liability company doing business in Salt Lake County, State of Utah. ("Wintergreen"). (R. 23 ¶3)

2. Defendant State of Utah Department of Transportation ("UDOT") is the Utah state entity with general responsibility for the state's highway system. (R. 23 ¶4)

3. Sometime before 2004, UDOT embarked on a project to widen State Road SR-36 in the City of Tooele and to conduct ancillary construction and improvements ("UDOT SR-36 Project"). (R. 23 ¶6)

4. Wintergreen owned several parcels of land in the City of Tooele, located on the

east and west sides of State Road 36 (SR-36), between 2000 North and 2400 North Streets ("Wintergreen's land"). (R. 23 ¶5)

5. Wintergreen's land is depicted on a portion of the Tooele Master Transportation Plan Map attached hereto as Addendum Exhibit 1. (R. 81)

6. Wintergreen's land consisted of a total of about 121.116 acres. (R. 23 ¶5)

7. Prior to the UDOT SR-36 Project, Wintergreen intended to use all its land, both on the east and west sides of SR-36, for construction of the North Town Shopping Center as an integrated economic unit. (R. 22-23 ¶7)

8. On March 30, 2004, UDOT served Wintergreen with summons and a complaint for condemnation in Case Number 040300459 ("Case 459 direct condemnation"), in which UDOT sought to condemn fee title to a strip of land of .275 acres belonging to Wintergreen located on the east side of SR-36 along 2400 North Street. (R. 22 ¶8)

9. On April 15, 2004, UDOT served Wintergreen with summons and a complaint for condemnation in Case Number 040300524 ("Case 524 direct condemnation"), in which UDOT sought to condemn several parts of a 16.666-acre parcel of land owned by Wintergreen located on the east side of SR-36, bordered by 2000 North on the south, 400 East on the east, and 2200 North on the north. The Case 524 direct condemnation sought to condemn fee title to two parcels of the land together comprising 2.183 acres, one perpetual easement of .111 acres, and three temporary easements amounting to .022 acres. (R. 22 ¶9)

10. Also on April 15, 2004, UDOT served Wintergreen with summons and a complaint for condemnation in Case Number 040300525 ("Case 525 direct condemnation"),

in which UDOT sought to condemn fee title to a strip of land of 2.147 acres belonging to Wintergreen located on the west side of SR-36 along the boundaries of four adjacent parcels of land owned by Wintergreen which collectively amounted to 104.175 acres. (R. 21-22 ¶10)

11. On July 1, 2004, the trial court entered an Order of Immediate Occupancy in each of the Case 459, Case 524 and Case 525 direct condemnation lawsuits. (R. 21 ¶11)

12. As a proximate result of the UDOT SR-36 Project, Wintergreen's land now consists of one 14.483-acre parcel on the east side of SR-36 burdened by a perpetual easement and three temporary easements, and four adjacent parcels along the west side of SR-36 consisting of 102.028 acres (116.511 acres hereinafter collectively referred to as "Wintergreen's remaining land"). (R. 21 ¶12)

13. Wintergreen's remaining land has been reduced in total size to 116.511 acres, subject to a perpetual easement and three temporary easements. (R. 21 ¶13)

14. UDOT also took the *physical* action of permanently blocking off from all traffic a formerly open turnoff from SR-36 onto 2000 North Street, which borders the southern boundary of Wintergreen's remaining land located on the east side of SR-36. (R. 21 ¶14)

15. UDOT further took the *physical* action of rendering 2200 North into a right-in, right-out-only street from SR-36, even though 2200 North is designated on the Tooele Master Transportation Plan as an ordinary street connecting Wintergreen's land on each side of SR-36. (R. 21 ¶15)

16. UDOT additionally took the *physical* action of closing off 2200 North westbound from SR-36 toward the Overlake Subdivision located immediately west of Wintergreen's

remaining land, even though 2200 North is designated on the Tooele Master Transportation Plan as an ordinary street traversing Wintergreen's land toward the Overlake Subdivision. (R. 20 ¶17)

17. As a proximate result of UDOT's condemnation of part of Wintergreen's land; UDOT's *physically* permanently blocking off from all traffic a formerly open turnoff from SR-36 onto 2000 North Street; UDOT's *physically* rendering of 2200 North Street into a right-in, right-out-only street from SR-36; and UDOT's *physically* closing off of 2200 North westbound from SR-36 toward the Overlake Subdivision, all the parcels of Wintergreen's remaining land have been isolated from each other, Wintergreen has been prevented from developing its land into the North Town Shopping Center as an integrated economic unit, and Wintergreen's remaining land has been substantially reduced in value. (R. 20 ¶18)

18. In the three direct condemnation lawsuits, UDOT offered Wintergreen no statutory severance damages and nothing for the resulting harm to Wintergreen's land as a whole integrated economic unit. (R. 20 ¶20; R. 154)

19. On March 18, 2005, Wintergreen therefore filed an "Inverse Condemnation" lawsuit, seeking relief under the Just Compensation Clauses of the Utah and Federal Constitutions, in order (1) to expand the inquiry to properly focus on the harm to Wintergreen's land as a whole integrated economic unit resulting from UDOT's physical and condemnation conduct; and (2) to assert state and federal constitutional claims in light of that broader focus. (R. 1--24)

20. On March 6, 2006, the trial court entered final judgment granting UDOT's motion

to dismiss Wintergreen's "Inverse Condemnation" lawsuit in its entirety for failure to state a claim, on the sole ground that UDOT's three *statutory* direct condemnation lawsuits precluded the filing of Wintergreen's inverse condemnation lawsuit asserting claims under the *constitutions* of the State of Utah and the United States. (R. 169-77 at 172)

21. On March 31, 2006, Wintergreen filed its Notice of Appeal to this Court. (R. 183)

SUMMARY OF ARGUMENT

Wintergreen's complaint alleged inverse condemnation claims under the Utah and Federal Constitutions. The trial court erroneously dismissed Wintergreen's complaint on the ground that such claims are precluded by statutory direct condemnation proceedings brought by UDOT.

Wintergreen contends its complaint stated claims for relief under this court's existing interpretations of Article I, Section 22 of the Utah Constitution. However, Wintergreen also suggests that such jurisprudence should be revised to more closely follow the Framers' intent. Wintergreen's complaint also states claims for relief under such revised jurisprudence.

ARGUMENT

I. Wintergreen's Complaint Properly Alleges Both State and Federal Constitutional Inverse Condemnation Claims Sufficient to Overcome UDOT's Motion to Dismiss

A. Standard of Judicial Review on a Motion to Dismiss Favors Wintergreen

The purpose of a Rule 12(b)(6) motion to dismiss "is to challenge the formal sufficiency of the claim for relief, not to establish the facts or resolve the merits of a case." Whipple v. American Fork Irrigation Co., 910 P.2d 1218, 1220 (Utah 1996). Thus, Utah Rule of Civil Procedure 8(a) requires only that a complaint contain a "short and plain statement ... showing that the pleader is entitled to relief" and "a demand for judgment for the relief".

All reasonable inferences must be drawn in the light most favorable to the plaintiff. Anderson v. Dean Witter Reynolds, Inc., 841 P.2d 742, 744 (Utah Ct.App.1992). "A dismissal is a severe measure and should be granted by the trial court only if it is clear that a party is not entitled to relief under any state of facts which could be proved in support of its claim." Colman v. Utah State Land Bd., 795 P.2d 622, 624 (Utah 1990).

B. Wintergreen's Complaint Properly Alleges State and Federal Constitutional Claims

1. Wintergreen's Complaint Properly Alleges *State* Constitutional Claims

a. Nature and Elements of State Inverse Condemnation Claims

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. That Clause protects "private property" from governmental "taking" or "damaging" for "public use" without payment of just compensation. Farmers New World Life Insurance

Co. v. Bountiful City, 803 P.2d 1241, 1243-44 (Utah 1990); see generally 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).

Three different scenarios give rise to Just Compensation claims under Article I, Section 22 of the Utah Constitution: (1) "Direct condemnation" occurs, for example, when a private home that lies in the path of a proposed freeway is purchased "directly" by UDOT. In that scenario, 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. UDOT unquestionably is required to initiate a direct condemnation proceeding and pay fair market value to the owner in that setting. UTAH CODE ANN. §§ 78-34-1--78-34-20.

(2) "Inverse condemnation" occurs when private property is taken or damaged for public use and either (A) the government has not initiated direct condemnation proceedings at all, or (B) as in this case, the property owner asserts that the direct condemnation proceedings which the government *has* brought will not provide the constitutionally required "just compensation" to the owner. Farmers New World Life Insurance Co. v. Bountiful City, 803 P.2d 1241, 1243-44 (Utah 1990); see also 3 Sands, Libonati & Martinez, LOCAL GOVERNMENT LAW, § 21:14 (de facto takings); § 21:16 (precondemnation blight).

Inverse condemnation law in Utah has followed a particularly tortuous path. This court initially held that the state Just Compensation Clause was self-executing, and did not require legislative grace to implement it. Webber v. Salt Lake City, 40 Utah 221, 224, 120 P. 503, 504 (1911). The court later reversed itself, however, holding instead that no claim

could be brought directly under the state constitution absent implementing legislation. Fairclough v. Salt Lake County, 10 Utah 2d 417, 354 P.2d 105 (1960). Then in 1990, the court reversed itself again, joining the vast majority of state courts in holding that such a claim can be brought. Colman v. Utah State Land Board, 795 P.2d 622, 630-34 (Utah 1990).

Constant resort to first principles therefore 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 provision in the federal constitution's 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).

In determining whether Wintergreen's complaint properly alleges inverse condemnation claims under the Utah constitution, therefore, both principles of civil procedure as well as the substantive policies underlying inverse condemnation theory counsel that Wintergreen's complaint should be upheld against UDOT's motion to dismiss.

b. Wintergreen Properly Alleged Each Element of State Inverse Condemnation Claims

Wintergreen properly alleged two "taking" claims (Claims 4 and 5) and a "damaging" claim (Claim 6) under Article I, Section 22 of the Utah Constitution as presently construed.

(1) "Private Property"

Wintergreen alleged that it owns "private property" in the form of fee title ownership

to approximately 121.116 acres of land in Tooele. (R. 23 ¶5); Farmers New World Life Ins. Co. v. Bountiful City, 803 P.2d 1241, 1244 (Utah 1990)("'property' includes but is not limited to land"); Colman v. Utah State Land Board, 795 P.2d 622, 625 (Utah 1990)("some protectible interest"; lease).

(2) "Public Use"

UDOT's reconstruction of SR-36 was for a "public use," because it was undertaken to "promote the public interest, and ... tends to develop the great natural resources of the [state]." (R. 17 ¶41; R. 16 ¶45; R. 15 ¶52); Nash v. Clark, 27 Utah 158, 75 P. 371, 373 (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).

(3) "Taking"

A "*taking*" under Article I, Section 22 of the Utah Constitution as presently construed 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). Wintergreen alleged "UDOT's conduct substantially interfered with and destroyed or materially lessened the value of [Wintergreen's] remaining lands." (R. 17 (Claim 4, ¶¶38-41) at ¶ 39). Wintergreen also alleged "UDOT's conduct in substantial degree abridged or destroyed [Wintergreen's] right to use and enjoyment of [Wintergreen's] remaining lands." (R. 16-17 (Claim 5, ¶¶42-45) at ¶ 43).

(4) "Damaging"

A "*damaging*" under Article I, Section 22 of the Utah Constitution as presently construed requires "some physical disturbance of a right, either public or private, which the owner enjoys in connection with his property and which gives it additional value, and which causes him to sustain a special damage with respect to his property in excess of that sustained by the public generally... with a perceptible effect on the present market value." Colman v. Utah State Land Board, 795 P.2d at 626 (turbulence from state pumping water from Great Salt Lake destroying underwater brine canals). Such interference must be "physical and permanent, continuous, or recurring." Farmers New World Life Ins. Co. v. Bountiful City, 803 P.2d at 1244 (diminution of value and cost of repairs to mall from city's temporary diversion of city creek during construction of culvert for creek).

Wintergreen properly alleged such elements of a "damaging" claim as follows:

¶ 47. UDOT through the physical conduct of failure to open 2200 North westbound from SR-36, rendering of 2200 North as a right-in, right-out street in relation to SR-36, and blocking of 2000 North from traffic in relation to SR-36, destroyed Plaintiff's right to develop its remaining lands into the North Town Shopping Center as an integrated economic unit, which gave Plaintiff's remaining lands additional value.

¶ 48. UDOT's conduct caused Plaintiff special damage in excess of that sustained by the public generally because Plaintiff's remaining East Side land was rendered isolated from Plaintiff's remaining West Side land, as well as from the areas surrounding Plaintiff's remaining East Side land, because Plaintiff no longer has access to or from SR-36 on 2000 North, and has no access to southbound SR-36 from 2200 North, but instead must travel a circuitous route eastward on 2000 North or 2200 North, then north on 400 East, then finally south on SR-36.

¶ 49. Such damage sustained by Plaintiff is a definite physical injury cognizable to the senses because Plaintiff's remaining lands are isolated from each other as well as from SR-36 to a substantial degree.

¶ 50. Such damage sustained by Plaintiff has a perceptible effect on the present market value of Plaintiff's remaining lands because all of such lands have been isolated from each other, Plaintiff has been prevented from developing its lands into the North Town Shopping Center as an integrated economic unit, and Plaintiff's remaining lands have been substantially diminished in value.

(R. 15-16 (Claim 6, ¶¶46-52) at ¶¶ 47-50).

2. Wintergreen's Complaint Properly Alleges *Federal* Constitutional Claims

a. The Federal Just Compensation Clause is Self-Executing Against the State

The Just Compensation Clause of the Fifth Amendment of the United States Constitution protects "private property" from governmental "taking" for "public use" without payment of just compensation. U.S. CONST. amend. V. The Fifth Amendment's Just Compensation Clause is self-executing and applies to the States through the Fourteenth Amendment's Due Process Clause. U.S. CONST. amend. XIV, Sec. 1; Jacobs v United States, 290 U.S. 13 (1933); Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 241, 17 S. Ct. 581, 586 (1897).

The United States Supreme Court on innumerable occasions has applied the federal Just Compensation Clause against States directly. See, e.g. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074 (2005)(suit challenging Hawaii state statute); Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001)("The Takings Clause of the Fifth Amendment, [is] applicable to the States through the Fourteenth Amendment..."); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 481 n.10 (1987)(restriction of the federal Just Compensation Clause "is applied to the States through the Fourteenth Amendment."); Webb's

Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980)(federal Just Compensation Clause "prohibition, of course, applies against the States through the Fourteenth Amendment"). Indeed, the United States Supreme Court has applied the Just Compensation Clause against States without even bothering to mention the principle. See, e.g., Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003); Nollan v. California Coastal Commission, 483 U.S. 825 (1987).

This court also has recently acknowledged that the federal Just Compensation Clause provides a direct action against the State of Utah. In Smith v. Price Development Company, 2005 UT 87, 125 P.3d 945 this court held that the State of Utah could not enforce a statute that would have allowed the State to seize one-half of punitive damages awards in suits between private parties. The State was joined as a party defendant in the trial court, which held that the statute "effected an unconstitutional taking...in violation of article I, section 22 of the Utah Constitution **and** the Fifth and Fourteenth Amendments of the United States Constitution." Id. ¶ 1(emphasis added). On appeal, this court defined the issue as "whether the Smiths' interest, if any, was 'taken' within the meaning of article I, section 22 of the Utah Constitution **and** the Fifth Amendment and Fourteenth Amendments to the United States Constitution." Id. ¶13 (emphasis added). The Court affirmed the judgment against the State.

In addition to a substantive right under the Fifth Amendment's Just Compensation Clause, Wintergreen also has an independent substantive right to injunctive relief against UDOT under the doctrine of Ex Parte Young. Verizon Maryland, Inc. v. Public Service Com'n of Maryland, 535 U.S. 635, 645 (2002)("In determining whether the doctrine of *Ex*

Parte Young [applies,] a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" (quoting Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 296 (1997)); Ex Parte Young, 209 U.S. 123 (1908). Here, Wintergreen sought injunctive relief, *inter alia*, "mandating Defendant UDOT to open 2200 North westbound from SR-36; to render 2200 North as a four-way intersection at SR-36, with appropriate traffic signal devices; [and] to remove the obstruction of 200 North from traffic to and from SR-36 northbound and southbound... ." (R. 14 (Prayer for Relief) at ¶ (d)(i))

b. Wintergreen Properly Alleged Each Element of Federal Inverse Condemnation Claims

Wintergreen properly alleged three "taking" claims (Claims 1, 2 and 3) under the Just Compensation Clause of the Constitution of the United States.

(1) "Partial Taking" of All Wintergreen's Remaining Land

Wintergreen's complaint properly alleges under the federal constitution that Wintergreen has suffered a "partial taking" of its remaining land in that "Defendant UDOT through the UDOT SR-36 Project imposed substantial economic harm on Plaintiff's remaining lands, Plaintiff has demanded compensation for such harm, and UDOT refuses to pay such compensation" and that "[s]uch conduct by UDOT constitutes a partial taking of Plaintiff's property." (R. 19-20 (Claim 1, ¶¶19-24) at ¶¶ 20, 22); Palazzolo v. Rhode Island, 533 U.S. 606, 617-18, 121 S. Ct. 2448, 2457-58 (2001)("Where [governmental conduct]...places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including

the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.").

(2) Total "Categorical Taking" of Reduction in Value of Wintergreen's Remaining Land

Wintergreen's complaint also properly alleges under the federal constitution that Wintergreen has suffered a total "categorical taking" as a result of UDOT's conduct because "Defendant UDOT through the UDOT SR-36 Project imposed substantial economic harm on Plaintiff's remaining lands, Plaintiff has demanded compensation for such harm, and UDOT refuses to pay such compensation" and "[s]uch conduct by UDOT constitutes a categorical total taking of the reduction in value of Plaintiff's remaining lands resulting from UDOT's conduct." (R. 18-19 (Claim 2, ¶¶25-30) at ¶¶ 26, 28); Palazzolo v. Rhode Island, 533 U.S. 606, 630-31, 121 S. Ct. 2448, 2464-65 (2001)(total categorical taking of narrowly-defined property interest).

(3) "Unconstitutional Condition" Taking

Wintergreen's complaint also properly alleges under the federal constitution that Wintergreen has suffered a taking through imposition of an unconstitutional condition because "UDOT through the UDOT SR-36 Project" engaged in "excessive condemnation" by attempting to force Wintergreen to give up the value of Wintergreen's land as an integrated economic unit in exchange for the inadequate compensation UDOT offered Wintergreen in the three direct condemnation lawsuits. (R. 17-18 (Claim 3, ¶¶31-37) at ¶¶ 32, 35); Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074, 2087 (2005)(rejecting

"not substantially advance" test for takings, but retaining doctrine of unconstitutional conditions).

II. Wintergreen's *State* Constitutional Inverse Condemnation Claims are not Precluded by UDOT's Statutory Direct Condemnation Lawsuits

The trial court dismissed Wintergreen's Fourth, Fifth and Sixth Claims for Relief for inverse condemnation under Article I, Section 22 of the Utah Constitution on the ground that UDOT's initiation of direct condemnation proceedings under state statute against *parts* of Wintergreen's land precluded Wintergreen's state constitutional inverse condemnation claims with respect to *all* of Wintergreen's land detrimentally affected by UDOT's conduct. (R. 169-77 at 172)

The trial court thereby erroneously elevated state legislation over state constitutional rights.

A. The Three Direct Condemnation Lawsuits Brought by UDOT Will Not Provide Wintergreen With Constitutionally Adequate Recovery

Article I, Section 22 provides a "textual constitutional right" to compensation. Spackman v. Bd. of Educ. of Box Elder County Sch. Dist., 2000 UT 87, ¶ 20, 16 P.3d 533 (Article I, Section 22 provides a "textual constitutional right to damages for one who suffers [that] constitutional tort.").

Thus, this court need not determine whether it would formulate a damages remedy under its common law authority. *Id.* at ¶ 23 (damages remedy under this court's common law authority is provided only in "appropriate circumstances"). Instead, the court need only consider whether the three direct condemnation lawsuits brought by UDOT will provide

Wintergreen with constitutionally adequate recovery.

1. Three Direct Condemnation Lawsuits Brought by UDOT Artificially Fragment Wintergreen's Property

The three direct condemnation lawsuits brought by UDOT artificially fragment Wintergreen's 121 acres of land into three isolated segments. Such fragmentation results in denying constitutionally required "just compensation" to Wintergreen.

Case 524 isolates a 16.666-acre parcel of land owned by Wintergreen on the east side of SR-36 as a separate segment and appropriates 2.183 acres in fee, imposes a permanent easement on .111 acre, and imposes three temporary easements on .022 acres. Case 525 isolates four adjacent parcels of land owned by Wintergreen on the West side of SR36 totaling approximately 104.175 acres as a separate segment and appropriates 2.147 acres in fee. Case 459 isolates 2400 North as a separate segment and appropriates .275 acres of Wintergreen's land for road surface. (R. 21-22 ¶¶ 8-10)

2. Impact of Fragmentation of Wintergreen's Land by Three Direct Condemnation Lawsuits Brought by UDOT

a. Recovery Under Utah Code Section 78-34-10(1) for Land Actually Appropriated

Utah Code Section 78-34-10 defines the recovery statutorily available to a landowner in direct condemnation proceedings. Subsection (1) provides for recovery of the value of the land actually appropriated. UTAH CODE ANN. § 78-34-10(1). Under Subsection (1), Wintergreen is entitled to compensation for the segments of land actually appropriated by UDOT.

b. Recovery Under Utah Code Section 78-34-10(2) for Harm to Land Remaining After an Actual Appropriation: Statutory "Severance Damages"

Subsection (2) of Utah Code Section 78-34-10 provides:

[I]f the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff... .

UTAH CODE ANN. § 78-34-10(2)(emphases added). Under Subsection (2), Wintergreen is also entitled to compensation in the form of "severance" damages, consisting of Type-(i) damages to remaining land resulting from the *fact of detachment* of a portion of land from a "larger parcel" and Type-(ii) damages to remaining land resulting from *construction on land actually appropriated*. State v. Harvey Real Estate, 2002 UT 107, ¶¶ 10-11, 57 P.3d 1088.

With respect to Type-(i) severance damages, (those resulting from the *fact of detachment* of a portion of land from a "larger parcel"), the amount of damages obtained is substantially affected by the definition of the "larger parcel" from which the land actually appropriated is detached. The difference is particularly dramatic in this case, since the 121-acre assembled landholding has value *because* it is large enough to comprise a future shopping mall. UDOT artificially fragmented the relevant "larger parcel" into three isolated direct condemnation lawsuits. Not surprisingly, and almost inevitably, UDOT offered no severance damages in any of those three direct condemnations. ((R. 20 ¶20; R. 154)

With respect to Type-(ii) severance damages, (those resulting from *construction on land actually appropriated*), Wintergreen's recovery is limited to impacts to its remaining

land resulting from construction of improvements by UDOT *on the appropriated land*. State v. Harvey Real Estate, 2002 UT 107, ¶10, 57 P.3d 1088 ("Section 78-34-10 gives a landowner the right to present evidence of damages caused by the construction of the improvement made on the severed property. It does not give the landowner the right to present evidence of damages caused by other facets of the construction project.").

Here, UDOT's physical conduct occurred primarily on land which UDOT already owned or controlled. Thus, UDOT permanently blocked off a street serving Wintergreen's land; transformed another street into a right-in, right-out-only turnoff; and erected barriers to prevent traffic from crossing from Wintergreen's land on one side of SR-36 to Wintergreen's land on the other side of SR-36. (R. 20-21 ¶¶ 14, 15, 17, 18) Thus, similarly, UDOT offered no severance damages in any of the three direct condemnations for such harm either. (R. 20 ¶20; R. 154)

c. Recovery Under Utah Code Section 78-34-10(3) for Land "no part" of Which is Actually Appropriated

Subsection (3) Utah Code Section 78-34-10, provides:

[I]f the property, though no part thereof is taken, will be damaged by the construction of the proposed improvement, the amount of such damages... .

UTAH CODE ANN. § 78-34-10(3). There are five independent reasons why Subsection (3) will not result in constitutionally adequate recovery here. First, the subsection is not applicable in this case because it allows recovery for damage to land only "if...no part thereof is taken". State v. Ward, 112 Utah 452, 189 P.2d 113 (1948)("If there is no taking of part of the property, [then recovery is available for] a damaging as contemplated by paragraph (3)... .").

UDOT unquestionably has "taken" part of Wintergreen's 121 acres in the three direct condemnation lawsuits. By the plain meaning of its express terms the *statutory* claim for damages provided by Subsection (3) is precluded by the *statutory* direct condemnation lawsuits brought by UDOT. Utah Public Employees Ass'n v. State, 2006 UT 9, ¶ 72, 131 P.3d 208 (plain meaning of statute controls).

Second, Subsection (3) by its terms applies only to damage caused "by the construction of the proposed improvement... ." In this case, part of Wintergreen's harm resulted from UDOT's fragmenting of Wintergreen's "remaining land" through UDOT's filing of three separate direct condemnation lawsuits, each isolating a small segment of UDOT's land. Thus, instead of a unitary, 116.511-acre remaining land "larger parcel," the three direct condemnation lawsuits treated smaller bits of Wintergreen's land as the "larger parcel" in each case. The result was that UDOT offered no severance damages at all. Such harm caused by the fragmentation of Wintergreen's remaining land, however, is not recoverable under Subsection (3) because it is not caused "by the construction of the proposed improvement."

Third, Subsection (3) has been construed narrowly by this court to apply only to "physical" impact "cognizable to the senses" on the owner's property. See Colman v. Utah State Land Board, 795 P.2d at 626 ("This Court has also defined ... [Section 78-34-10(3) of] the eminent domain statute" as limited to physical impact "cognizable to the senses")(quoting *Bd. of Educ. of Logan City School Dist. v. Croft*, 13 Utah 2d 310, 314, 373 P.2d 697, 699 (1962)). Here, although Wintergreen suffered such physical impacts as well, a major impact is on Wintergreen's legal rights to use, transfer and exclude others, resulting in devaluation

of its remaining land. Such harm, as discussed in Part II.B.4.c below, is constitutionally compensable under Article I, Section 22 of the Utah Constitution.

Fourth, Subsection (3) also has been construed narrowly by this court to include only "*unavoidable* injuries arising out of the proper construction of a public use which directly affect the market value of the abutting property... ." Farmers New World Life Ins. Co. v. Bountiful City, 803 P.2d at 1244. Thus, *avoidable* injury to Wintergreen's land caused by UDOT's physical conduct of permanently blocking off a street serving Wintergreen's land; transforming another street into a right-in, right-out-only turnoff; and erecting barriers to prevent traffic from crossing from Wintergreen's land on one side of SR-36 to Wintergreen's land on the other side of SR-36 would not be compensated under the statute. Farmers New World Life Ins. Co. v. Bountiful City, 803 P.2d at 1245 ("Avoidable injuries not directly resulting from the construction or operation of a public improvement are not within the statute's protection.").¹ In contrast, such harm is compensable under Article I, Section 22.

Fifth, "[d]amages arising out of carelessness or negligence or indifference in the construction of a utility upon land taken for public use are not damages contemplated by the statutes as recoverable under the principles of law pertaining to eminent domain proceedings." Farmers New World Life Ins. Co. v. Bountiful City, 803 P.2d at 1245, quoting *Thomas E. Jeremy Estate v. Salt Lake City*, 87 Utah 370, 49 P.2d 405, 407 (1935)). Such damages are "recoverable only in a negligence action." Id. at 1245-46. The Utah

¹. It is not entirely clear whether this court in Farmers New World was construing the statute or Article I, Section 22. See Farmers New World Life Ins. Co. v. Bountiful City, 803 P.2d at 1246 n.2 ("We acknowledge that the statute is inapplicable to this case and cite it only as a reflection of current legislative views on public policy.").

Governmental Immunity Act, however, immunizes the State from negligence liability in most cases. See UTAH CODE ANN. § 63-30d-301 (5)(exceptions to negligence liability). In Colman, though, this court held that the Legislature may not raise the shield of sovereign immunity under the Utah Governmental Immunity Act to immunize itself against inverse condemnation claims under Article I, Section 22. Colman v. Utah State Land Board, 795 P.2d at 634-35 ("It can hardly be maintained that the doctrine of sovereign immunity, alone among all doctrines, is outside the limitations the people established [in the Utah Constitution]." And this court also has made clear that "[i]ntent is not an element of [an inverse condemnation] action... ." Farmers New World Life Insurance Co. v. Bountiful City, 803 P.2d at 1246.

In summary, the net impact on Wintergreen of UDOT's filing of the three direct condemnation lawsuits was twofold: (1) The fragmentation into three direct condemnation lawsuits, with their concomitant isolated "larger parcel" definitions, prevented Wintergreen from recovering for harm to the entirety of its remaining 116.511-acre tract; and (2) UDOT's filing of the three direct condemnation lawsuits also prevented Wintergreen from recovering for damage to its remaining land resulting from construction of improvements by UDOT which permanently blocked off a street serving Wintergreen's land; transformed another street into a right-in, right-out-only turnoff; and erected barriers to prevent traffic from crossing from Wintergreen's land on one side of SR-36 to Wintergreen's land on the other side of SR-36.

Utah Code Section 78-34-10 therefore does not provide Wintergreen constitutionally adequate recovery for the resulting harm. Such recovery under state law must be obtained by

an inverse condemnation action under Article I, Section 22 of the Utah Constitution.

B. State Legislature May not Preclude State Constitutional Claims

1. The Role of This Court in Interpreting Article I, Section 22 of the Utah Constitution

In Colman v. Utah State Land Bd., 795 P.2d 622 (Utah 1990), this court acknowledged that:

The history of [the cases holding that the Utah Legislature by statute could hold itself immune from takings claims brought under Utah Constitution article I, section 22] shows that for a time the Court's concentration on the doctrine of sovereign immunity caused it to neglect this constitutional provision, which was designed to protect individual rights. This elevation of legislation and common law principles over a clear constitutional limitation strikes at the heart of constitutional government. The people of Utah established the Utah Constitution as a limitation on the power of government. It can hardly be maintained that the doctrine of sovereign immunity, alone among all doctrines, is outside of the limitations the people established. In *Dean v. Rampton*, 556 P.2d 205 (Utah 1976), we stated:

The purpose of a constitution is to provide an orderly foundation for government and to keep even the sovereign ... within its bounds. Therefore, the legislative power itself must be exercised within the framework of the constitution. Accordingly, it has been so long established and universally recognized, as to be hardly necessary to state, that if a statutory enactment contravenes any provision of the constitution, the latter governs. 556 P.2d at 206-07 (citing *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803)).

Id. at 634-35. See also Utah Public Employees Association v. State of Utah, 2006 UT 9 ¶ 18, 131 P.3d 208 ("It is important to note that in a republican form of government, and as specified in our state constitution, the judicial power of the State is vested in this court.").

In Colman, this court held that the "framers of the Utah Constitution expected [Article I, Section 22] to act as a real limit on the powers of the state...[and] certainly did not intend to allow state government to override the constitutional guarantee with a legislative enactment." Colman v. Utah State Land Board, 795 P.2d at 630. Thus, the court concluded

that the Legislature could not, through the Utah Governmental Immunity Act, trump a property owner's right to compensation under Article I, Section 22 of the Utah Constitution. Id. at 634-35. More broadly, this court held that the Legislature could not use the concept of sovereign immunity, embodied in the Utah Governmental Immunity Act, to shield itself from liability for takings or damagings of property under Article I, Section 22.² In this case, this court is similarly called upon to hold that the Legislature, through the state's direct condemnation statutes, cannot trump a property owner's right to compensation under Article I, Section 22 of the Utah Constitution.

The Legislature "unquestionably has the right to take or damage private property when necessary for public use." State v. District Court, 94 Utah 384, 78 P.2d 502, 505 (1937). The Legislature also unquestionably has the right to adopt procedures for the exercise of that power. Id. Direct condemnation statutes, including Utah Code Ann. Section 78-34-10, embody such procedures. But the *substantive content* of the constitutional protections afforded by Article I, Section 22, as confirmed by this court in Colman, is for this court to determine. As in Colman, this court must not "neglect this constitutional provision." The trial court's conclusion that the initiation of statutory direct condemnation proceedings precludes

². Other state courts have taken a similar perspective on their role as protectors of individual property rights against state legislative action. See, e.g., Buckeye Union Fire Insurance Company v. Employers Mutual Fire Insurance Company, 383 Mich. 630, 178 N.W.2d 476 (1970)(state had acquired factory in tax foreclosure, and then let it deteriorate and become a nuisance; Michigan Supreme Court held state constitution's Just Compensation Clause covered the nuisance-type of "taking" involved and superseded state statute immunizing state); Burns v. Board of Supervisors of Fairfax County, 218 Va. 625, 238 S.E.2d 823 (1977)(water discharged from county storm sewer caused \$50,000 in damage to plaintiffs' home; Virginia Supreme Court held state constitution's Just Compensation Clause covered harm and superseded statutory governmental immunity).

the assertion of a constitutional claim under Article I, Section 22 did just that.

2. Other States Allow Inverse Condemnation Claims Even if Direct Condemnation Lawsuits Have Been Brought by the Government

Other state courts allow inverse condemnation claims--in the same lawsuit or in a separate action--even if direct condemnation lawsuits have been brought by the government.³

Such uniform practice is not surprising, since considerations of judicial economy and the need for consistent judgments on statutory and constitutional claims are thereby assured.

3. Wintergreen and UDOT Offered to Consolidate the Inverse Condemnation Claims and the Direct Condemnation Actions, But the Trial Court Refused to Do So

Wintergreen here requested that the four cases should be consolidated, or in the alternative, that the three direct condemnation cases should be consolidated and Wintergreen's inverse condemnation claims should be deemed counterclaims in those

³. See, e.g., Brown v. State, 694 So.2d 1342, 1343-44 (Ala. 1997) (inverse condemnation action properly transferred action back to original county for consolidation with state's direct condemnation action which was pending in original county and concerned portions of same property; trying inverse condemnation and direct condemnation actions in different counties could potentially result in inconsistent verdicts regarding same property and consolidation of actions would promote judicial economy); Block v. Orlando-Orange County Expressway Authority, 313 So.2d 75, 76-77 (Fla. App. 1975) (constitutional inverse condemnation claim is a compulsory counterclaim in the direct condemnation lawsuit brought by the government); Flo-Rob, Inc. v. Colonial Pipeline Co., 170 Ga. App. 650, 652, 317 S.E.2d 885, 887 (1984) (separate actions required; "Though the law generally favors the prevention of a multiplicity of actions, it appears that condemnation law in Georgia rather strictly limits the relevant evidence in condemnation cases and therefore separate suits for different kinds of damages are not uncommon." *Simon v. Dept. of Transp.*, 245 Ga. [478], 479, 265 S.E.2d 777.); Kohn Enterprises, Inc. v. City of Overland Park, 221 Kan. 230, 24-35, 559 P.2d 771, 774-75 (1977) (landowner inverse condemnation claim for restriction of access properly tried together with direct condemnation action for improvement of portions of street and for intersection improvements); City of Austin v. Casiraghi, 656 S.W.2d 576, 581-82 (1983) (inverse condemnation claim may be asserted separate from direct condemnation lawsuit).

consolidated cases. (R. 160-163). And in a letter to the trial court, UDOT conceded that Wintergreen's state inverse condemnation claims could be consolidated:

"UDOT asks that the Article I, Section 22 claims either be dismissed as improper assertion of a counterclaim under Rule 13 or order that all Article I, Section 22 claims for just compensation be heard as part of the consolidated condemnation case(s)."

(R. 161)(emphasis added) The trial court ignored the suggestions and instead dismissed all Wintergreen's inverse condemnation claims altogether. (R. 170)

4. Substantive Content of Constitutional Protection Under Article I, Section 22 of the Utah Constitution

As set out in Part I.B.1. above, Wintergreen's complaint properly alleges both "taking" and "damage" claims under Article I, Section 22 of the Utah Constitution as interpreted by this court to date. And as demonstrated in Part II.A. above, Utah's statutory provisions for compensating harm to property caused by the SR-36 project undertaken by UDOT are inadequate to compensate Wintergreen for the resulting harm. The definitions of a "taking" and "damaging" under Article I, Section 22 of the Utah Constitution, however, are in need of further refinement.

a. Importance of Distinguishing Between *Governmental Conduct* and *Impact on the Owner*

A large part of the difficulty in takings jurisprudence arises from the failure to adequately differentiate between *government conduct*, on one hand, and its *impact on an owner*, on the other.⁴ The distinction is critical, since what the government intends, on one

⁴. See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 322 n.17, 122 S.Ct. 1465, 1478 n.17 (2002)(conflating governmental conduct and the impact on the owner); see generally John Martinez & Karen Martinez, A Prudential Theory for Providing a Federal Forum for Federal Takings Claims, 36 REAL

hand, may not be what the property owner experiences, on the other.⁵ Careful differentiation between those two sides of the equation is therefore critical for formulating a refined "taking" and "damaging" jurisprudence under Article I, Section 22 of the Utah Constitution.

b. Two Types of "Takings" Under Article I, Section 22

(1) Direct Condemnation

In "Direct Condemnation" types of takings, the *governmental conduct* is the purposeful exercise of the power of eminent domain and the *impact on the owner* is complete expropriation. In that setting:

[It is] a settled principle of universal law, reaching back of all constitutional provisions, that the right to compensation [is] an incident to the exercise of the power of eminent domain; that the one [is] so inseparably connected with the other that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle; and that the legislature 'can no more take private property for public use with just compensation than if this restraining principle were incorporated into, and made part of, its State Constitution.'

Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 237-38, 17 S. Ct. 581, 585 (1897)(quoting Sinnickson v. Johnson, 17 N.J.L. 129, 145, 1839 WL 2671, * 13, 34 Am. Dec. 184, 2 Harrison 129 (N.J. 1839)).

In this case, there is no dispute that Wintergreen will be entitled to just compensation for the lands directly appropriated by UDOT in the three direct condemnation lawsuits.

PROPERTY, PROBATE & TRUST J. 445, 453 (Fall 2001)(discussing critical distinction between *governmental conduct* and the *impact* of such conduct on an owner).

⁵. "Intent is not an element of [an inverse condemnation] action." Farmers New World Life Insurance Co. v. Bountiful City, 803 P.2d at 1246; *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 Exh. 2, p.327).

(2) Functional Equivalent of Direct Condemnation

The Functional Equivalent type of taking occurs when governmental conduct, other than the purposeful exercise of the power of eminent domain, has an *impact* on the owner that is indistinguishable from the direct condemnation setting, and therefore similarly entitles the owner to just compensation.

Governmental conduct in this type of taking is defined in contrast to governmental conduct in direct condemnations. Any governmental conduct *other* than the purposeful exercise of the power of eminent domain suffices. Physical governmental conduct qualifies.⁶ Regulatory governmental conduct, such as land use regulation, qualifies.⁷ And flawed direct condemnation conduct, as in this case, also qualifies.⁸

On the impact side, the Functional Equivalent type of taking entails the *practical ouster* of a property owner's possession by the government.⁹ Examples include the government's seizure and operation of a coal mine to prevent a national strike by coal

⁶. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982)(permanent physical occupation).

⁷. See generally 3 Sands, Libonati & Martinez, LOCAL GOVERNMENT LAW, §§ 16.53.10--16.53.50 (takings resulting from land use control).

⁸. See 3 Sands, Libonati & Martinez, LOCAL GOVERNMENT LAW, § 21:14 (de facto takings); § 21:16 (precondemnation blight).

⁹. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537, 125 S. Ct. 2074, 2081 (2005); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); Transportation Co. v. Chicago, 99 U.S. 635, 642, 25 L.Ed.336 (1879)("practical ouster of [the owner's] possession").

miners,¹⁰ the government's occupation of a private warehouse leased by a private tenant¹¹ and the permanent flooding of private land resulting from the construction of a dam.¹²

In Stockdale v. Rio Grande Western Ry. Co., 28 Utah 201, 77 P. 849 (1904), however, this court defined a "taking" under Article I, Section 22 of the Utah Constitution as:

... 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...

Id. at 211, 77 P. at 852. See also Colman v. Utah State Land Board, 795 P.2d at 626.

In accordance with this precedent, Wintergreen has alleged that UDOT's conduct in fragmenting Wintergreen's land through the three direct condemnation lawsuits, and UDOT's physical conduct negatively affecting Wintergreen's land, are "takings" under Stockdale. Thus, Wintergreen alleged "UDOT's conduct substantially interfered with and destroyed or materially lessened the value of [Wintergreen's] remaining lands." (R. 17 (Claim 4, ¶¶38-41) at ¶ 39). Wintergreen also alleged "UDOT's conduct in substantial degree abridged or destroyed [Wintergreen's] right to use and enjoyment of [Wintergreen's] remaining lands." (R. 16-17 (Claim 5, ¶¶42-45) at ¶ 43). However, as discussed below, these claims may more properly be viewed as "damaging" claims under a reconstructed Utah takings jurisprudence.

¹⁰. United States v. Pewee Coal Co., 341 U.S. 114, 71 S.Ct. 670, 95 L.Ed. 809 (1951).

¹¹. United States v. General Motors Corp., 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945).

¹². Pumpelly v. Green Bay Company, 80 U.S. 166, 13 Wall. 166, 20 L.Ed. 557 (1871).

c. "Damaging" Under Article I, Section 22

(1) Illinois Constitution

In 1870 Illinois became the first state to amend its constitution to include "or damaged" in its Just Compensation Clause.¹³ The change was inserted because prior to that date, a "taking" had been interpreted to include only (a) direct condemnations and (b) only non-direct condemnations in which the governmental conduct caused an *impact* on the owner that constituted an *actual physical intrusion* onto an owner's property.¹⁴ The problem arose because the City of Chicago, in the course of improving its sewer and drainage system over a number of years, had raised the level of streets, sometimes as high as eight feet, leaving owners of adjacent stores and homes far below the level of the newly-elevated city streets.

In Rigney v. City of Chicago, 102 Ill. 64 (1881), the rental value of such an owner's land had been reduced from \$60 a month to \$23, and the market value of the land had been reduced by two-thirds. Id. at 69. The Illinois Supreme Court held that the "or damaged" provision provided compensation in those circumstances. Focusing on the *impact* side of the equation, the court clarified that the error in providing compensation only for physical impacts originated from a mistaken view of the legal concept of property:

Property, in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things and subjects, and generally to the exclusion of all others, and doubtless this is substantially the sense in which it is used in the constitution; yet the term is often used to indicate the *res* or the

¹³. Robert Brauneis, The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law, 52 VAND. L. REV. 57, 115 (1999).

¹⁴. Goodman's Peppermill Restaurant v. State of Illinois, 51 Ill. Ct. Cl. 18, 1999 WL 33246456, 4* (1999).

subject of the property, rather than the property itself, and it is evidently used in this sense in some of the cases in connection with the expression of physical injury, while at other times it is probably used in its more appropriate sense, as above mentioned. The meaning, therefore, of the expression "*physical injury*," when used in connection with the term property, would in any case necessarily depend upon whether the term property was used in the one sense or the other. To illustrate: If the lot and buildings of appellant are to be regarded as property, and not merely the subject of property, as strictly speaking they are, then there has clearly been no physical injury to it; but if by property is meant the right of user, enjoyment and disposition of the lot and buildings, then it is evident there has been a direct physical interference with appellant's property, and when considered from this aspect, it may appropriately be said the injury to the property is direct and physical... .

Id. at 78. Thus, "property" for constitutional purposes includes all the sticks in the bundle of rights: the rights to use or possess, to transfer, and to exclude others. The "or damaged" provision in the amended constitution, the court held, corrected a prior misperception:

Under the constitution of 1848 it was essential to a right of recovery, as we have already seen, that there should be a direct physical injury to the *corpus* or subject of the property, such as overflowing it, casting sparks or cinders upon it, and the like; but under the present constitution it is sufficient if there is a direct physical obstruction or injury to the right of user or enjoyment, by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally, which, by the common law, would, in the absence of any constitutional or statutory provisions, give a right of action.

Id. at 78 (emphasis added). Accordingly, governmental conduct which affects the value of land through impacts on the rights to use or possess, to transfer, or to exclude others, is covered. The court clarified that not all such impacts are compensable, and that some reductions in value must be absorbed by the landowner as the cost of living in a civilized society:

While it is clear that the present constitution was intended to afford redress in a certain class of cases for which there was no remedy under the old constitution, yet we think it equally clear that it was not intended to reach every possible injury that might be occasioned by a public improvement. There are certain injuries which are

necessarily incident to the ownership of property in towns or cities which directly impair the value of private property, for which the law does not, and never has, afforded any relief. For instance, the building of a jail, police station, or the like, will generally cause a direct depreciation in the value of neighboring property, yet that is clearly a case of *damnum absque injuria*. So as to an obstruction in a public street,--if it does not practically affect the use or enjoyment of neighboring property, and thereby impair its value, no action will lie. In all cases, to warrant a recovery it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally.

Id. at 81 (emphases added). Given the court's prior discussion about the legal conception of "property," the court's reference to a "direct physical disturbance," undoubtedly refers to physical¹⁵ *governmental conduct*, not to physical *impact on the owner*. Subsequent cases in Utah discussed below, however, erroneously interpreted Rigney as limited to physical *impacts* on the owner.

Finally, the Illinois court carefully delineated the boundary between compensable impacts on value and noncompensable costs of living in a civilized society. Thus, only those impacts on value which constitute "a special damage with respect to his property in excess of that sustained by the public generally" were held compensable. Id. That formulation is consistent with the foundational principle of modern Just Compensation law that individuals should not be sacrificed to the community by having to bear public burdens that "in all fairness and justice, should be borne by the public as a whole." Stockdale v. Rio Grande

¹⁵. Modern Just Compensation jurisprudence, of course, has expanded protection against governmental conduct which is nonphysical, such as land use regulation, as well as against physical governmental conduct. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922); see generally 3 Sands, Libonati & Martinez, LOCAL GOVERNMENT LAW, §§ 16.53.10--16.53.50 (takings resulting from land use control).

Western Ry. Co., 28 Utah 201, 203, 77 P. 849, 852 (1904)("The tendency under our system is too often to sacrifice the individual to the community."); Armstrong v. United States, 364 U.S. 40, 49 (1960).

(2) Utah Constitution

The Framers of the Utah Constitution confronted the same problem of elevated streets and resulting uncompensated damage as had arisen in Illinois.¹⁶ The Framers therefore included the words "or damaged" in Utah's Just Compensation Clause because they also were concerned that merely prohibiting "takings" without compensation would not protect owners whose property was neither actually appropriated in a direct condemnation, nor subjected to non-direct condemnation governmental conduct that resulted in physical intrusion impact on the owner's property.

In Twenty-Second Corp. of Church of Jesus Christ of Latter-Day Saints v. Oregon Short Line R. Co., 36 Utah 238, 103 P. 243 (1909), this court held that noise from a railroad did not amount to a "damaging" of adjacent buildings used for secular and religious purposes. Unfortunately, subsequent Utah decisions construed the opinion in Twenty-Second Corp. of

¹⁶. See *Proceedings and Debates of the Constitutional Convention*, 326-27 (1898)("or damaged" provision is meant to extend 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 Exh. 2, pp. 326-27)

See also *Proceedings and Debates of the Constitutional Convention*, 328 (1898)("I am in favor of retaining the words 'or damaged.' I recollect [when] I believe it was State street [in Salt Lake City]--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... [W]e should make them pay for whatever they take, and I believe the words 'or damaged' should remain in the Constitution.")(Mr. Pierce)(Addendum Exh. 2, p. 328)

Church of Jesus Christ of Latter-Day Saints to extend far beyond its holding and thereby severely limited the scope of the "or damaging" provision. Thus, in Colman v. Utah State Land Bd., 795 P.2d 622 (Utah 1990), this court limited "damagings" to "some physical disturbance of a right, either public or private, which the owner enjoys in connection with his property and which gives it additional value, and which causes him to sustain a special damage with respect to his property in excess of that sustained by the public generally... with a perceptible effect on the present market value." Colman v. Utah State Land Board, 795 P.2d at 626. Further, in Farmers New World Life Ins. Co. v. Bountiful City, 803 P.2d 1241, 1244 (Utah 1990), this court announced that "damagings" under the state constitution require an interference that is "physical and permanent, continuous, or recurring."

Limiting "damagings" in that manner is inconsistent with the constitutional history and purpose of Article I, Section 22 of the Utah Constitution, since the Framers of the Utah Constitution intended to protect against non-direct condemnation governmental conduct that *did not* result in a physical impact. This court's decision in Stockdale , albeit denominating it as a standard for "takings," actually articulated a perfectly usable "or damaging" standard that *is* consistent with the Framers' intent:

... 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... .

Stockdale v. Rio Grande Western Ry. Co., 28 Utah 201, 211, 77 P. 849, 852 (1904). That standard more closely reflects an accurate interpretation of the Rigney decision as well.

d. Jury Determination

The Framers of the Utah Constitution fully intended that a jury would determine whether the state has committed a compensable taking or damaging. *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 Exh. 2, p.327). *See also* UTAH CONST. art. I, §10 (Trial by Jury); International Harvester Credit Corp. v. Pioneer Tractor, 626 P.2d 418 (Utah 1981) (Utah Const. art. I, §10 guarantees right to jury trial on legal issues in civil cases); UTAH CODE ANN. §78-21-1 ("In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract or as damages for breach of contract, or for injuries, an issue of fact may be tried by a jury, unless a jury trial is waived or a reference is ordered."); Richards v. Salt Lake City, 49 Utah 28, 161 P. 680 (1916) (whether road debris on private lot warrants compensation is a question for the jury).¹⁷

With instructions based upon the standards for "takings" and "damagings" set out above, a jury can properly determine whether a taking or damaging has occurred.

III. Wintergreen's *Federal* Constitutional Inverse Condemnation Claims are not Precluded by UDOT's Direct Condemnation Lawsuits Under State Statute

The trial court dismissed Wintergreen's First, Second and Third Claims for Relief for inverse condemnation under the Just Compensation Clause of the Fifth Amendment of the United States Constitution on the ground that UDOT's initiation of direct condemnation

¹⁷. See also Williams v. State ex rel. Dept. of Transp., 2000 OK CIV APP 19, ¶ 35, 998 P.2d 1245 (jury determination of amount of damages must be necessarily preceded by jury determination that inverse condemnation has occurred).

proceedings under state statute against *parts* of Wintergreen's land precluded Wintergreen's federal constitutional inverse condemnation claims with respect to *all* of Wintergreen's land detrimentally affected by UDOT's conduct. (R. 169-77 at 172)

The trial court thereby erroneously elevated state legislation over federal constitutional rights.

A. Federal Inverse Condemnation Claims in *Federal* Courts Against the *Federal* Government are Allowed even if Direct Condemnation Lawsuits Have Been Initiated by the Federal Government

If the federal government brings a direct condemnation lawsuit in a federal district court, then a property owner may recover in the direct condemnation proceeding: (a) the value of the land appropriated, (b) damages to the remaining land caused by detachment of the appropriated land, and (c) damages to the remaining land caused by construction of improvements by the government on the appropriated land. U.S. v. Grizzard, 219 U.S. 180, 183, 31 S. Ct. 162, 163 (1911); cf. UTAH CODE ANN. § 78-34-10 (same principles).

If the owner claims damage to the remaining land other than from these three causes, and if such inverse condemnation claim is for \$10,000 or less, it may be asserted as a counterclaim in the federal district court under the Little Tucker Act. 28 U.S.C. § 1346(a)(2); U.S. v. 3,218.9 Acres of Land, 619 F.2d 288, 292 (3rd Cir. 1980). If such inverse condemnation claim exceeds \$10,000, it may still be asserted, but it must be brought in a separate action in the Court of Federal Claims under the Tucker Act. 28 U.S.C. § 1491. Therefore, "though he may have to appear in two proceedings to obtain the totality of that compensation...[t]he 5th Amendment, while it guarantees that compensation be just, does not

guarantee that it be meted out in a way more convenient to the landowner than to the sovereign." U.S. v. 101.88 Acres of Land, 616 F.2d 762, 772 (5th Cir. 1980).

B. Federal Inverse Condemnation Claims in State Courts Against State Governments are Allowed Even if Direct Condemnation Lawsuits Have Been Initiated by the State Government under State Legislation

As set out in Part I.B.2 above, Wintergreen's complaint properly alleges a "partial taking," a total "categorical taking" and an "unconstitutional condition" taking under the federal Just Compensation Clause. A state statutory direct condemnation proceeding does not override federal constitutional rights.

The principle of federal supremacy prohibits state Legislatures from overriding federal constitutional rights through state legislation. U.S. CONST. art. VI, cl. 2 ("This Constitution...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.")

Thus, for example, in Patsy v. Board of Regents of the State of Florida, 457 U.S. 496, 102 S. Ct. 2557, 73 L.Ed.2d 172 (1982), the United States Supreme Court held that 42 U.S.C. Section 1983 preempts university employment decision procedures with respect to suits in federal courts. And in Felder v. Casey, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988), the Court held that 42 U.S.C. § 1983 preempts state notice-of-claim statutes in federal civil rights actions brought in state court.

Similarly, the direct condemnation statute in Utah cannot override Wintergreen's federal constitutional rights. Cf. Com. of Mass. v. Bartlett, 266 F.Supp. 390, amended on

other grounds 384 F.2d 819, certiorari denied 390 U.S. 1003, 88 S. Ct. 1245, 20 L.Ed.2d 103 (D. Mass. 1967)(state power of direct condemnation, like other powers of the state, is subject to Supremacy Clause, and the state's exercise of its power must yield when it conflicts with a paramount federal statute).

C. Federal Ripeness Doctrine Does not Apply

In Patterson v. American Fork City, 2003 UT 7, ¶ 35, 67 P.3d 466 this court held that a federal Just Compensation Clause claim was not ripe for adjudication in a Utah state court until the property owner had obtained a complete adjudication of a state inverse condemnation claim. Subsequently, in San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323, 125 S. Ct. 2491, 2506 (2005), the United States Supreme Court held:

The requirement that aggrieved property owners must seek 'compensation through the procedures the State has provided for doing so,' [Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194, 105 S. Ct. 3108, 87 L.E.2d 126 (1985)] does not preclude state courts from hearing simultaneously a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution."

Accordingly, Wintergreen's inverse condemnation claims under the federal Just Compensation Clause can be adjudicated by the trial court simultaneously with Wintergreen's inverse condemnation clause claims under the Utah Constitution on remand.

CONCLUSION

The trial court's judgment dismissing Wintergreen's inverse condemnation complaint should be reversed. Since Wintergreen's appeal thereby will have resulted in substantial benefit to the public as a result of the refinement in state inverse condemnation law brought about by this appeal, Wintergreen should be awarded its costs on appeal UTAH RULES APP. PROC. 34(b)(costs on appeal against the state of Utah); Cooke v. Cooke, 2001 UT App 110, ¶14, 22 P 3d 1249 (successful appellant entitled to costs on appeal).

DATED this 26th day of June, 2006.


JOHN MARTINEZ
Attorney for Plaintiff-Appellant Wintergreen

ADDENDUM

Exhibit 1: Map depicting Wintergreen's land. (R. 81)

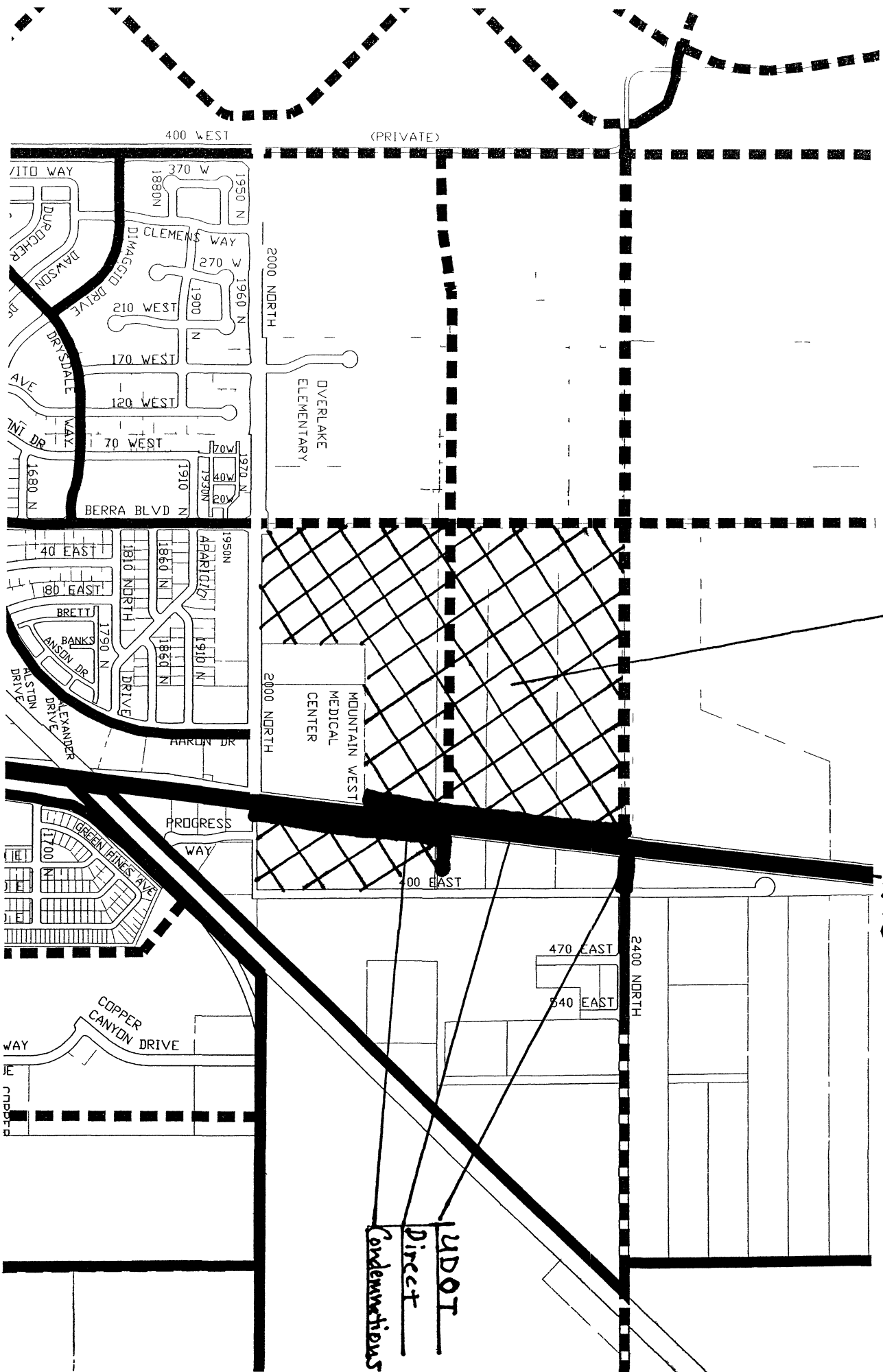
Exhibit 2: *Proceedings and Debates of the Constitutional Convention*, 315-16, 326-329 (1898)

**WINTERGREEN'S OPENING BRIEF
ADDENDUM EXHIBIT 1**

General location of Plaintiff's Lands (X-hatched area)

SR 36

NORTH
↑



UDOT
Direct
Condemnation

WINTERGREEN'S OPENING BRIEF ADDENDUM EXHIBIT 2

(Excerpts: Proceedings and Debates of the Constitutional Convention (1898))

might refuse to give an examination, then

The CHAIRMAN The question is on the amendment offered by the gentleman from Weber as amended

Mr THURMAN "Unless waived by the accused with the consent of the State "

Mr WHITNEY. It is proposed to put all that between "examination" and "and?"

Mr VARIAN No, after "commitment "

Mr EVANS (Weber) Let it go after the word "magistrate "

Mr. THURMAN You will have to add to the word, "magistrate," "unless examination is waived by the accused with the consent of the State."

The CHAIRMAN. The article as proposed to be amended would read as follows:

Offenses heretofore required to be prosecuted by an indictment shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State.

Mr. VAN HORNE. What is the rest of the amendment?

Mr. VARIAN. That is all.

Mr. BUYS. Mr. Chairman, it seems to me that this would waive the commitment which I don't think we wish to waive. It seems to me it should be after "information" or the words "unless the examination be waived," as suggested by the gentleman from Utah.

Mr. WELLS. Mr. Chairman, I would like to ask some of these legal gentlemen a question, whether or not, if an examination is waived, is it not the same as an examination? Why these words are necessary at all?

Mr. EVANS (Weber). This, as it now stands, requires an examination. If there wasn't an examination it would be error to take proceedings against the accused by information.

The amendment was agreed to.

Mr EICHNOR Mr Chairman, I move to amend section 13 by striking out, after the word "commitment" and insert in lieu thereof, "the grand jury shall consist of seven persons, of whom five must concur on indictment, but no grand jury shall be drawn and examined unless in the opinion of the judge of the district, public interest demands one "

The amendment was agreed to.

On motion of Mr. Evans, of Weber, the committee arose.

The committee then arose and reported to the Convention as follows:

Your committee of the whole, after examining and carefully considering the preamble and bill of rights, report progress.

The Convention then at 4:43 p. m. adjourned.

TWENTY-SECOND DAY

MONDAY, March 25, 1895.

The Convention was called to order at 2 p. m. by President Smith.

The roll was called and the following named members were found in attendance:

| | |
|--------------|-----------------|
| Adams | Kimball, Weber |
| Allen | Larsen, C. P. |
| Anderson | Lemmon |
| Barnes | Lewis |
| Bowdle | Low, Wm |
| Boyer | Low, Peter |
| Brandley | Low, Cache |
| Button | Lund |
| Buys | Maeser |
| Call | Mackintosh |
| Cannon | Maloney |
| Chidester | Maughan |
| Christianson | McFarland |
| Clark | Morris |
| Coray | Moritz |
| Creer | Murlock, Beaver |
| Cunningham | Murlock, Summit |
| Cushing | Nebeker |
| Driver | Pare |

| | |
|--------------------|-------------------|
| Eichnor | Partridge |
| Emery | Peters |
| Engberg | Peterson, Grand |
| Evans, Weber | Peterson, Sanpete |
| Evans, Utah | Preston |
| Farr | Raleigh |
| Francis | Richards |
| Gibbs | Ricks |
| Goodwin | Robertson |
| Green | Robinson, Kane |
| Hammond | Robison, Wayne |
| Hart | Snow |
| Haynes | Squires |
| Halliday | Stover |
| Heybourne | Strevell |
| Howard | Symons |
| Hughes | Thurman |
| Hyde | Van Horne |
| Ivins | Varian |
| James | Warrum |
| Johnson | Wells |
| Jolley | Whitney |
| Keith | Williams |
| Kearns | Mr. President. |
| Kimball, Salt Lake | |

Prayer was offered by Rev. S. J. Adams, Baptist district missionary for Utah.

The journal of the twentieth day's session was read and approved.

Mr. Boyer presented a petition, signed by Frank C. Leonard and twenty others of the Christian Endeavor Society, of Springville, Utah County, for prohibition (file No. 156).

Referred to committee on schedule and future amendments and miscellaneous.

Mr. Morris presented a petition from Edwin Dalton and 102 others, citizens of Parowan, asking that the question of prohibition be submitted to the people (file No. 157).

Referred to committee on schedule and future amendments and miscellaneous.

The committee on rules reported as follows:

MR. PRESIDENT:

The committee on rules, to which was referred resolution (not numbered) relating to morning sessions, herewith report the same, with the recommenda-

striking out "2 o'clock p m" on third line thereof, and inserting "10 o'clock a. m."

VARIAN,

Acting Chairman.

Mr. THURMAN Mr President, I move that the rules be suspended and that the standing rule be amended in accordance with the report.

Mr. STREVELL. I move to amend by making it 10:30 instead of 10.

The amendment was rejected.

The motion was agreed to.

The committee on ordinances and federal relations reported as follows:

MR. PRESIDENT:

Your committee on ordinances and federal relations respectfully submit for your consideration their joint report of the accompanying draft of an ordinance on compact, and recommend its adoption. We also report back the following propositions referred to us:

File No. 118, by Mr. Maloney, of Weber.

File No. 153, by Mr. Raleigh, of Salt Lake.

With recommendation that the latter be referred to the committee on schedule, future amendments and miscellaneous.

HEYBOURNE,

Chairman committee on ordinance.

PAGE,

Chairman committee on federal relations.

The PRESIDENT. Under the rule it goes to the printers and will be put on the calendar of the committee of the whole.

Motions and resolutions.

Mr. CHIDESTER. Mr. President, I desire to make a motion, and as a preface to this motion, I wish to say that the object of the motion is to secure a speedy action upon the election bill. By a speedy action, I mean that it may not be delayed by the act of the minority, who have informed the Convention that they wished to make a report the other day. I believe that it is the object of some who do not favor this bill to delay it and for that reason the minority have not made any report. Of course, I may be mistaken on this, but the circumstances go to prove to me that this is the case. Therefore, I move

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.

Mr. WHITNEY. Mr. Chairman, I

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 in accord with the motion of the gentleman to require the compensation to be first made, but it seems to me that

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 can be compensated for just as well in the beginning as it can after the lapse of ten years, because the means of ar-

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 ascertained. It seems to me that this is the only way that it can be done.

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 that is the reason that I am anxious that the words "or damaged" should be left in. And in speaking to the remarks Mr. Varian made I desire to

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 public gets absolute justice in relation to the matter, but to say that a public corporation should be permitted by 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 be secured, yet we know of cases—there are many in the Territory—

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 impossible. Sometimes the thing is to be

CERTIFICATE OF SERVICE

Filed ten copies of the foregoing, *one of which contains an original signature*, with the Clerk of the Supreme Court:

OFFICE OF THE CLERK OF THE COURT
SUPREME COURT OF THE STATE OF UTAH
450 SOUTH STATE STREET, FIFTH FLOOR
SALT LAKE CITY, UTAH 84114-0210

and served two copies of the foregoing upon the following:

Randy S. Hunter
160 East 300 South, 5th Floor
Salt Lake City, Utah 84114-0857

via first class mail, postage pre-paid, this 26th day of June, 2006, addressed as set forth above.

