

2006

# Wintergreen Group v. Utah DOT : Reply Brief

Utah Court of Appeals

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John Martinez; Nick J. Colessides; Attorneys for Appellant.

Brent A. Burnett; Randy S. Hunter; Utah Attorney General's Office; Attorneys for Appellee.

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WINTERGREEN GROUP, LC, a Utah  
Limited Liability Company,

V.

Defendant-Appellee.

Trial Court Case No. 050300341  
Judge Randall N. Skanchy

**SEP 28 2006**

-3325 FILED  
00152144  
APPELLATE COURT

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

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## ARGUMENT

### INTRODUCTION

UDOT does not challenge the three principal arguments in Plaintiff Wintergreen's Opening Brief: (I) that Wintergreen's complaint properly *alleges* both state and federal constitutional inverse condemnation claims sufficient to overcome UDOT's motion to dismiss;<sup>1</sup> (II) that Wintergreen's *state* constitutional inverse condemnation claims are not precluded by UDOT's statutory direct condemnation lawsuits;<sup>2</sup> and (III) that Wintergreen's *federal* constitutional inverse condemnation claims are not precluded by UDOT's direct condemnation lawsuits initiated under state statute.<sup>3</sup>

Instead, UDOT in its Appellee's Brief advances only two propositions: (1) That "[t]he trial court correctly dismissed this entire action as being in violation of Utah R. Civ. P. 13(a)"<sup>4</sup> and (2) That "[t]he trial court correctly dismissed plaintiff's three § 1983 claims based on [UDOT]'s Eleventh Amendment immunity."<sup>5</sup>

UDOT's first proposition is irrelevant, since although Plaintiff requested the trial court to allow Plaintiff to file its action as a counterclaim, the trial court instead based its dismissal of Plaintiff's action on Utah R. Civ. P. 12(b)(6), not on Utah R. Civ. P. 13(a). UDOT's second proposition also has no merit because the trial court based its dismissal of Plaintiff's federal

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<sup>1</sup>. Plaintiff's Opening Br. Pt. I, pp. 10-19.

<sup>2</sup>. Plaintiff's Opening Br. Pt. II, pp. 19-38.

<sup>3</sup>. Plaintiff's Opening Br. Pt. III, pp. 38-41.

<sup>4</sup>. UDOT Br. p.1.

<sup>5</sup>. UDOT Br. p.2.

claims based on a decision of the *Georgia* Court of Appeals that an inverse condemnation claim based on Section 1983 could not be asserted when the government has brought a direct condemnation action. Since the Plaintiff's federal claims are based directly on the federal constitution, and alternatively on the doctrine of Ex Parte Young, 209 U.S. 123 (1908), the Georgia Court of Appeals decision is not only lacking in precedential authority for Utah courts, but also inapplicable to this case.

Therefore, this Court should reverse the trial court, award costs to Plaintiff on appeal, **and** remand the case to the trial court for further proceedings.

#### **I. COMPULSORY COUNTERCLAIM RULE IS IRRELEVANT**

UDOT erroneously asserts that "[t]he trial court correctly dismissed this entire action as being in violation of Utah R. Civ. P. 13(a)"<sup>6</sup> UDOT's assertion is irrelevant, since although Plaintiff requested the trial court to allow Plaintiff to file its action as a counterclaim, the trial court instead based its dismissal of Plaintiff's action on Utah R. Civ. P. 12(b)(6), not on Utah R. Civ. P. 13(a).

##### **A. Plaintiff properly requested to assert a counterclaim--and UDOT consented to Plaintiff's assertion of Plaintiff's *state* inverse condemnation claims as counterclaims**

UDOT filed three direct condemnation lawsuits and Plaintiff filed this fourth, inverse condemnation lawsuit. Toward the close of oral argument in the court below on UDOT's motion to dismiss Plaintiff's fourth, inverse condemnation lawsuit, the following exchange occurred:

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<sup>6</sup>. UDOT Br. p.1.

"MR. MARTINEZ: Your honor, if I may seek some clarification. When Your Honor refers to consolidation, there are several different meanings. One is--

THE COURT: And I understand your--

MR. MARTINEZ: --consolidate of all four cases?

THE COURT: And I haven't made that decision. I don't know whether it means I consolidate three cases or whether I consolidate four cases.

MR. MARTINEZ: Or there's a third alternative which is to consolidate the three cases and allow the plaintiff, the landowner, to assert the inverse condemnation in the counterclaim within those consolidated cases.

THE COURT: Which is really accomplishing the same thing. It could be accomplishing the same thing as what would happen here if I simply consolidated it in.

MR. MARTINEZ: Yes. I agree.

THE COURT: ... I think your question Mr. Martinez, is a good one; that is, I haven't decided yet exactly what that consolidation might be. And I'm not certain my making a decision before I hear briefing on consolidation assists the Court in any particular way or assists the parties in any particular way, because I think you have at least those rights one way or the other . I either consolidate it in or you bring it as a counterclaim."<sup>7</sup>

Accordingly, the trial court clearly understood that Plaintiff sought either "consolidation" of all four cases, or consolidation of the three direct condemnation lawsuits with Plaintiff's inverse condemnation claims asserted as counterclaims within those three consolidated actions. As both the trial judge and Plaintiff's counsel understood, the two alternatives would have accomplished the same thing, as a practical matter.

The trial court then invited both sides to provide supplemental briefing on the consolidation/counterclaim question:

THE COURT: [Addressing Mr. Hunter] How much time do you need to put together your thinking as to whether or not you would oppose consolidation by this Court and if so, you would brief it?

....

---

<sup>7</sup>. Transcript of Oral Argument on UDOT's Motion to Dismiss, November 29, 2005, p.40, ll.20-25; p.42, ll.1-25 (R.197) (emphasis added)(A copy of the Transcript is attached hereto as Plaintiff's Reply Addendum Exh. 1).



THE COURT: [Addressing both counsel] Okay. And then after you brief it, you're certainly entitled to reply. I'll give you the opportunity to make that reply. ...<sup>8</sup>

In response to the trial court's invitation, on December 7, 2005, Plaintiff filed a Supplemental Memorandum in which Plaintiff in which Plaintiff asserted:

**I. Court May Consolidate all Four Cases or Convert Plaintiff's Fourth Suit into a COUNTERCLAIM in Consolidated Cases**

Through a letter to the Court dated December 2, 2005, UDOT states that it "will not oppose consolidation" of the three "direct" condemnation cases. In addition, UDOT in its Supplemental Memorandum states:

"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)." (emphasis added)

Plaintiff properly has properly alleged both state and federal constitutional inverse condemnation claims. And since UDOT apparently does not object to having Plaintiff's *state* constitutional inverse condemnation claims consolidated with the three direct condemnation cases, this court should either consolidate all four cases or simply convert Plaintiff's fourth suit in its entirety into a Counterclaim with respect to each of the three consolidated cases.<sup>9</sup>

In addition, and in further response to the trial court's invitation, on December 8, 2005, Plaintiff filed a "Request for 4-Case Consolidation or, in the Alternative, Request for 3-Case Consolidation Plus Deeming 4th Case Complaint as Counterclaim."<sup>10</sup> Accordingly, Plaintiff

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<sup>8</sup>. Transcript of Oral Argument on UDOT's Motion to Dismiss, November 29, 2005, p.47, ll.6-9, 19-21 (R.197)(Reply Addendum Exh.1).

<sup>9</sup>. Plaintiff's Supplemental Memorandum In Response to Court's Request and in Response to UDOT's Supplemental Memorandum in Support of UDOT's 12(b)(6) Motion to Dismiss, filed December 8, 2005, p.2 (R.158)(emphasis added)(A copy is attached hereto as Plaintiff's Reply Addendum Exh. 2).

<sup>10</sup>. Plaintiff's Request for 4-Case Consolidation or, in the Alternative, Request for 3-Case Consolidation Plus Deeming 4th Case Complaint as Counterclaim, filed December 9, 2005 (R.160-63)(emphasis added)(A copy is attached hereto as Plaintiff's Reply Addendum Exh. 3).

properly requested to assert a counterclaim.

Moreover, UDOT in its Supplemental Memorandum dated December 2, 2005 expressly *consented* to adjudication of Plaintiff's *state* constitutional inverse condemnation claims as counterclaims in the three consolidated direct condemnation lawsuits:

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).<sup>11</sup>

**B. The trial court dismissed Plaintiff's claims under 12(b)(6), for failure to state a claim**

UDOT states that "The court rejected plaintiff's claim that inverse condemnation claims were not based on the same transaction or occurrence as were the condemnation actions. R. 172-74"<sup>12</sup> One searches in vain through those pages--or in fact throughout the entire trial court's memorandum decision--for anything resembling support for that assertion.

On the contrary, at the oral argument on UDOT's motion to dismiss Plaintiff's fourth, inverse condemnation lawsuit, UDOT admitted that only UDOT's 12(b)(6) motion was before the court:

THE COURT: Right. But at this point your motion is a motion to dismiss under **Rule 12(b)(6)**.

MR. HUNTER: Yes.<sup>13</sup>

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<sup>11</sup>. UDOT Supplemental Memorandum dated December 2, 2005 (R.164-168, at 165)(emphasis added).

<sup>12</sup>. UDOT Br. p.4.

<sup>13</sup>. Transcript of Oral Argument on UDOT's Motion to Dismiss, November 29, 2005, p.43, ll.9-11 (R.197) (emphasis added)(Reply Addendum Exh. 1).

Moreover, on page 6 of its Memorandum Decision, the trial court stated: -

"The Court GRANTS UDOT's Rule 12(b)(6) motion to dismiss... ." <sup>14</sup>

Thus, the trial court ruled that Plaintiff's allegations were legally insufficient to state a claim, not, as UDOT contends, because Plaintiff was prohibited from asserting those claims in its fourth, inverse condemnation complaint by the compulsory counterclaim rule.

### **C. Plaintiff's request to assert a counterclaim became moot**

Since the trial court ultimately granted UDOT's motion to dismiss the claims in Plaintiff's fourth, inverse condemnation lawsuit, Plaintiff's request for consolidation/counterclaim of Plaintiff's claims in that fourth lawsuit into the three direct condemnation suits became moot. Thus, the trial court's memorandum decision concluded:

The Court The Court GRANTS UDOT's Rule 12(b)(6) motion to dismiss and orders the three condemnation suits ... against Wintergreen be consolidated. <sup>15</sup>

Since the trial court thus dismissed all the claims in Plaintiff's fourth, inverse condemnation lawsuit and consolidated only the three pending direct condemnation lawsuits brought by UDOT, the trial court did not bother to further address Plaintiff's request to assert its claims as counterclaims in the consolidated proceedings.

UDOT's arguments regarding the compulsory counterclaim rule thus are *irrelevant*.

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<sup>14</sup>. Tr. Ct. Mem. Opinion and Order, March 6, 2006. p.6 (R.170).

<sup>15</sup>. Tr. Ct. Mem. Opinion and Order, March 6, 2006, p.6 (R.170)(emphasis added).

**D. This Court should direct the trial court to consolidate all four cases or to allow Plaintiff's fourth, inverse condemnation, lawsuit claims as counterclaims in the three direct condemnation suits**

If this Court agrees that Plaintiff properly stated claims in its fourth, inverse condemnation lawsuit, then this Court should direct the trial court to consolidate all four cases or to allow Plaintiff's fourth, inverse condemnation lawsuit claims as counterclaims in the three now-consolidated direct condemnation suits. In that regard, Plaintiff's arguments in its request for consolidation/counterclaim in the court below are *apropos*:

**"I. Consolidation of All Four Lawsuits Will Achieve Consistent Jury Determinations**

.... The question then becomes one of efficient, consistent and fair administration of the four lawsuits. A jury must determine both the direct condemnation and inverse condemnation claims. *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).

Thus, since Plaintiff properly alleges state and federal constitutional claims, all four cases should be consolidated so that a single jury will achieve consistent, fair determinations of the four lawsuits. UTAH R.CIV.P. 42(a).

....

**II. Consolidation of Three Direct Condemnation Lawsuits, Plus Deeming of 4th Case Complaint as Counterclaim Also Will Achieve Consistent Jury Determinations**

Alternatively, the Court may achieve the necessary consistency, efficiency and fairness by consolidating the three direct condemnation lawsuits, and deeming all claims in the fourth, inverse condemnation lawsuit as a Counterclaim, applicable to all three cases in the consolidated action."<sup>16</sup>

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<sup>16</sup>. Plaintiff's Request for 4-Case Consolidation or, in the Alternative, Request for 3-Case Consolidation Plus Deeming 4th Case Complaint as Counterclaim, filed December 9, 2005 (R.161-62)(A copy is attached hereto as Plaintiff's Reply Addendum Exh. 3).

## II. PLAINTIFF PROPERLY ALLEGES FEDERAL CLAIMS

UDOT erroneously asserts that "[t]he trial court correctly dismissed plaintiff's three § 1983 claims based on [UDOT]'s Eleventh Amendment immunity."<sup>17</sup> On the contrary, the trial court based its dismissal of Plaintiff's federal claims on a decision of the *Georgia* Court of Appeals that an inverse condemnation claim based on Section 1983 could not be asserted when the government has brought a direct condemnation action. Since the Plaintiff's federal claims are based directly on the federal constitution, and alternatively on the doctrine of Ex Parte Young, 209 U.S. 123 (1908), the Georgia Court of Appeals decision is not only lacking in precedential authority for Utah courts, but also is inapplicable to this case.

### A. Plaintiff's claims in its fourth, inverse condemnation, lawsuit are not based on Section 1983

Relying on a decision of the *Georgia* Court of Appeals, the trial court dismissed Plaintiff's federal claims on the ground that an inverse condemnation claim based on Section 1983 could not be asserted when the government has brought a direct condemnation action.<sup>18</sup>

It is elementary that Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." 42 U.S.C.A. § 1983; City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 749 n.9, 119 S.Ct. 1624, 1658 n.9

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<sup>17</sup>. UDOT Br. p.2.

<sup>18</sup>. Tr. Ct. Mem. Opinion and Order, March 6, 2006, pp.6-7, R.171-72. ("The [Court of Appeals of Georgia] found a taking which is no more than an ordinary legal action by the department of Transportation to take property in accordance with the statutes of the state is not enough to convert the action into a civil rights violation [under Section 1983]... .").

(1999)(quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)). Thus, Section 1983 is merely a "shopping basket" for claims; the substantive content of the claims put into the "shopping basket" must come from the "shelves" of the federal constitution or statutes.

The substantive basis for Plaintiff's federal claims, therefore, is not Section 1983, which merely provides the remedies for Plaintiff's federal claims. Instead, as set out in Plaintiff's Opening Brief,<sup>19</sup> the *substantive content* of Plaintiff's claims arises from two independent sources: First, Plaintiff has a substantive right against UDOT arising directly from the Just Compensation Clause of the Fifth Amendment of the federal Constitution. Jacobs v United States, 290 U.S. 13 (1933) (plaintiff who claims property has been taken can sue directly under the Fifth Amendment). UDOT does not contest Plaintiff's arguments in that regard.

Second, Plaintiff also has a substantive right to injunctive relief against UDOT officials under the doctrine of Ex Parte Young, 209 U.S. 123 (1908). UDOT also does not contest Plaintiff's arguments in that regard.

**B. San Remo Hotel says nothing about direct condemnations and their relation to inverse condemnation claims**

UDOT misconstrues the United States Supreme Court's decision in San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323, 125 S. Ct. 2491 (2005) by contending that case established "that a federal claim could be raised in the same action brought by the state to condemn private property."<sup>20</sup>

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<sup>19</sup>. Plaintiff's Opening Br. Pt. I.B.2.a, pp. 15-17.

<sup>20</sup>. UDOT Br. p. 12.

First, no direct condemnation was involved at all in San Remo Hotel. The Hotel applied for conversion and conditional use permits to allow tourist use of the hotel. The San Francisco Planning Commission granted both permits, but subject to payment of a \$567,000 "in lieu" fee, and the provision of lifetime leases to the then current-residents.

Second, the Supreme Court in San Remo Hotel held that a claimant may assert both state and federal takings claims simultaneously in the same lawsuit in a state court.<sup>21</sup> The Court thereby overruled prior state court rulings, including that of the Utah Supreme Court in Patterson v. American Fork City, 2003 UT 7, 67 P.3d 466, that a federal takings claim was not "ripe" until a state takings claim had been fully adjudicated. As the San Remo Hotel case recognized, when combined with issue preclusion rules, that would prevent a litigant from adjudicating a federal takings claim in any forum at all. It is in that context that the United States Supreme Court stated:

"[State courts may hear] 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."<sup>22</sup>

Accordingly, San Remo Hotel held only that a takings claimant may bring all state and federal takings claims in a state court. That is a different question altogether from whether the state's initiation of direct condemnation proceedings limits takings claimants to the remedy provided in the direct condemnation proceedings, thereby prohibiting the assertion of inverse condemnation claims, state or federal. UDOT simply misreads San Remo Hotel.

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<sup>21</sup>. Id. at 2506.

<sup>22</sup>. Id.

### **C. UDOT is attempting a shell game**

UDOT's concluding statement in its Appellee's Brief that San Remo Hotel authorizes "The trial court [to] hear plaintiff's federal takings claims simultaneously to [sic] determining the condemnation claims"<sup>23</sup> is a misleading attempt at a shell game. UDOT means that Plaintiff is limited to the direct condemnation lawsuits and that Plaintiff's federal and state inverse condemnation claims are folded into those lawsuits. UDOT thereby attempts a shell game, whereby Plaintiff's federal and state inverse condemnation claims vanish under the direct condemnation lawsuit shells.

As discussed at length in Plaintiff's Opening Brief, the direct condemnation lawsuits do not address the full scope of the harms suffered by Plaintiff as a result of UDOT's conduct. Since Plaintiff has properly alleged federal takings claims, the only question is whether they should be adjudicated in a separate, fourth inverse condemnation lawsuit or instead as consolidated actions/counterclaims with the three direct condemnation lawsuits.

### **CONCLUSION**

The trial court's judgment dismissing Plaintiff Wintergreen's fourth, 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

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<sup>23</sup>. UDOT Br. p. 12.



appeal).

DATED this 28th day of September, 2006.



JOHN MARTINEZ  
Attorney for Plaintiff-Appellant Wintergreen

### **REPLY ADDENDUM**

- Reply Exhibit 1:** Transcript of Oral Argument on UDOT's Motion to Dismiss, November 29, 2005 (R.197).
- Reply Exhibit 2:** Plaintiff's Supplemental Memorandum In Response to Court's Request and in Response to UDOT's Supplemental Memorandum in Support of UDOT's 12(b)(6) Motion to Dismiss, filed December 8, 2005 (R.147-59).
- Reply Exhibit 3:** Plaintiff's Request for 4-Case Consolidation or, in the Alternative, Request for 3-Case Consolidation Plus Deeming 4th Case Complaint as Counterclaim, filed December 9, 2005 (R.160-63).

# **REPLY ADDENDUM EXHIBIT 1**

**Transcript of Oral Argument on UDOT's Motion to Dismiss,  
November 29, 2005 (R.197)**

ORIGINAL

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR TOOELE COUNTY, STATE OF UTAH

WINTERGREEN GROUP, T.C., a UTAH	]	
Limited Liability Company,	]	
	]	
Plaintiff,	]	Civil Case No.
	]	050300341
Vs.	]	Supreme Court Case
	]	No.
UTAH DEPARTMENT OF	]	
TRANSPORTATION	]	
Defendant.	]	

November 29, 2005, 11:00 a.m.

ORAL ARGUMENT

**FILED DISTRICT COURT**  
Third Judicial District

UDOT'S MOTION TO DISMISS

APR 14 2006

*fk* SALT LAKE COUNTY  
County Clerk

Third District Court  
450 South State  
Salt Lake City, Utah

BEFORE THE HONORABLE RANDALL SKANCHY  
District Court Judge

20060338

FILED

CLERK OF DISTRICT COURT So

MAY 15 2006

Peggy L Grover  
CERTIFIED COURT TRANSCRIBER  
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DRAPER, UTAH 84120 1274  
(801) 571-5206

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1 IN THE THIRD JUDICIAL DISTRICT COURT  
 2 IN AND FOR TOOELE COUNTY, STATE OF UTAH  
 3 WINTERGREEN GROUP, L.C., a UTAH  
 4 Limited Liability Company, }  
 5 Plaintiff, } Civil Case No.  
 6 Vs. } 050300341  
 7 UTAH DEPARTMENT OF } Supreme Court Case  
 8 TRANSPORTATION, } No.  
 9 Defendant. }

10 November 29, 2005, 11:00 a.m.  
 11 ORAL ARGUMENT  
 12 UDOT'S MOTION TO DISMISS

13 Third District Court  
 14 450 South State  
 15 Salt Lake City, Utah

16  
 17 BEFORE THE HONORABLE RANDALL SKANCHY  
 18 District Court Judge  
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 25

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Page 3

1 SALT LAKE CITY, TUESDAY, NOVEMBER 29, 2005, 11:00 A.M.  
 2 P R O C E E D I N G S  
 3 THE COURT: Okay. Let's go on the record. This is  
 4 the matter of Wintergreen Group, L.C., versus Utah  
 5 Department of Transportation. It is Case Number  
 6 050300341.  
 7 Counsel, if you want to make your record of  
 8 appearance here today.  
 9 MR. COLESSIDES: Nick Colessides together  
 10 with John Martinez for the plaintiff, Your Honor.  
 11 MR. MARTINEZ: And for the record, Your  
 12 Honor, the dean asked me always to note that I do not  
 13 represent the University or the College of Law.  
 14 THE COURT: Does he require that disclaimer  
 15 of all professors or just yourself?  
 16 MR. MARTINEZ: All professors.  
 17 THE COURT: Thank you.  
 18 MR. HUNTER: Randy Hunter of the Attorney  
 19 General's Office. We do represent the University but  
 20 not in this matter today.  
 21 THE COURT: All right.  
 22 MR. CUSHING: Andrew Cushing also with the  
 23 State Department of Transportation, who has represented  
 24 the University in the past but not today.  
 25 THE COURT: Yeah. It's funny what strange

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1 bedfellows the law makes. All right, Counsel, it's your  
 2 motion.

3 MR. HUNTER: It is.

4 THE COURT: If you would like to proceed.

5 MR. HUNTER: Thank you, Your Honor.

6 Before we get started, I understand Mr.

7 Colessides has requested a recording of this and so I  
 8 also would like a recording. Thank you.

9 THE CLERK: I have three tapes. I can keep  
 10 one for you. If that's okay with you.

11 MR. HUNTER: Than you. I apologize I wasn't  
 12 able to do that before.

13 THE COURT: Let's try to make this videotape  
 14 as interesting as possible.

15 MR. HUNTER: I believe this will be an  
 16 interesting case for Your Honor. I'm looking forward to  
 17 the arguments today. I'm looking forward to hearing  
 18 what the arguments are, to be honest.

19 What has brought us to the Court today is  
 20 that the Utah Department of Transportation has been  
 21 reconstructing SR-36, which is the road that goes from  
 22 Tooele to I-80 out at Lakepoint. And as part of that  
 23 reconstruction a condemnation was filed against the  
 24 plaintiffs in this case. In the condemnation case  
 25 they're defendants. And there actually are three

1 condemnation cases; one here on this parcel, one on this  
2 parcel up here, and one on this parcel.

3 THE COURT: Just to orient me, as I'm looking  
4 at this, tell me where in connection with the parcel is  
5 the Medical Center, the hospital.

6 MR. HUNTER: Right here.

7 THE COURT: Okay. So the hospital is on the  
8 west side, the top of your chart then is the east side  
9 of SR-36?

10 MR. HUNTER: Correct. This is the overpass  
11 that comes down from the railroad and here is an aerial  
12 photo that I have marked on. This is the hospital.  
13 There are some buildings here at the bottom of the  
14 overpass, here is the railroad tracks. The overpass  
15 comes down and ends about here And if you ever see  
16 these cases in your courtroom we'll have fancier  
17 exhibits, I promise. I threw these together quickly for  
18 you to have a feel for it

19 Now, this is a fourth case. Those are three  
20 cases that are pending before Your Honor This is a  
21 fourth case that has been filed by the parties, the  
22 Wintergreen Investment Group or Wintergreen Partnership,  
23 and this is a case in inverse condemnation. The State  
24 action which is alleged to bring about the inverse  
25 condemnation is the filing of a condemnation action. I

1 must confess this is new to me, I have not seen that  
2 alleged in the past as a State action causing a taking.  
3 as the filing of a taking.

4 Mr. Martinez and I are having some fun here  
5 in a series of cases and I think this is just part of  
6 the series where we're exploring the parameters of the  
7 takings clause and having a lot of fun in doing so, I  
8 think And I am here today to represent the takings  
9 clause, the Constitution. There are some laws that  
10 define under which government can take and how just  
11 compensation is to be paid The takings clause in Utah  
12 is Article 1, Section 22: "Private property shall not  
13 be taken or damaged for public use without just  
14 compensation." And I've included a copy of that in the  
15 bench book that I have provided Your Honor

16 Now, I have filed in response to this  
17 complaint a motion to dismiss under Rule 12(b) and the  
18 basis for my motion is that they have failed to state a  
19 cause of action No cause of action exists for a taking  
20 because we are doing the taking. We are seeking in  
21 those condemnation cases an award of just compensation  
22 They will be properly compensated under the law I don't  
23 know exactly, and I'm looking forward to hearing exactly  
24 what type of compensation beyond just compensation they  
25 believe they are entitled to. We do know one is

1 attorney's fees. Attorney's fees are awarded under the  
2 law for an inverse condemnation case and are not awarded  
3 for a condemnation case. And so we're seeing a plethora  
4 of answers to condemnation cases and the answer arouses  
5 the counterclaim of condemnation. They're  
6 inappropriate.

7 THE COURT: Let me understand this, because  
8 as I understood at least some of your argument from the  
9 pleadings you believe this to be a compulsory  
10 counterclaim that should have been filed with respect to  
11 the-- this sort of action could have been filed as a  
12 counterclaim. Now, am I hearing you say something  
13 different today; that it's not available by way of  
14 counterclaim?

15 MR. HUNTER: No, it is-- the claim for just  
16 compensation is available by counterclaim and they've  
17 raised it properly.

18 THE COURT: And is it raised properly in these  
19 three cases?

20 MR. HUNTER: Yes.

21 THE COURT: So you have counterclaims pending  
22 in those cases?

23 MR. HUNTER: We have counterclaims for  
24 seeking just compensation. I do not believe they're  
25 couched as a cause of action in inverse condemnation,

1 are they?

2 THE COURT: That's correct.

3 MR. HUNTER: And the only thing to be gained  
4 by an inverse condemnation, as I say, is attorney's  
5 fees.

6 THE COURT: Okay. I'm with you

7 MR. HUNTER: And that's the part that I mean  
8 is inappropriate.

9 THE COURT: All right.

10 MR. HUNTER: We are seeking just  
11 compensation, plain and simple And so my Rule 13  
12 argument is very simple, that this is a matter which  
13 will be addressed in those condemnation cases and to  
14 have to argue it in a fourth case is-- it's just plain  
15 inappropriate under the rules It's a single  
16 transaction. Now, in this case they are filed each as  
17 separate actions. If they believe that they are not  
18 separate actions, their remedy is to file a motion for  
19 consolidation and we would address that at that time. We  
20 do not believe it's appropriate for consolidation and  
21 we're not conceding that because they're separate  
22 parcels, separate tax identifications, and they are not  
23 contiguous, and don't have any continuity or uniformity  
24 of use.

25 THE COURT: Well, then, let me ask this

1 question then You seem to be, based upon what I just  
 2 heard you say, that the remedy that may be available  
 3 that you allege by way of counterclaim is not  
 4 necessarily available to them because their argument is  
 5 that this is part and parcel of a grander piece of  
 6 property, and that grander piece of property needs to be  
 7 factored in when looking at just compensation. And if  
 8 you were to say because they are not contiguous and,  
 9 therefore, are separate parcels, so that you resist a  
 10 motion to consolidate, then the plaintiffs would appear  
 11 to be in this particular case left without a remedy and  
 12 you ultimately by this argument seem to be making some  
 13 portion of their case.

14 MR. HUNTER: I hope I'm not, Your Honor. I am  
 15 saying the proper remedy for that is a motion to  
 16 consolidate, not this independent action. And we would  
 17 address that. If they're entitled to, and if they can  
 18 prove this grander scheme, then a consolidation would be  
 19 appropriate. I'm asserting they cannot prove that and  
 20 reserving the right to challenge that. But there have  
 21 been other cases where we've consolidated them and if  
 22 it's appropriate then I have no heartburn with these  
 23 being consolidated, should Your Honor believe that's  
 24 appropriate. We'll deal with that at that time.

25 The other step-- Let me skip over the

1 severance damages and speak to rightness. Normally,  
 2 when we talk about rightness in the context of a  
 3 constitutional taking, we're talking about an  
 4 administrative process, and they haven't exhausted their  
 5 administrative remedies. That's not the rightness  
 6 argument that we're arguing. The rightness argument  
 7 that we're arguing is that a final determination of just  
 8 compensation in those cases has not yet been made. We  
 9 are seeking just compensation, they are seeking just  
 10 compensation. If those courts, if those juries in those  
 11 cases award just compensation, then they will be  
 12 compensated under the Constitution and so why is this  
 13 other fourth case seeking just compensation as well? I  
 14 am curious and I'm anxious to hear what that is, what  
 15 type of just compensation they're entitled to that just  
 16 compensation under the takings won't be awarded then.  
 17 And so this case is not ripe because those juries have  
 18 not yet made their award of just compensation. In  
 19 theory their award of just compensation adequately  
 20 compensates Wintersgreen, the property owner, under the  
 21 Constitution.

22 That moves us to our third preliminary  
 23 argument, severance damages. The whole purpose of  
 24 severance damages is to compensate a landowner for  
 25 damages to the greater parcel when a strip taking, such

1 as this, causes injury to that greater parcel. The  
 2 question of severance damages will be fully litigated in  
 3 those condemnation cases and if they're entitled to  
 4 severance damages, they will receive an award of that.

5 Now, Article 1, Section 22 of the Utah  
 6 Constitutional Takings Clause is self-enforcing and a  
 7 cause of action can be brought under that article. But  
 8 then how do you calculate the damages? The Utah  
 9 Governmental Immunity Act has addressed that and it  
 10 tells us how to calculate the damages for a cause of  
 11 action under Article 1, Section 22, and you calculate  
 12 those damages exactly the same way that you calculate  
 13 damages in a condemnation case. It refers you to Title  
 14 34 or to Chapter 34 of Title 78, the inverse domain or  
 15 the imminent domain chapter. So the remedies available  
 16 to a landowner under an Article 1, Section 22 action are  
 17 identical to the letter of the remedies available under  
 18 a straightforward condemnation. They're not entitled to  
 19 some other remedies ethereal floating out there in the  
 20 universe somewhere. They are defined by law and I am  
 21 here today to defend that law and see that they receive  
 22 the just compensation that they are entitled to under  
 23 law.

24 So with that I would like to end with those  
 25 three arguments and I'm as curious as you are to hear

1 what type of compensation they believe they're entitled  
 2 to beyond what the law gives them and I would like to  
 3 reserve the right to address those once I figure out  
 4 what they may be.

5 THE COURT: Okay.

6 MR. MARTINEZ: First of all, Your Honor, if  
 7 I may, I would like to describe the three cases that are  
 8 already in play. We'll refer to those as the direct  
 9 condemnation actions that UDOT has initiated.

10 Essentially we have the first one of 459, it's that  
 11 little strip right there, with respect to 2400 North  
 12 The second one is 524, the strip across 2200 North, and  
 13 then along SR-36, affecting the plaintiff's land on the  
 14 east side of SR-36. And then the third lawsuit is 525,  
 15 taking a couple of different strips along the west side  
 16 of SR-36.

17 It is surprising to me that counsel for the  
 18 State does not-- states that he does not quite  
 19 understand the role of this fourth inverse condemnation  
 20 lawsuit, because it all is premised on the fact that  
 21 these three lawsuits that they have brought, the direct  
 22 condemnation lawsuits, have the effect of fragmenting  
 23 the plaintiff's lands. The plaintiff's lands are  
 24 crosshatched in here. There's the Medical Center, and  
 25 they are on the west side as well as on the east side of

1 SR-36  
 2 Counsel for the State, would have this Court  
 3 believe that the three direct condemnation lawsuits will  
 4 adequately compensate the landowner for the harm that  
 5 has been imposed. The fourth lawsuit, the inverse  
 6 condemnation lawsuit, simply begs to differ with that  
 7 conclusion. Essentially what's happened, Your Honor, is  
 8 by condemning, by filing three different lawsuits  
 9 involving only small pieces, those three pieces, what  
 10 the State has done is said: "Look, you're entitled to  
 11 the value of the land we took, which is not a major  
 12 amount of land, and you are also entitled to severance  
 13 damages but the severance damages will only be that  
 14 which is affected by each of those different lawsuits.  
 15 So, for example, if you take the first one, it's only  
 16 that little tiny strip. By definition what's happened  
 17 is the filing of that lawsuit fragments the plaintiff's  
 18 entire landholding into just that little area plus, if  
 19 anything, just this tiny corner here. The larger of our  
 20 greater parcel is actually fairly minimal. Consequently,  
 21 the same thing happens in each of the other lawsuits.  
 22 The State's appraisal, not surprisingly, says, You are  
 23 entitled to the value of the land that we've taken,  
 24 those minimal amounts of land, but you are entitled to  
 25 no severance damages whatsoever. And it's that concern,

1 as well as the fact that it's fragmenting the  
 2 plaintiff's land is the reason why plaintiff brought  
 3 this fourth inverse condemnation lawsuit. Essentially  
 4 what plaintiff is saying in the inverse condemnation  
 5 lawsuit is: Look, you have done several things that  
 6 have affected or impacted our landholdings, and these  
 7 are the landholdings involved. Plaintiff had, prior to  
 8 the State's conduct, had planned the Northtown Shopping  
 9 Center, which would have involved this entire area as an  
 10 integrated economic unit. And we have documented in our  
 11 pleadings the idea that the integrated economic unit is  
 12 what the relevant property is.  
 13 Moreover, the State contends that all it has  
 14 done is filed direct condemnation actions but that  
 15 simply is not the case. If Your Honor will look to our  
 16 memorandum in opposition to the plaintiff's motion to  
 17 dismiss-- the defendant's motion to dismiss at Page 4,  
 18 at the bottom, that's our-- plaintiff's memorandum in  
 19 opposition which would be item 4 in our courtesy copies,  
 20 Item 4, Page 4. At the bottom it says: 'The net effect  
 21 on all plaintiff's land has been as follows:  
 22 Fragmentation into one 14 483 acre parcel in the east  
 23 side,' that would be leaving that parcel isolated from  
 24 the rest of them.  
 25 'Secondly, reduction in total size to 116 51

1 acres," in other words, the condemnations will reduce  
 2 the total size from 121 to 116.  
 3 Three. They have blocked the access  
 4 completely from SR-36 over this way on 2200 North.  
 5 Before the State's actions, which included more than  
 6 simply bringing the direct condemnation claim lawsuits,  
 7 they have blocked off this intersection right here. You  
 8 can no longer go right to the plaintiff's land here,  
 9 thereby isolating it from the rest of the parcels and  
 10 from SR-36 itself.  
 11 Number 4, rendering 2200 North, which is  
 12 right here, they transformed that into a  
 13 right-in/right-out so that, again, has the effect of  
 14 isolating this parcel from the rest of the landholdings,  
 15 unreasonably restricting it, the access essentially to  
 16 that land there. In order to get to that land you have  
 17 to go now up around and through, and over and down to  
 18 get to this area here. To get out to go on SR-36 going  
 19 south, you have to go all the way up -- let's see.  
 20 Let's see. You can get out here to the right but you  
 21 cannot go left. In order to go south you have to go  
 22 over on 4th, that is at 4th East, go up here, turn left  
 23 here, and then turn down. That's the only way in which  
 24 you can get to SR-36 going south from this parcel now.  
 25 Before that you could simply do it by going out this way

1 out. Now, you have to go all the way up and around and  
 2 through and over and down. They have also precluded--  
 3 You will notice that this is an orange dotted line.  
 4 This is from the county's master plan and what that is  
 5 scheduled to be is a street that connects SR-36 with the  
 6 Overland subdivision on this side. In the course of  
 7 their construction in this area, what they've done is  
 8 blocked this off. They have not opened it up so that  
 9 there is no west direction travel through that area of  
 10 the plaintiff's landholdings. Essentially, they've  
 11 isolated the land from each other, as I've demonstrated  
 12 through their condemnation, as well as the blocking of  
 13 access and the intersections. And the net result has  
 14 been a substantial diminution in the entire landholdings  
 15 and that fundamentally is what that fourth lawsuit is  
 16 about. The relevant property is different from the  
 17 property that was identified in each of the three direct  
 18 condemnation lawsuits. And, Your Honor, that is the  
 19 purpose of the just compensation clause. The purpose of  
 20 the just compensation clause, as is often said by both  
 21 the State court and the Federal courts, is to prevent  
 22 one individual from having to bear burdens that in all  
 23 fairness and justice should be borne by the public as a  
 24 whole. The inverse condemnation action seeks to do that  
 25 by asserting the necessary elements for both State



1 claims and Federal claims. Nowhere in the States's  
 2 argument today, nor in the papers that they have  
 3 submitted, do they contend that plaintiff has not met  
 4 the elements of stating claims. The standard under  
 5 12(b)6 is whether plaintiff's allegations are  
 6 sufficient. And plaintiffs have alleged the necessary  
 7 elements. There is property, the larger area, there has  
 8 been a taking and damaging both in terms of the direct  
 9 condemnation lawsuits that have fragmented the area and  
 10 in terms of the other six actions that the State has  
 11 done physically to interfere with the way in which the  
 12 entire economic-- the integrated economic unit was to be  
 13 developed, and there have been damages which need to be  
 14 ascertained by a trier of fact.

15 The State has more or less conceded, and I  
 16 was as surprised as Your Honor when the State said they  
 17 have no heartburn with respect to consolidation. Well,  
 18 if they mean that their major concern is that there will  
 19 be three different trials, or three different juries,  
 20 well, we can simply consolidate the fourth action into  
 21 all of them. Let's let the Jury decide to what extent  
 22 has the plaintiff been affected by the State's conduct  
 23 taken as a whole.

24 THE COURT: Let me stop and ask you this,  
 25 because it's referred to, at least in the pleadings by

1 the State, and it would seem to be an appropriate  
 2 remedy, and that is: You do have a remedy under Section  
 3 78-10(4) I think, for this, as the State talks about it,  
 4 to severance damages. And that talks about this greater  
 5 parcel being part of what would otherwise be a  
 6 contemplation of damages for purposes of a condemnation  
 7 lawsuit. And so as I walk through the thinking of this,  
 8 the idea of the consolidation, of course, as addressed  
 9 by one or both of you is in the context of three  
 10 separate lawsuits and three separate parcels, however,  
 11 all involving one integrated economic parcel that you  
 12 have just been talking about. How is it that the remedy  
 13 isn't available to you simply by consolidation of these  
 14 three cases and the proper counterclaim associated with  
 15 the damages of severance that has arisen as a result of  
 16 the fact or impact upon this greater parcel?

17 MR. MARTINEZ: Well, two responses to that,  
 18 Your Honor; one law and the other factual. The first  
 19 is, the State seems to refer to the statutory provisions  
 20 as if they are by way of incantation. The statutory  
 21 provisions, we learn in the first year of law school  
 22 statutes cannot prevail over constitutional provisions  
 23 The constitutional claim is separate and distinct from  
 24 the statutory claim. And anticipating that this was an  
 25 argument that the State would make, there is a most

1 recent decision from the Utah Court of Appeals as of May  
 2 12th that I had prepared for the argument as we have  
 3 been going along, that specifically addresses that  
 4 point. It addresses that-- I'll provide a copy to  
 5 counsel, and if I may approach the bench.

6 THE COURT: Do I already have a copy of this?

7 MR. MARTINEZ: No. No, Your Honor.  
 8 (inaudible) before. I think this is a fairly critical  
 9 component and I have highlighted the necessary message  
 10 In that case in Hughes Land, the Court dealt with the  
 11 question of the extent to which the Utah Governmental  
 12 Immunity Act, a statutory provision, and it's notice of  
 13 claim requirements apply to inverse condemnation actions  
 14 under the State Constitution. The Court in discussing  
 15 it refers to it as a matter of fairly well understood--  
 16 a fairly well understood proposition so much so that we  
 17 hardly ever mention it, "It is clear," at the bottom of  
 18 page 3, "that legislative power itself must be exercised  
 19 within the framework of the Constitution." And going  
 20 over to page 4 in that same paragraph, "Accordingly, it  
 21 has been so long established and universally recognized  
 22 as to be hardly necessary to state that a statutory  
 23 enactment contravened any provision of the Constitution;  
 24 the latter governs." And the Court of Appeals in that  
 25 case was discussing the Coleman decision, which is cited

1 in our pleadings and also included in the courtesy  
 2 copies, where the Court emphasizes: Look, there is the  
 3 statutes. There are the statutes and then there's the  
 4 constitutional provision. 'And the inverse condemnation  
 5 claim which comes out of the constitutional provision is  
 6 separately developed by the courts.' So the first  
 7 question then becomes under the Constitution--

8 THE COURT: Let me stop and ask you this  
 9 question. But it may be separately developed but this  
 10 doesn't suggest that it be the statutory remedy that  
 11 we're looking at here under Section 4 of 78-10 is  
 12 unconstitutional. Indeed--

13 MR. MARTINEZ: No, it does not, Your Honor.

14 THE COURT: Indeed, it is constitutional, has  
 15 probably been proven to be constitutional, so that's  
 16 your remedy.

17 MR. MARTINEZ: But the question then  
 18 becomes--

19 THE COURT: Under the Constitution and the  
 20 statute.

21 MR. MARTINEZ: --how is the property defined  
 22 for purposes of the constitutional claim? And that is  
 23 the factual question. The difficulty with the statutory  
 24 remedy, and it should come as no surprise that both the  
 25 State Legislature and the Utah Department of

1 Transportation have formulated standards and guidelines  
 2 for determining severance damages that are fairly  
 3 pro-government That is the reason why the inverse  
 4 condemnation remedy is so critical, is so serious that  
 5 we maintain some substantive content to it, because that  
 6 is the only way in which the plaintiff can broaden the  
 7 focus, if you will, to include the impact on the entire  
 8 landholdings; whereas, the State would have the Court  
 9 instead focus more narrowly on the impact of each of the  
 10 separate and distinct and independent direct  
 11 condemnations, the very small parcels in each situation,  
 12 that would relate only to a small area in each case.

13 The purpose of the fourth lawsuit therefore  
 14 dramatically differs from the three lawsuits and, as I  
 15 mentioned before, we have no difficulty if the State is  
 16 primarily concerned with the possibility of duplication  
 17 of effort, or confusion, or inconsistent results, or  
 18 perhaps even efficiency of adjudication, we have no  
 19 difficulty with folding in the fourth lawsuit with the  
 20 other three.

21 THE COURT: Would you then simply say this:  
 22 That the inverse condemnation suit that you brought is  
 23 another, you believe, remedy available under this  
 24 statute for purposes of how a jury may look at and  
 25 determine the outcome of the particular case?

1 MR. MARTINEZ: Well, it's an additional  
 2 remedy, it's a constitutional remedy. The determination  
 3 would be indistinguishable. For a jury making the  
 4 determination you can tell them: Okay. You're making  
 5 this under the statute, you're making this under the  
 6 Constitution, and also the Constitution, it won't make  
 7 any difference one would imagine. And, therefore,  
 8 that's why as a practical matter we have no objection to  
 9 consolidating the four lawsuits into one and making it  
 10 much more efficient

11 THE COURT: Let's just follow that up, because  
 12 what you said earlier was that there are procedures in  
 13 place or the defining of the property that the State has  
 14 provided that makes it more difficult and more narrow  
 15 for somebody in your particular context to be successful  
 16 with this argument about a larger parcel. Indeed, I  
 17 look at it, and I've been wrong. I've been citing  
 18 Section 4, but it's Section 10. It simply says, "The  
 19 Jury must hear legal evidence as offered by the parties  
 20 to ascertain and assess, and; 2. Whether the property  
 21 sought to be condemned constitutes a larger part of the  
 22 parcel, the damages which would accrue to that portion  
 23 as well."

24 MR. MARTINEZ: That's right.

25 THE COURT: So the remedy is the same, the

1 process is the same by way of evidence, so what is  
 2 gained by this inverse condemnation lawsuit other than  
 3 attorney's fees, the right to claim attorney's fees?

4 MR. MARTINEZ: Because the State in each  
 5 case will argue that the relevant or larger parcel is  
 6 much more constrained or restricted in each of the cases  
 7 involved. That's-- well, in my cynical self says that's  
 8 why they brought three lawsuits instead of one, which is  
 9 to fragment or segregate out each direct condemnation  
 10 from the rest of the holdings. The fourth  
 11 condemnation-- the fourth inverse condemnation lawsuit  
 12 opens up the inquiry under the constitutional authority  
 13 to do so, so that the jury can consider the-- not only  
 14 the direct condemnations but also the physical conduct  
 15 that the State has engaged in that affects the entire  
 16 landholdings.

17 THE COURT: That physical being the  
 18 elimination of the egress and ingress?

19 MR. MARTINEZ: Exactly. Blocking it off and  
 20 making this only a right-in/right-out on--

21 THE COURT: But doesn't that, wouldn't that  
 22 come out as evidence under Section 2, 78, instead of 10,  
 23 78-34-10?

24 MR. MARTINEZ: That would not, Your Honor,  
 25 because the State has argued in previous cases, which we

1 have not-- which have not become relevant here, has  
 2 argued in previous cases that the interference with  
 3 access, whether it be physical or by way of the direct  
 4 condemnation, is simply not compensable, in fact, they  
 5 reiterated that in the appraisals that they did here  
 6 Any other impact that the condemnations have is simply  
 7 non-compensable.

8 THE COURT: That's a factual question that  
 9 the jury will be asked to decide, whether it is or  
 10 isn't, and they'll provide that evidence to suggest it's  
 11 not and trot out the experts and you'll trot out the  
 12 experts as well to suggest it is, and that becomes a  
 13 factual determination for the jury; is that correct?

14 MR. MARTINEZ: That's correct. And the  
 15 question then becomes: With respect to what? Because  
 16 one must determine not only what the governmental  
 17 conduct is but also what the burden is on the landowner;  
 18 what it is that's being burdened? The State will seek  
 19 and, in fact, has in the appraisal, will seek to focus  
 20 it very, very narrowly and potentially at least and,  
 21 certainly, if they're consistent, will seek to exclude  
 22 any evidence with respect to the entire mall; whereas,  
 23 in fact, under the inverse condemnation claim that is  
 24 entirely relevant and can be introduced.

25 THE COURT: And this is what I'm struggling

1 with because I-- as I look at this and I look at the  
2 fact that I have three separate lawsuits, which I'm not  
3 going to permit to go forward, I'm going to consolidate  
4 these

5 MR MARTINEZ: Uh-huh.

6 THE COURT: And permit you to make your  
7 argument in the context of a consolidated case that  
8 deals with this impact as it impacts this larger parcel  
9 with each of these three separate impacts there And I  
10 may hear protestations from the State but I can tell  
11 them that short of there being some legal precedent  
12 otherwise, I don't see a reason why I wouldn't  
13 consolidate them. So assuming that I consolidate these  
14 cases, then your argument is-- has the ability to be  
15 addressed within the statutory framework as set forth  
16 under Section 34

17 MR MARTINEZ: As long as the-- well, the  
18 problem is that the direct condemnation cases themselves  
19 will still be distinct components within that  
20 consolidated proceeding and so I have no doubt that the  
21 State would still nonetheless argue that we should only  
22 consider the small areas next to the direct condemnation  
23 parcels, as opposed to the larger economic, integrated  
24 economic unit. And that is why it is so essential to  
25 include the inverse condemnation claim as well.

1 THE COURT: But they'll argue that  
2 unsuccessfully, at least to a Judge, because the Judge  
3 has already consolidated those. What that ultimately  
4 means is that this will become a factual determination  
5 for a Jury to make a determination of how large of a  
6 parcel that is that's impacted, whether this shopping  
7 center is-- was indeed a conceptually larger parcel that  
8 includes these parcels and, therefore, can be deemed a  
9 part of the impact for purposes of how we assess what  
10 happens

11 MR MARTINEZ: And I believe, Your Honor,  
12 that even when one is instructing the jury, the  
13 plaintiff is, the plaintiff here in this case, the  
14 landholder, is put at a serious disadvantage when you  
15 have the State describing the nature of the independent  
16 condemnations as opposed to looking at it more globally  
17 in terms of an integrated economic unit. There is no  
18 harm that comes to the State from asserting or including  
19 the inverse condemnation claim if in fact the jury can't  
20 consider the entire area. I think we also have to go  
21 back to the standard that is before the Court with  
22 respect to a 12(b)6 motion

23 THE COURT: And I understand that standard  
24 And I appreciate your articulating it because it does  
25 set it in the prospective associated with this

1 MR. MARTINEZ: Uh-huh.

2 THE COURT: I do have the power under my--  
3 the Rules of Civil Procedure however to on my own motion  
4 to consolidate these cases.

5 MR. MARTINEZ: Absolutely.

6 THE COURT: I intend to exercise that some  
7 time here later today.

8 MR. MARTINEZ: Uh-huh.

9 THE COURT: Let me just if-- let me see if  
10 I-- You have answered all of my questions. This hasn't  
11 been raised as a counterclaim in the other suits.

12 MR. MARTINEZ: That's correct, Your Honor.  
13 The question of the integrated economic unit has not  
14 been raised in the other suits because we were in  
15 essentially a reactive position. As Your Honor is well  
16 aware, these cases move fairly quickly. And the  
17 landholder has never attempted to stop the development.  
18 That assertion is made in the pleadings by the State We  
19 have no contention in that regard. In fact, the  
20 construction is going on merrily along it's merry way  
21 As we go down SR-36 you see the effects of it

22 For purposes of the record, Your Honor, I  
23 would also like to emphasize the other points or respond  
24 to the other points that the State made. But I have  
25 spoken with respect to the consolidation, if Your Honor

1 is willing to consolidate, and I think we're-- I have no  
2 objection to consolidating all four cases into one

3 Second, the rightness concern. There is no  
4 rightness concern. The San Remo Hotel case, that we  
5 have set in the courtesy copies in our pleadings,  
6 demonstrate that-- the both San Remo and the Lengel  
7 case, explicitly state the Federal claims can be  
8 adjudicated alongside the State claims. There was some  
9 degree of confusion about that before those cases came  
10 out this year. I think it's fairly clear.

11 THE COURT: I tried to read those cases  
12 because rightness seemed to be an issue I was concerned  
13 about based upon the pleadings I've seen. But if you  
14 have it, point me to the language that I ought to be  
15 looking at in those cases because I have looked at them  
16 to try to see where it was that provided me the  
17 extinguishment of my concern, let's say, associated with  
18 the issue on rightness.

19 MR. MARTINEZ: Yes, Your Honor If you will  
20 look to Case Number 29 in our materials in the courtesy  
21 copies.

22 THE COURT: Uh-huh.

23 MR. MARTINEZ: And it is Page 17 of the case  
24 and in the paragraph on the right-hand side, just  
25 immediately following Footnote 25, it says with respect

1 to those Federal claims--"

2 THE COURT: All right.

3 MR. MARTINEZ: "that did require reckoning,  
4 we reject the petitioner's contention that Williamson  
5 County forbids the plaintiffs from advancing their  
6 Federal claims in State courts. The requirement that  
7 aggrieved property owners can seek compensation for  
8 their procedures the State has power for doing so does  
9 not preclude State courts from hearing simultaneously a  
10 plaintiff's request for compensation under State law and  
11 the claim that in the alternative the denial of  
12 compensation would violate the defendant under the  
13 Federal Constitution "

14 THE COURT: Which seems to me then, we go  
15 back to this issue of remedies, that what the Court is  
16 telling us here is that this is another remedy and  
17 you're not precluded from pursuing that remedy in the  
18 context of these condemnations.

19 MR. MARTINEZ: That's exactly right, Your  
20 Honor.

21 THE COURT: Okay.

22 MR. MARTINEZ: I believe I have addressed the  
23 third point, also, the severance damages question, and  
24 demonstrated why it's a different concept in the inverse  
25 condemnation setting than it is in the direct

1 condemnation setting.

2 THE COURT: Okay Thank you

3 MR. MARTINEZ: Thank you, Your Honor

4 THE COURT: Mr. Colessides, are you going to  
5 have anything to say in this?

6 MR. COLESSIDES: No, Your Honor

7 THE COURT: The last time Mr. Colessides was  
8 here, not the last time in Tooele, but the last time he  
9 actually had a case in front of me, I think I had a  
10 requirement that you bring baklava to the next  
11 proceeding.

12 MR. COLESSIDES: Your Honor, that will be--

13 MR. MARTINEZ: I second that

14 THE COURT: I find that to be no such thing  
15 here today.

16 MR. COLESSIDES: Your Honor changed the  
17 courtroom but we are willing, and not depending upon  
18 your ruling.

19 THE COURT: We want to make that absolutely  
20 clear. All right. Go ahead, Mr. Hunter.

21 MR. HUNTER: I can't think of a single  
22 occasion when Mr. Colessides has provided us with  
23 baklava. At any rate--

24 THE COURT: What about? Let's start with the  
25 rightness first, because that's the last thing we left.

1 What about this San Remo case and rightness? Really,  
2 what I'm hearing Wintergreen tell me is that this is  
3 really another remedy and that remedy is not precluded  
4 under an argument of rightness.

5 MR. HUNTER: Perhaps I'm misreading San Remo,  
6 Your Honor. As I-- Looking at page 22, maybe I'm placing  
7 too much reliance on Williamson County, because I've  
8 been using Williamson County for so long that I still  
9 think that that's good law.

10 Starting at the top of-- I'm not sure which  
11 version that you submitted. Looking at our version,  
12 which is the official Supreme Court version, on page 22  
13 at the top.

14 THE COURT: And I don't have that. I just  
15 brought one in.

16 MR. HUNTER: Okay.

17 THE COURT: But why don't you tell me where  
18 it starts.

19 MR. HUNTER: Reading Williamson County, "To  
20 preclude plaintiffs from raising such claims in the  
21 alternative would erroneously interpret our cases  
22 requiring property owners to resort to piecemeal  
23 litigation or otherwise unfair procedures. It is hardly  
24 a radical notion to recognize that as a practical matter  
25 a significant number of plaintiffs will necessarily

1 litigate their Federal takings in State courts. It was  
2 well settled before Williamson County that a claim that  
3 the application of government regulations effect the  
4 taking of property interests is not ripe until the  
5 government entity charged with implementing the  
6 regulation has reached a final decision regarding the  
7 application of the regulations to the property at  
8 issue " And that's all I am asking here, is that a  
9 final decision of just compensation be reached in those  
10 cases that we're seeking just compensation. And then if  
11 they think there is some other just compensation that  
12 they're entitled to, then an inverse condemnation is  
13 appropriate. In the meantime just compensation will be  
14 awarded then through the condemnation cases,  
15 consolidated or not.

16 THE COURT: I'm smiling because it sounds  
17 like, "Trust me. I'm from the government. We'll take  
18 care of you."

19 MR. HUNTER: And the government will not be  
20 making that decision. I could care less what the dollar  
21 amount is.

22 THE COURT: It's the jury that makes that  
23 decision.

24 MR. HUNTER: The jury makes that decision and  
25 they make it based upon competent evidence and the law

1 I retain the right to challenge their evidence as to  
2 whether it's competent or not and I'm going to argue  
3 then every inch of the way based on my interpretation of  
4 the law, because that is defending the Constitution and  
5 that's what I intend to do

6 To be honest with you, I'm very offended at  
7 Mr. Martinez's insinuation that the government has  
8 developed some appraisal standards that are  
9 pro-government. Those appraisal standards are developed  
10 by the American Appraisal Institute, the very standards  
11 their appraisers use as our appraisers -- USPAP -- the  
12 Uniform Standards and Policies for Appraisal Practice.  
13 They're not developed by the government. And we expect  
14 our appraisers to apply those standards and we will hold  
15 their appraisers to those same standards. That's a very  
16 inappropriate argument. The government is here today to  
17 say we want just compensation awarded. That was the  
18 prayer of our complaint, it's the prayer of their  
19 counterclaim. It's now up to us to determine what that  
20 is. Now, Mr. Martinez is correct, the landowner is  
21 correct in saying that our appraisals do not include  
22 severance damage.

23 He's alleged that this taking fragments the  
24 land. Well, that land was fragmented before, it had a  
25 highway going through it. The highway has been widened.

1 What piece of his property does this-- what larger piece  
2 does this taking touch on? Zero. He does not own this  
3 property, he does not own this property. He does not  
4 own this property. He does not own this property. This  
5 is not a piece of a larger parcel. I am sorry. It does  
6 not contribute to some grand scheme of a supermarket, of  
7 a shopping center.

8 THE COURT: But that's ultimately up to--

9 MR. HUNTER: That will be argued in the case.

10 THE COURT: And that's a factual question in  
11 determining-- the determination of the--

12 MR. HUNTER: Yes. The determination of the  
13 larger parcel will be fully litigated in the upcoming  
14 case. But this land was already fragmented. The  
15 highway went through here -- fragmented. And we haven't  
16 ignored the reality when our appraisals were done.  
17 Those appraisals recognized the reality of that  
18 fragmentation in the appraisals and that's why the  
19 condemnations were filed separately. This is not one  
20 parcel. We vehemently disagree that this is one parcel.

21 And we hope that Your Honor will allow us  
22 time to brief the subject of a consolidation motion at  
23 the time that a consolidation motion is made in those  
24 cases. I recognize your power and I'm not going to  
25 challenge that.

1 THE COURT: I understand that, too, but your  
2 argument in part is that it should be raised in this  
3 particular case because otherwise we have fragmented  
4 potential verdicts coming back in different pieces and  
5 that is exactly right and it's exactly right associated  
6 with three different parcels so--

7 MR. HUNTER: Three different parcels.

8 THE COURT: And it's exactly right associated  
9 with three different parcels. But the argument on the  
10 other side is that these three parcels are part and  
11 parcel of the larger parcel.

12 MR. HUNTER: Yeah. They do enjoy uniformity  
13 of ownership and that speaks to a consolidation.

14 THE COURT: And so then it becomes again a  
15 factual question ultimately that goes to a jury to make  
16 a determination of whether or not they're part and  
17 parcel of a larger piece and, therefore, ought to be  
18 considered in larger pieces. But if I don't  
19 consolidate-- if I don't consolidate, the very things  
20 you argue for here today exist by way of an extension of  
21 that argument for purposes of juries coming to different  
22 results.

23 MR. HUNTER: That is a risk and it's  
24 something that you have got to deal with. And, as I  
25 say, I am not going to lose any sleep should you choose

1 to consolidate.

2 THE COURT: I'm trying to make the State's  
3 burden lighter. That is, I'll grant you leave to brief  
4 the particular issue if you really want to, but it seems  
5 to me you'll have to kind of stay up at nights late  
6 thinking of how you might argue that in some creative  
7 way to be able to do-- to counteract the very arguments  
8 that you've been making in this case that, you know,  
9 that this should be dismissed.

10 MR. HUNTER: I don't see those as  
11 alternatives, Your Honor, and perhaps-- I concede I'm  
12 not the smartest guy in the world. I'm just an old  
13 gunfighter that has been sent into the city to try these  
14 cases. But these parcels are separate parcels. There  
15 is no larger parcel that they are talking about and I  
16 reserve the right to argue that at a jury, to a jury.  
17 The jury will make that determination. It's  
18 inappropriate in this case because it will be determined  
19 in those cases. And should Your Honor-- we will probably  
20 argue it well before then in a consolidation motion and  
21 should Your Honor grant it, we won't lose any sleep over  
22 it. We just assert that it's inappropriate because  
23 these are independent parcels, they're separated by a  
24 highway, they do not have continuity, physical  
25 continuity, or continuity of development potential. And

1 I believe the facts will show that. But, as I say,  
2 that's not the big issue to us. The issue today is: Is  
3 this appropriate to proceed as an independent inverse  
4 condemnation or even as an inverse condemnation in the  
5 condemnation cases? I mean we're seeking just  
6 compensation.

7 Now, I am uncertain as to whether Mr.  
8 Martinez is arguing that the State statute, 63-30(d)-302  
9 is unconstitutional. I believe that he needs to say  
10 that. Is that unconstitutional? Because Article 1,  
11 Section 22, is a self-enforcing clause and it has  
12 remedies, and we recognize those remedies, and the State  
13 has attempted to define those remedies by referring to  
14 the imminent domain code. And if Mr. Martinez is now  
15 saying that that's inappropriate, I need to understand  
16 that.

17 Access. Let me address very quickly access.  
18 There is a long history of cases in Utah stating what  
19 your constitutional remedies are for disruption of  
20 access. There's no question that highways require some  
21 sort of access control; otherwise, you just have drivers  
22 pulling on and off everywhere the way it used to be. We  
23 have a standard in Utah called an open access highway  
24 and once upon a time an adjoining property owner had the  
25 right to just pull onto the highway anywhere he wanted.

1 where his property was abutting. But that has gone by  
2 the wayside in modern times. And now we have some  
3 highways that are access controlled. In other words, the  
4 State reserves the right through its police powers to  
5 define where those driveways are in the abutting  
6 property line. And, further, the Supreme Court of the  
7 State of Utah has repeatedly said that a  
8 right-in/right-out is not a denial of access.  
9 Springville Banking cannot state that more clearly and  
10 it has been sustained by the Utah Supreme Court just two  
11 years ago in the case of UDOT versus Harvey, it has been  
12 sustained by the Court of Appeals within the last year.  
13 And access, it means reasonable access. They have  
14 reasonable access here. They don't have the right to  
15 define and dictate to the rest of the citizenry what  
16 their access will be. That is not part of their bundle  
17 of sticks. The Supreme Court has repeatedly said that's  
18 not a part of their bundle of sticks. There is no  
19 taking because that's not a right that they enjoy, plain  
20 and simple under Utah law. Harvey says that, it cannot  
21 be more clear. So they're alleging a loss of a right  
22 that they don't have, when they talk about this loss of  
23 access, and that's why our appraisers didn't give them  
24 money for it, because they don't have that right.

25 Let me just very quickly address a couple of

1 other points. Mr. Martinez has indicated in his  
2 argument that they're not trying to stop the highway.  
3 Well, the complaint did have a cause of action for  
4 injunction and they've attempted to justify that in  
5 their pleadings by invoking the Ex Parte Young Doctrine.  
6 The purpose of the Ex Parte Young Doctrine is to get an  
7 injunction. And so, obviously, I am not understanding  
8 something here. Either they are trying to stop this  
9 action through an injunction or they are giving that up.  
10 And so they are seeking an additional remedy through  
11 this inverse condemnation that it is important for us to  
12 defend the State's power. The State has the power to go  
13 forward with those condemnations, the State has the  
14 power to go forward with the construction, they do not  
15 have the right to stop it by way of an injunction,  
16 either under the inverse condemnation or under the Ex  
17 Parte Young Doctrine. Further, the case is not pled as  
18 an Ex Parte Young case. The concept of an Ex Parte  
19 Young is to get around governmental immunity by suing  
20 the named individuals who operate that government agency  
21 and enjoining them from going forward with the agency  
22 programs. This has not been alleged. John Nord's name  
23 is not on the pleadings, he has not been served, the  
24 executives of UDOT, the governor have not been named,  
25 they are not named defendants here. This is not an Ex

1 Parte Young case. And an injunction, the remedies  
2 sought under Ex Parte Young is inappropriate and we're  
3 attempting to stop that. And that's an important  
4 element in this case, although a very minor element,  
5 certainly, and we haven't addressed it up until now, but  
6 that's one of the reasons why we're seeking the  
7 dismissal of this case, is to stop that threat of an  
8 injunction which they have employed.

9 To summarize, we want to see them receive  
10 just compensation, the full just compensation allowed  
11 them under the Constitution, under the laws of the State  
12 of Utah. We believe that will happen under the  
13 condemnation cases whether they're consolidated or  
14 whether they proceed independently. The facts will play  
15 out as the facts play out and they will receive just  
16 compensation. So there is no reason for this inverse  
17 condemnation seeking some other just compensation. If  
18 they are successful in defining a larger parcel, if they  
19 have competent evidence which conforms with Utah law to  
20 create this larger parcel, they will receive that. Under  
21 the provisions of 78-34-10 in the condemnation cases  
22 they don't need another cause of action, a separate case  
23 to give them another bite of the apple. Thank you, Your  
24 Honor.

25 THE COURT: Let me just ask a question from

1 you before you sit down That is the timing for  
2 purposes of-- You want to brief an argument on the  
3 issue, you want to at least brief the issue of  
4 consolidation?

5 MR. HUNTER: That's Mr. Cushing's job. He's  
6 going to brief that.

7 MR. CUSHING: I don't like the way you're  
8 looking at me

9 MR. HUNTER: He's lead counsel on the  
10 condemnations

11 THE COURT: Do you want to do these-- do you  
12 oppose, are you going to oppose, or do you want to make  
13 an argument associated with consolidation? If you do,  
14 I'll grant you the time to provide the Court with a  
15 pleading on that.

16 MR. CUSHING: I would like to take the time  
17 to look at it in more depth and see what can be  
18 consolidated and what shouldn't be consolidated. So  
19 yes, I would like the time for that.

20 MR. MARTINEZ: Your Honor, if I may seek some  
21 clarification. When Your Honor refers to consolidation,  
22 there are several different meanings. One is--

23 THE COURT: And I understand your--

24 MR. MARTINEZ: --consolidate of all four  
25 cases?

1 THE COURT: And I haven't made that decision  
2 I don't know whether it means I consolidate three cases  
3 or whether I consolidate four cases

4 MR. MARTINEZ: Or there's a third alternative  
5 which is to consolidate the three cases and allow the  
6 plaintiff, the landowner, to assert the inverse  
7 condemnation in the counterclaim within those  
8 consolidated cases

9 THE COURT: Which is really accomplishing the  
10 same thing It could be accomplishing the same thing as  
11 what would happen here if I simply consolidated it in

12 MR. MARTINEZ: Yes. I agree.

13 THE COURT: And, you know, I kind of had some  
14 impressions when I came in associated with the arguments  
15 today and I want to go back and look at the cases that  
16 have been provided to me before I make a ruling on that  
17 particular issue, but I think your question, Mr  
18 Martinez, is a good one; that is, I haven't decided yet  
19 exactly what that consolidation might be. And I'm not  
20 certain that my making a decision before I hear briefing  
21 on consolidation assists the Court in any particular way  
22 or assists the parties in any particular way, because I  
23 think you have at least those rights one way or the  
24 other. I either consolidate it in or you bring it as a  
25 counterclaim.

1 MR. MARTINEZ: I suspect the question would  
2 be whether the State has any objection to folding all  
3 four cases together.

4 THE COURT: It sounds like they do, but--

5 MR. HUNTER: Yes, Your Honor, the reason why  
6 is, simply stated, under an inverse condemnation they  
7 have a right to attorney's fees and I think that's  
8 inappropriate.

9 THE COURT: Right. But at this point your  
10 motion is a motion to dismiss under Rule 12(b)6.

11 MR. HUNTER: Yes.

12 THE COURT: And the standard associated with  
13 Rule 12(b)6 is fairly liberal. Mr. Martinez has  
14 indicated, at least by way of argument, that they have  
15 met each of those and we're not at a point where we're  
16 talking about partial summary judgment. Some of the  
17 arguments being made today may be appropriate for  
18 summary judgment, they may not be, but under a 12(b)6  
19 standard, they may very well be there and have overcome  
20 the motion to dismiss based upon the fact that they have  
21 set out the appropriate pleadings. But, again, I'm not  
22 speaking as if I've made a decision but at least that's  
23 the argument I've heard today and understand it's  
24 associated with the standard I apply to the case that's  
25 now in front of me

1 MR. HUNTER: Understood. And perhaps I  
2 haven't addressed that as well as I should have in my  
3 pleadings. I would certainly like to address these  
4 issues later in a motion for summary judgment.

5 THE COURT: And, well, that's why I come  
6 back-- That's why I come back to the issue of mootness  
7 because it very well may be that all of the factual  
8 allegations have been made but even so, having given  
9 that, under the standard, with all of that being true,  
10 you still haven't met the legal burden because it's moot  
11 and that's why I want to go back and look at the  
12 information that's been provided here associated with  
13 that. But that's really about the only thing that holds  
14 me up from saying I'm going to deny the motion to  
15 dismiss until I look at this-- go back to see this  
16 issue of mootness. Now, if I am convinced that Mr  
17 Martinez's argument on mootness is the correct one, then  
18 I'll deny the motion. If I'm convinced that it's not  
19 the correct one, and that you made the argument that I  
20 need to look at, then I'll, you know, grant the motion  
21 based upon that legal principle, taking all of these  
22 things as true, which I have to do in a 12(b)6, still  
23 don't state a claim because they can't, given the  
24 statute.

25 MR. HUNTER: And I guess that's where I'm

1 standing. I confess I have not addressed  
2 element-by-element those standards and I've fallen short  
3 there, but the reason why is because they don't have--  
4 they have not stated a cause of action under Utah law.  
5 All of their rights under Utah law are in those imminent  
6 domain cases, and they have not stated an independent  
7 cause of action recognized under Utah law. That's my  
8 motion

9 THE COURT: I understand

10 MR. MARTINEZ: Well, Your Honor, saying that  
11 and saying it repeatedly does not change the fact that  
12 the State constitutional claim requires a taking of any  
13 substantial interference with private property which  
14 destroys or materially lessens its value That we have  
15 alleged Or that the owner's right to use and enjoyment  
16 is in any substantially way abridged, destroyed.  
17 Abridged or destroyed. We've alleged that

18 THE COURT: And I think really that's why I  
19 was asking, the issue associated with remedies, and I  
20 think I come back to this being a remedy, it's a remedy  
21 that's available to you. We sort it out as we go  
22 forward.

23 What is the status of discovery in this case  
24 on this grander issue of whether or not there's a great  
25 scheme to put the shopping center out there, which is

1 going to turn this whole strip into, you know, the  
2 biggest congestion with shopping centers between here  
3 and Wendover? The status of discovery? Has any  
4 discovery been undertaken in this case or is this our  
5 preliminary--

6 MR. HUNTER: Appraisals have been exchanged

7 MR. COLETTESIDES Of course, we're waiting,  
8 Your Honor. The discovery will have to take place  
9 assuming that the Court either consolidates and  
10 facilitates as a counterclaim and therefore we need to  
11 get additional discovery and additional appraisals,  
12 because the appraisal process is different now, if we  
13 prevail, as I think we should.

14 MR. HUNTER. Either looking at a larger  
15 parcel versus individual parcels, discovery will be  
16 geared towards that

17 MR. MARTINEZ: And, Your Honor, I think if I  
18 may make just two small points, and that is one of the  
19 things that the separate Constitutional Court is meant  
20 to address. It is a separate and distinct remedy, as  
21 even the State concedes, that they get attorney's fees.  
22 Well, there's a reason for that, because it's a  
23 Constitutional Court And the State-- the second point  
24 is that the State continues to hammer on the notion that  
25 it's not one parcel and that is the basic difficulty

1 that the plaintiff is put into by the fact that the  
2 State brought three different actions, segregating,  
3 fragmenting the area. It's only the inverse  
4 condemnation claim that allows us to expand the scope to  
5 the real economic reality.

6 THE COURT: How much time do you need to put  
7 together your thinking as to whether or not you would  
8 oppose a consolidation by this Court and, if so, you  
9 would brief it?

10 MR. CUSHING: In a motion form?

11 THE COURT: Let's do this. Can you make this  
12 decision in a week, whether you wish to brief it?

13 MR. CUSHING: I can make that decision within  
14 a week.

15 THE COURT: Okay. And then if you decide  
16 that you want to brief it, then brief it--

17 MR. CUSHING: In two weeks to brief that as  
18 well

19 THE COURT: Okay. And then after you brief  
20 it, you're certainly entitled to reply. I'll give you  
21 the opportunity to make that reply. I'm not certain  
22 that I'll hold my decision here hostage to that  
23 determination but I probably will. I probably won't  
24 make my decision until after I've seen the briefing on  
25 the consolidation, although I am going to work on this

1 particular issue now. But I don't see it impacting it  
2 too much.

3 MR. MARTINEZ: And if Your Honor wishes  
4 additional briefing, there are additional points that  
5 were raised and it is a complicated area and that's why  
6 I'm writing a book on it. The State makes an argument  
7 with respect to the San Remo Hotel case, it's much more  
8 complicated than that.

9 THE COURT: Well, I read both of those cases  
10 and, frankly, you know, I read them to try to get to the  
11 point. I'm going to go back and re-read them with the  
12 idea that they're important for the principles which you  
13 espoused today. It sounds like we both have, at least  
14 the parties both have different interpretations of what  
15 San Remo actually means. But, really, San Remo was--  
16 didn't that involve really a determination of whether  
17 that action should proceed in Federal court as opposed  
18 to State court?

19 MR. MARTINEZ: That is correct, Your Honor,  
20 and the plaintiffs managed to get themselves in a  
21 position where they asserted a claim in State court that  
22 was identical to a Federal claim so it went back to the  
23 Federal court, the Court resolved the issue to  
24 conclusion and essentially the Court was forced to  
25 resolve the basic question that I would refer Your Honor



1 to, which is: Where can you litigate the Federal claim?  
 2 The answer is: You can do it in--

3 THE COURT: State court.

4 MR. MARTINEZ: --State court.

5 THE COURT: Which is really bolstering your  
 6 argument that this is an independent remedy.

7 MR. MARTINEZ: Absolutely. And in fact it  
 8 overrules a point in that regard by the Utah Supreme  
 9 Court which had said that you could not assert the  
 10 Federal claim along with your State claim until you had  
 11 sought and been denied compensation. The San Remo Hotel  
 12 case, at least with respect to the property owners that  
 13 I usually advocate for, is a good case and that's  
 14 because that at least there is a forum for the Federal  
 15 claim that's in State courts. So there may be a new  
 16 chapter in the book.

17 THE COURT: You very well may be making a new  
 18 chapter. Let's have you by letter simply indicate by  
 19 next week at this time that you have made a decision,  
 20 that decision is you won't oppose consolidation, or you  
 21 will oppose consolidation, and you intend to brief it  
 22 and you will have your brief out at such and such a  
 23 time. Send that letter directed to me so I get it, and  
 24 to counsel, and then we'll see where that gets us.  
 25 Okay?

1 MR. HUNTER. Thank you, Your Honor

2 MR. MARTINEZ: Thank you, Your Honor

3 THE COURT: Thank you for your arguments  
 4 today, they have been helpful

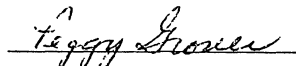
5 MR. MARTINEZ: Thank you, Your Honor

6 [Proceedings concluded ]  
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1 C E R T I F I C A T E

2 I, Peggy Grover, RMR, CCT, do hereby certify  
 3 that the foregoing proceedings held on November 29,  
 4 2005, at the time and place indicated, were transcribed  
 5 from a videotape recording of said proceedings provided  
 6 by the Clerk of the Court, and that the foregoing pages,  
 7 numbered 3 through 50, is a true and accurate  
 8 transcription of said videotaped proceedings to the best  
 9 of my ability.

10 Dated this 13th day of April 2006.

11   
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 13 Peggy Grover, RMR, CCT  
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34 2  towards 46 16  tracks 5 14  transaction 8 16  transcribed 51 4  transcription 51 8</p>	<p>transformed 15 12  Transportation 3 5 23 4 20 21 1  travel 16 9  trials 17 19  tried 28 11  trier 17 14  trot 24 11,11  true 44 9,22 51 7  Trust 32 17  try 4 13 28 16 36 13 48 10  trying 36 2 39 2,8  TUESDAY 3 1  turn 15 22,23 46 1  two 18 17 38 10 46 18 47 17  type 6 24 10 15 12 1</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p>UDOT'S 1 11 12 9 38 11 39 24  Uh-huh 25 5 27 1 8 28 22  ultimately 9 12 26 3 34 8 35 15  uncertain 37 7  unconstitutional 20 12 37 9,10  Under 20 19 40 20  understand 4 6 6 10,17,22 7 1,7 8 15 10 12,16,20 11 7,11,16,17,22 12 19 17 4 18 2 19 14 20 7,11 21 23 22 5,5 23 12,22 24 23 25 16 26 23 27 2 29 10 12 31 4 35 1 37 15 38 20 39 16,16 40 2,11,11,12 41 23 43 6,10,18,23 44 9 45 4,5,7, 9  understanding 39 7  understood 7 8 19 15 16  Understood 44 1  undertaken 46 4  unfair 31 23  Uniform 33 12  uniformity 8 23 35 12  unit 14 10,11 17 12 25 24 26 17 27 13  universally 19 21  universe 11 20  University 3 13,19 24  unreasonably 15 15  unsuccessfully 26 2  until 32 4 40 5 44 15 47 24 49 10 up 5 2 15 17,19,22 16 1,8 22 11 23 12 33 19 34 8 36 5 39 9 40 5 44 14  upcoming 34 13  upon 9 1 18 16 28 13 30 17 32 25 37 24 43 20 44 21  us 4 19 10 22 11 10 29 16 30 22 33 19 34 21 37 2 39 11 47 4 49 24  use 6 13 33 11 45 15  used 37 22  using 31 8  USPAP 33 11  usually 49 13  UTAH 1 6 2 12 3 4 4 20 6 11 11 5, 8 19 1,11 20 25 37 18,23 38 7,10, 20 40 12,19 45 4,5,7 49 8</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p>value 13 11,23 45 14  vehemently 34 20  verdicts 35 4  version 31 11,11,12  versus 3 4 38 11 46 15  very 8 12 21 11 24 20,20 33 6 10, 15 35 19 36 7 37 17 38 25 40 4 43 19 44 7 49 17  videotape 4 13 51 5  videotaped 51 8  violate 29 12  Vs 1 5</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p>waiting 46 7  walk 18 7  want 3 7 30 19 33 17 36 4 40 9 41 2,3,11,12 42 15 44 11 47 16  wanted 37 25  wasn't 4 11  way 7 13 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## **REPLY ADDENDUM EXHIBIT 2**

**Plaintiff's Supplemental Memorandum in Response to Court's Request and in  
Response to UDOT's Supplemental Memorandum in Support of UDOT's 12(b)(6)  
Motion to Dismiss, filed December 8, 2005 (R.147-59)**

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Tele: 801.521-4441  
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JOHN MARTINEZ (USBA #4523)  
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Fax: 801.582-7664

Attorneys for Plaintiff

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IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR TOOELE COUNTY, STATE OF UTAH

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WINTERGREEN GROUP, LC, a Utah	:	<b><u>SUPPLEMENTAL MEMORANDUM</u></b>
Limited Liability Company,	:	IN RESPONSE TO COURT'S REQUEST
	:	AND IN RESPONSE TO UDOT'S
Plaintiff,	:	SUPPLEMENTAL MEMORANDUM
	:	IN SUPPORT OF UDOT'S 12(b)(6)
v.	:	MOTION TO DISMISS
	:	
UTAH DEPARTMENT OF	:	
TRANSPORTATION,	:	
	:	Case No. 050300341
Defendant.	:	
	:	Judge: Randall N. Skanchy

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Plaintiff Wintergreen Group, LC ("Plaintiff") hereby submits this Supplemental Memorandum in response to the court's request at the hearing on Monday, November 29, 2005, and in response to Defendant UDOT's Supplemental Memorandum in support of its Motion to Dismiss.



**I. Court May Consolidate all Four Cases or Convert Plaintiff's Fourth Suit into a Counterclaim in Consolidated Cases**

Through a letter to the Court dated December 2, 2005, UDOT states that it "will not oppose consolidation" of the three "direct" condemnation cases. In addition, UDOT in its Supplemental Memorandum states:

"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)." (emphasis added)

Plaintiff properly has properly alleged both state and federal constitutional inverse condemnation claims. And since UDOT apparently does not object to having Plaintiff's state constitutional inverse condemnation claims consolidated with the three direct condemnation cases, this court should either consolidate all four cases or simply convert Plaintiff's fourth suit in its entirety into a Counterclaim with respect to each of the three consolidated cases.

**II. Court's Request for Further Briefing Regarding Relation Between Constitutional and Statutory Rights for Purpose of Consolidation of all Four Cases**

At the hearing on Monday, November 29, 2005, the Court requested additional briefing regarding the relation between Plaintiff's constitutional and statutory rights, and the impact of such relationship on the question of consolidation of the three "direct condemnation" cases filed by UDOT and the fourth "inverse condemnation" case filed by Plaintiff.

## **A. Relation Between Plaintiff's Constitutional and Statutory Rights**

### **1. Constitutional Rights**

Plaintiff has the right to "just compensation," under both the Utah and federal constitutions, when UDOT "takes" Plaintiff's property, as well as the right to compensation under the Utah constitution when UDOT "damages" Plaintiff's property Lingle v Chevron U S A Inc., 125 S Ct 2074, 2005 WL 1200710 (U S , May 23, 2005), Smith v Price Development Company, 2005 UT 87, 2005 WL 3244473 (December 2, 2005), Colman v Utah State Land Bd., 795 P 2d 622, 624 (Utah 1990)

The meaning of the constitutional guarantees is not determined by Congress nor by state Legislatures, but by the courts Heughs Land, L L C v Holladay City, 2005 UT App 202, ¶9, 113 P 3d 1024 (Utah constitutional guarantee is self-executing, statutes to the contrary are unconstitutional)

Plaintiff herein has properly alleged all the *elements* of state and federal constitutional inverse condemnation claims. Thus, Plaintiff's complaint properly alleges under the Utah constitution that Plaintiff's "property" has been both "taken" and "damaged" through UDOT's conduct Colman v Utah State Land Bd., 795 P 2d 622, 626-27 (elements of "taking" and "damaging" claims), Complaint, Claim 4 ("taking" through substantial interference with private property which destroys or materially lessens its value), Claim 5 ("taking" through substantial abridgment or destruction of right to use and enjoy land), Claim 6 ("damaging" of land).

Similarly, Plaintiff's complaint properly alleges under the federal constitution that Plaintiff has suffered a "partial taking," a "categorical taking," and because UDOT's conduct does not substantially advance a legitimate governmental objective. Palazzolo v. Rhode Island, 533 U.S. 606, 630-31(2001)(discussing partial takings and categorical takings); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)(discussing "not substantially advance legitimate governmental objective" claim); Complaint, Claim 1 (partial taking), Claim 2 (categorical taking), Claim 3 ("not substantially advance governmental objective" claim).

UDOT contends that since it has brought three "direct condemnation" suits, Plaintiff's constitutional claims must be dismissed. UDOT thereby argues the supremacy of statutory direct condemnation actions--and the remedies the Legislature by grace may have been willing to provide--over the Constitutional claims and remedies, both state and federal, which Plaintiff properly alleges. UDOT has it exactly backwards: it is constitutional rights that prevail over statutory ones.

The fact that UDOT has initiated statutory direct condemnation actions does not preclude the bringing of "inverse condemnation" constitutional claims to seek relief that is not included in those direct condemnation actions. Indeed, the purpose of "inverse condemnation" claims is to seek redress for harm which the government has caused without intending to do so. The drafters of Utah's Just Compensation and Damaging Clause were well aware that *unintentionally*-caused harm is compensable. *Proceedings and Debates of the Constitutional Convention*, 327 (1898)("Damage is not always--in fact is not often contemplated or expected. It comes unlooked for as the consequence

of an act which the party performs.")(Samuel R. Thurman). And Utah law is clear that "Intent is not an element of [an inverse condemnation] action." Farmers New World Life Insurance Co. v. Bountiful City, 803 P.2d 1241, 1246 (Utah 1990)(interpreting UTAH CONST. art. I, §22).

Ascertainment of the nature and extent of harm caused through inverse condemnation is a question for the jury. The drafters of the Utah Constitution intended that a *jury* determine whether the state has imposed compensable "harm." See Proceedings and Debates of the Constitutional Convention, 327 (1898)("...the means of arriving at the estimate are within the knowledge of men and can be adduced before a jury.")(Lorin Farr).

Thus, since Plaintiff properly alleges state and federal constitutional claims, UDOT's motion to dismiss must be denied. If all four cases are consolidated, the jury, upon proper instructions, can be entrusted to determine the appropriate relief.

## **2. Statutory Rights**

The *power* of government to appropriate property using direct condemnation, also known as the power of "eminent domain," is held by the federal and state governments as an inherent "attribute of sovereignty". Mississippi & Rum River Boom Co. v. Patterson, 98 U.S. 403, 406 (1878); Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 62, 646 P.2d 835, 837, 183 Cal. Rptr. 673, 675 (1982).

*Limitations* on government direct condemnation power are contained in state and federal "taking" and "damaging" provisions, which demand that "just compensation" must be provided.

Thus, although the Legislature may provide procedures and remedies for the exercise of the power of eminent domain, the Legislature may not provide lesser protection than constitutional "taking" and "damaging" provisions demand.

In this case, UDOT contends that the nature and scope of "compensation" the State is willing to provide under Utah statutes implementing the power of eminent domain is identical to--and sufficient to satisfy--the constitutional requirements of "just compensation." The shortcoming of UDOT's contention inheres in the "larger parcel" concept, which is *statutorily* mandated in Utah. Thus, Utah Code § 78-34-10(2) provides:

"The court, jury or referee must ... ascertain and assess: 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 [UDOT]..."

There is no statutory definition of what constitutes the "larger parcel" for any given direct condemnation. UDOT has applied that concept to Plaintiff here, however, by treating each of the three direct condemnations as concerning separate and distinct lands. Accordingly, UDOT has offered **NO severance damages whatsoever** for any of the three direct condemnations.

Though UDOT in its December 2, 2005 letter to this Court indicates it does not oppose consolidation of the three "direct condemnation" cases, UDOT still expects "to fully litigate factual issues such as the larger parcel issue." Therefore, even if the three direct condemnation cases are consolidated, UDOT still will insist that the three direct condemnations concern isolated lands, and are not part of any "larger parcel" under the statute. The statutory "larger parcel" concept thus limits

the available relief under the Legislature's statutory definition of its power of eminent domain

**B. The Statutory "Larger Parcel" Concept is Irrelevant to Plaintiff's Constitutional Rights**

The "larger parcel" concept has no place in state or federal constitutional inverse condemnation claims. Instead, the jury is merely asked to determine the elements of each claim, including identification of the "relevant property" involved. Under those claims, Plaintiff is free to argue that the "relevant property" consists of the North Town Shopping Center as an integrated economic unit.

Moreover, in the inverse condemnation context, Plaintiff also is free to argue that UDOT's action consists not only of the bringing of direct condemnation proceedings, but also of UDOT's physical actions and omissions which detrimentally affected Plaintiff's entire landholdings as the "relevant property," as alleged in Plaintiff's complaint. Also, Plaintiff is entitled to attorney fees and costs under 42 U.S.C. § 1988.

Accordingly, it is essential that Plaintiff should be allowed to bring its constitutional claims, as well as its statutory claims, before the jury.

**III. Response to UDOT's Supplemental Memorandum**

Plaintiff's responses will track UDOT's memorandum for the Court's convenience.

**1. UDOT reiterates erroneously that the State cannot be sued for federal inverse condemnation.**

Plaintiff already has responded to this assertion, both in its Opposition Memorandum and in its recent submission of the Utah Supreme Court's decision in Smith v. Price Development.

Company, 2005 UT 87, 2005 WL 3244473 (December 2, 2005).

In contrast, UDOT submits as authority a 1981 decision of a intermediate appellate court in Georgia. In that decision, Jackson v. Department of Transp., 159 Ga.App. 130, 132, 283 S.E.2d 59, 61 (Ga.App.1981), the court pointed out that "Appellants raised no legal objection to the propriety of that taking, contesting only the value of the property taken and consequential damages," a sentence which UDOT omitted. In contrast, Plaintiff properly has alleged both state and federal inverse condemnation claims here.

## **2. UDOT erroneously contends injunctive relief is unavailable**

Injunctive relief is available as a remedy for inverse condemnation when the remedy of compensation is inadequate. Johnson v. Hermes Associates, Ltd., 2005 UT 82, ¶ 35 n.8, 2005 WL 3110674. Thus, if this court finds, for example, that a monetary remedy is inadequate, it may order UDOT to re-open 2000 North to eastbound traffic in order to make Plaintiff whole.

## **3. UDOT misconstrues Lingle**

In Lingle v. Chevron U.S.A. Inc., 125 S. Ct. 2074, 2005 WL 1200710 (U.S., May 23, 2005), the United States Supreme Court held that the "not substantially advance a legitimate governmental objective" is not a valid test for adjudicating Just Compensation claims. However, the Court was careful to point out that where governmental conduct involves "dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings," compensable takings will be deemed to have occurred. Id. at 13. The government may not impose

"unconstitutional conditions," the Court held, whereby the government forces a property owner to give up one right in exchange for another right which "has little or no relationship to the property."

Id.

In this case, UDOT is attempting to force Plaintiff to dedicate to the public the value of Plaintiff's lands for construction of the North Town Shopping Center as an integrated economic unit in exchange for the compensation Plaintiff might receive in the three condemnation lawsuits which artificially fragment Plaintiff's lands into three isolated segments. Such limited compensation has "little or no relationship" to the value of Plaintiff's lands for construction of the North Town Shopping Center as an integrated economic unit. That is a fundamental reason why Plaintiff brought this fourth lawsuit, a critical factor which UDOT would like to have this court overlook.

In addition, the Lingle court was careful to point out that Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) and Dolan v. City of Tigard, 512 U.S. 374 (1994) remained good law. Those cases, the Court held, "drew upon the language" of the NSA-LGO test, but did not apply it. Lingle v. Chevron U.S.A. Inc., 125 S. Ct. 2074, 2086 (2005) As in Nollan and Dolan, UDOT here imposed physical constraints on Plaintiff's ability to use its land. These included: UDOT's failure to open 2200 North westbound from SR-36; UDOT's rendering of 2200 North as a right-in, right-out street in relation to SR-36; and UDOT's blocking of 2000 North from traffic in relation to SR-36.

Accordingly, UDOT's conduct constituted a taking under those cases, even though the "not substantially advance" theory has been abandoned.



#### 4. UDOT misapprehends the concept of "ripeness"

In Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) the Court held that two distinct "ripeness" requirements applied to federal Just Compensation Clause Claims. First, the claimant must obtain a "final" decision from whatever governmental agency or official can inform the claimant about how the claimant's property rights will be affected. Thus, the Court held, a subdivision developer not only had to submit a development application, but once that was denied, the developer also had to seek--and be denied--a variance from the local board of adjustment. Significantly, the Court held that no appeals had to be "exhausted," but that only administrative mechanisms for obtaining the last word, or a "final" decision," had to be utilized.

Second, the Williamson County court held that a claimant also must satisfy the "completeness" requirement, whereby the claimant must ask for--and be denied--compensation before a federal Just Compensation Clause claim would be ripe for judicial review. The Court reasoned that the federal Just Compensation Clause does not prohibit "takings," but only takings *without payment of just compensation*, and therefore until the claimant was denied compensation, the federal Just Compensation Clause claim was not "complete" for purposes of judicial resolution.

It is the second, "completeness," requirement which UDOT seeks to argue purportedly applies here. In San Remo Hotel, L.P. v. City and County of San Francisco, 125 S.Ct. 2491, 2506 (2005), the court addressed the Catch-22 which the completeness requirement had come to mean for

claimants: it required claimants to litigate a takings claim under *state* law in order to make the federal claim "ripe," but if claimants did so, and if the state claim involved adjudication of issues that were identical to those under the federal claim, then *issue preclusion* prohibited the subsequent litigation of the same issues under the federal claim in federal court. See Bateman v. City of West Bountiful, 89 F.3d 704, 709 (10th Cir. 1996)(preventing such relitigation). Accordingly, the claim went from "green" to "rotten" without ever being "ripe." See John Martinez & Karen L. Martinez, A Prudential Theory for Providing a Forum for Federal Takings Claims, 36 REAL PROPERTY PROBATE AND TRUST L.J. 445 (Fall 2001)(discussing "ripeness").

In San Remo Hotel, the court again barred a claimant who had actually litigated a state claim with issues identical to the federal claim from relitigating those issues in federal court. However, the court emphasized that,

"[P]etitioners have overstated the reach of *Williamson County* throughout this litigation.... The requirement that aggrieved property owners must seek 'compensation through the procedures the State has provided for doing so,'... 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. ... It is hardly a radical notion to recognize that, as a practical matter, a significant number of plaintiffs will necessarily litigate their federal takings claims in state courts."

San Remo Hotel, L.P. v. City and County of San Francisco, 125 S.Ct. 2491, 2506.

Similarly, UDOT has overstated the reach of Williamson County. San Remo Hotel makes clear that Plaintiff may bring its federal claims to this court.

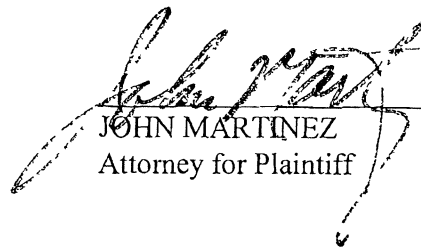
**5. UDOT erroneously equates statutory direct condemnation with constitutional claims**

UDOT asserts that "compensation" obtained through the direct condemnation statutory procedures is equivalent to "just compensation" under Plaintiff's constitutional inverse condemnation claims. Plaintiff has addressed this argument in Part II of this memorandum.

**6. UDOT similarly errs by equating statutory direct condemnation and Plaintiff's state inverse condemnation claim**

Plaintiff similarly has addressed this argument in Part II of this memorandum.

DATED this 7th day of December, 2005.



JOHN MARTINEZ  
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned filed the original of the foregoing with the Clerk of the Court:

OFFICE OF THE CLERK  
THIRD JUDICIAL DISTRICT COURT, TOOELE COUNTY  
47 SOUTH MAIN  
TOOELE, UTAH 84074

and served a copy 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 7th day of December, 2005, addressed as set forth above.

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

## **REPLY ADDENDUM EXHIBIT 3**

**Plaintiff's Request for 4-Case Consolidation or, in the Alternative, Request for 3-Case Consolidation Plus Deeming 4th Case Complaint as Counterclaim, filed December 9, 2005 (R.160-63)**

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Tele: 801.582-1386  
Fax: 801.582-7664

Attorneys for Plaintiff

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IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR TOOELE COUNTY, STATE OF UTAH

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WINTERGREEN GROUP, LC, a Utah	:	<b><u>Pro Forma</u></b>
Limited Liability Company,	:	REQUEST FOR 4-CASE CONSOLIDATION
	:	OR, IN THE ALTERNATIVE,
Plaintiff,	:	REQUEST FOR 3-CASE CONSOLIDATION
	:	PLUS DEEMING 4th CASE COMPLAINT
v.	:	AS COUNTERCLAIM
	:	
UTAH DEPARTMENT OF	:	
TRANSPORTATION,	:	
	:	Case No. 050300341
Defendant.	:	
	:	Judge: Randall N. Skanchy

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Plaintiff Wintergreen Group, LC ("Plaintiff") hereby submits this Pro Forma Request for 4-Case Consolidation or, in the Alternative, Request for 3-Case Consolidation Plus Deeming of 4th Case Complaint as Counterclaim, in response to the Court's indication at the hearing on Monday,

November 29, 2005 in this matter that the Court would be willing to consider a restructuring of the four lawsuits between Plaintiff Wintergreen and Defendant UDOT.

This Request is styled "pro forma" to indicate Plaintiff's preferences, in light of the Court's acknowledged authority under Utah Rule of Civil Procedure 42(a), and taking into account that UDOT apparently consents to consolidation of the *state* inverse condemnation claims.

#### **I. Consolidation of All Four Lawsuits Will Achieve Consistent Jury Determinations**

Under the standard for motions to dismiss, Plaintiff properly states both state and federal inverse condemnation claims. UTAH R.CIV.P. 8(a)("short and plain statement ... showing that the pleader is entitled to relief" and "a demand for judgment for the relief"); Colman v. Utah State Land Bd., 795 P.2d 622, 624 (Utah 1990)("A dismissal ... 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.")(seminal Utah takings case). UDOT's motion to dismiss, therefore, must be denied.

The question then becomes one of efficient, consistent and fair administration of the four lawsuits. A jury must determine both the direct condemnation and inverse condemnation claims. *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).

Thus, since Plaintiff properly alleges state and federal constitutional claims, all four cases should be consolidated so that a single jury will achieve consistent, fair determinations of the four lawsuits. UTAH R.CIV.P. 42(a).

## **II. Consolidation of Three Direct Condemnation Lawsuits, Plus Deeming of 4th Case Complaint as Counterclaim Also Will Achieve Consistent Jury Determinations**


Alternatively, the Court may achieve the necessary consistency, efficiency and fairness by consolidating the three direct condemnation lawsuits, and deeming all claims in the fourth, inverse condemnation lawsuit as a Counterclaim, applicable to all three cases in the consolidated action.

In its December 2, 2005 letter to the Court, UDOT states that it "will not oppose consolidation" of the three "direct" condemnation cases. And in its Supplemental Memorandum, UDOT states:

"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)." (emphasis added)

Thus, UDOT apparently has no objection to consolidation of the three cases, plus the deeming of the *state* inverse claims in the fourth lawsuit, as a Counterclaim applicable to all three cases in such consolidated action. Plaintiff's federal claims also are properly stated, as demonstrated in Plaintiffs previous Memoranda herein. And as a practical matter, similar issues will arise in regard to the state and federal claims. Therefore, *a jury* should be allowed to determine both the state inverse condemnation claims, as well as the federal inverse condemnation claims.

DATED this 8th day of December, 2005.

  
JOHN MARTINEZ  
Attorney for Plaintiff



CERTIFICATE OF SERVICE

The undersigned filed the original of the foregoing with the Clerk of the Court:

OFFICE OF THE CLERK  
THIRD JUDICIAL DISTRICT COURT, TOOELE COUNTY  
47 SOUTH MAIN  
TOOELE, UTAH 84074

and served a copy 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 8th day of December, 2005, addressed as set forth above.



## CERTIFICATE OF SERVICE

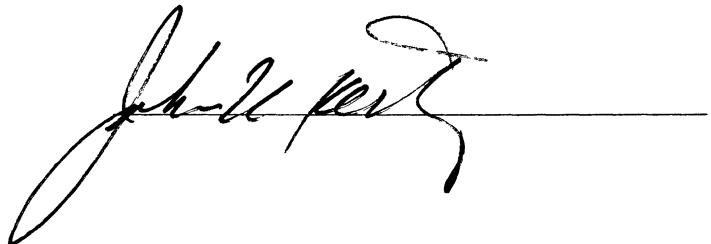
Filed **ten** copies of the foregoing, *one of which contains an original signature*, with the Clerk of the Supreme Court:

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:

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

via first class mail, postage pre-paid, this 28th day of September, 2006, addressed as set forth above.

A handwritten signature in cursive script, appearing to read "John H. Perry", is written over a horizontal line.