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A Municipality's Interest in an Electrical Power Generating Facility: Some Tax Considerations

I. INTRODUCTION

The ever-increasing capital required to produce and supply electrical energy has made it attractive for two or more utilities to invest in a commonly owned installation.¹ Municipally owned utilities are no exception, as evidenced by the proposed Warner Valley Project in southern Utah. The City of St. George, Utah, is negotiating with the City of Los Angeles and the Nevada Power Company to unite in the construction of a coal-fired power plant in Warner Valley, Washington County, Utah. The plant would supply electrical energy to the areas serviced by the participants in the project. Although the final documents are as yet unsigned, the Warner Valley Project has raised some interesting tax issues.

As municipal corporations owning public utilities struggle to cope with the energy shortage and seek to provide their residents with a sufficient supply of electrical energy at the most reasonable cost, the questions to be illuminated in this Comment will inevitably surface in many jurisdictions. While this Comment will be couched in the framework of Utah constitutional and statutory law, its analysis and conclusions will have application to similar municipal interests in the many jurisdictions with comparable constitutional and statutory provisions.² To enable discussion of the pertinent issues, the following project arrangement will be assumed:

(1) The participants are St. George, Utah, Los Angeles, California, and Nevada Power Company, a Nevada corporation.

(2) The project will be located outside of St. George but within Washington County, Utah, on federal land presently administered by the Bureau of Land Management. The site will be leased from the government for a ninety-nine-year period with the three participants owning the electrical generating plant and accompanying improvements.

(3) The three participants will be tenants in common in the following percentages: Nevada Power, twenty-five percent; Los Angeles, fifty percent; and St. George, twenty-five percent.

(4) The costs of operation and the electrical energy produced will be shared by the participants in proportion to their ownership interests.

². For a listing of states with similar laws see note 11 infra.
(5) The cities of Los Angeles and St. George will distribute their portions of the generated power only to their residents. Any revenue collected above costs will be utilized for other municipal activities.

(6) St. George’s interest will be financed by the issuance of revenue bonds secured only by the city’s interest in the project. This Comment will not consider the issue of whether a municipality has power to engage in such a joint enterprise. Nor will it discuss the taxability in Utah of Nevada Power, a private foreign corporation. Discussion is limited to the question of whether the State of Utah through its political subdivision, Washington County, has the authority to tax the interests of St. George, a domestic municipality, or of Los Angeles, a foreign municipality.

Discussion will center on two distinct taxes: (1) an ad valorem tax, which would be levied directly on the generating plant and accompanying improvements; and (2) a use tax, which would be levied on the municipalities on the basis of their possessory leasehold interests in the otherwise tax-exempt federal land.

II. AD VALOREM TAXES

A. Background

Property taxation is the general rule and exemption is the exception. Courts strictly construe exemption provisions and are reluctant to extend them by implication. Some exemption provi-

3. Private Utah utilities are not immune from taxation. E.g., State ex rel. Public Serv. Comm’n v. Southern Pac. Co., 95 Utah 84, 79 P.2d 25 (1938). Foreign corporations may not transact business on conditions more favorable than those prescribed for domestic corporations. UTAH CONST. art. 12, § 6. Since property of domestic private utilities is taxable, property located in Utah but owned by foreign private utilities must be taxable as well.

4. The Warner Valley issues will likely be subjected to litigation because of the uncertainty as to the taxability of St. George’s interest and the large amount of tax revenues in question. The Kaiparowits Project, never completed because of environmental concerns, was similar to the Warner Valley Project and was expected to increase property tax revenues by as much as $42.4 million. Salt Lake Tribune, Dec. 5, 1974, at B-1, col. 2.

5. An ad valorem tax refers to a tax or duty upon the value of the property. BLACK’S LAW DICTIONARY 58 (rev. 4th ed. 1968).

6. See notes 54-58 and accompanying text infra.

7. See, e.g., Friendship Manor Corp. v. Tax Comm’n, 26 Utah 2d 227, 234, 487 P.2d 1272, 1277 (1971) (quoting Parker v. Quinn, 23 Utah 332, 337, 64 P. 961, 961 (1901)).

The Utah Constitution provides: “All tangible property in the state, not exempt under the laws of the United States, or under this Constitution, shall be taxed in proportion to its value . . . .” UTAH CONST. art. 13, § 2.

sions, however, are not usually subject to strict construction. This is especially true of provisions exempting publicly owned property where the presumption favors exemption and the burden is upon the government to establish the taxability of the property it seeks to reach. Construction and interpretation of the Utah exemption provision therefore becomes critical in determining the tax status of property held in Utah by municipalities, both foreign and domestic.

B. Utah Exemption Provision

Utah's self-executing constitutional provision exempts public property from ad valorem taxation in the following words:

All tangible property in the state, not exempt . . . shall be taxed in proportion to its value . . . . The property of the state, counties, cities, towns, school districts, municipal corporations and public libraries, lots with buildings thereon used exclusively for either religious worship or charitable purposes, and places of burial not held or used for private or corporate benefit, shall be exempt from taxation.

Two separate tests are used in determining exemption from ad valorem taxation under this constitutional provision—ownership and use. The test for exemption of municipal

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10. A provision is self-executing when it is effective without the aid of ancillary legislation. "[P]ublic property used exclusively for any public purpose, shall be exempt from taxation . . . ." MINN. CONST. art. 10, § 1 (emphasis added). A provision is not self-executing if its terms indicate it is not to become operative without enabling or supplemental legislation. "The General Assembly may, by law, exempt from taxation all public property . . . ." GA. CONST. art. 7, § 1 (emphasis added).
11. UTAH CONST. art. 13, § 2. At least thirteen other states have adopted similar constitutional exemption provisions. See, e.g., Alabama—ALA. CONST. art. 4, § 91; Arizona—ARIZ. CONST. art. 9, § 2; Colorado—COLO. CONST. art. 10, § 4; Idaho—IDAHO CONST. art. 7, § 4; Missouri—MO. CONST. art. 10, § 6; Nebraska—NEB. CONST. art. 8, § 2; New Mexico—N.M. CONST. art. 8, § 3; North Carolina—N.C. CONST. art. 5, § 2; North Dakota—N.D. CONST. art. 11, § 176; Oklahoma—OKLA. CONST. art. 10, § 6; South Dakota—S.D. CONST. art. 11, § 5; Virginia—VA. CONST. art. 10, § 6; Washington—WASH. CONST. art. 7, § 2.


The Utah Legislature enacted a statute using virtually the identical wording as the constitutional exemption provision. UTAH CODE ANN. § 59-2-1 (1963).
property is ownership. Although the word "own" is not used in the Utah constitutional provision, the requirement of ownership in connection with municipal property should be implied.\textsuperscript{12} The wording of the exemption provision, "property of the state, counties, cities . . . and municipal corporations,"\textsuperscript{13} connotes ownership. No requirement that the municipal property be put to any particular use is expressed.

In contrast, the constitution provides an entirely different test for exempting religious or charitable property. Such property must be "used exclusively for either religious worship or charitable purposes."\textsuperscript{14} Under statutory and grammatical construction, the use requirement does not apply to municipal property, but only to property that would not be exempt except for its religious or charitable use. If the constitutional convention delegates, when exempting property of public entities, also intended to require that such property be "used" for public purposes, such requirement most likely would have been express.\textsuperscript{15}

Utah case law supports the proposition that ownership by one of the enumerated public entities is the only requirement for exemption from ad valorem taxation. The case of Springville v. Johnson\textsuperscript{16} is one of the first and foremost expressions of Utah's policy regarding the exemption of public entities: "[T]he exemption from taxation of the property of cities is so clear and expressive that there would seem to be no room for any doubt, or necessity of resorting to any rule of construction. The exemption is absolute, and depends upon no condition but ownership by the city."\textsuperscript{17} This view was reinforced in Duchesne County v. State Tax Commission,\textsuperscript{18} a case where no clear majority opinion pre-

\textsuperscript{12} The word "owned" did appear in the territorial statute that was the predecessor to the present constitutional provision: "All property, real and personal, situate and being in this Territory, is taxable, except: . . . 3. Property owned by this Territory or any county, city, or school district." 1 COMP. LAWS OF UTAH § 2009 (1888).

\textsuperscript{13} UTAH CONST. art. 13, § 2.

\textsuperscript{14} Id. (emphasis added).

\textsuperscript{15} See generally City of San Francisco v. McGovern, 28 Cal. App. 491, 509, 12 P. 980, 987 (1915).

\textsuperscript{16} 10 Utah 351, 37 P. 577 (1894).

\textsuperscript{17} Id. at 356, 37 P. at 578. The City of Springville, a municipal corporation, owned 900 acres of land within its corporate limits from which it derived revenue by renting the property for pasturage. Taxes assessed against the land were not paid by the city and the land was sold to the defendant at a tax sale. The city sought to quiet title. The court held that the city's leasing of the land for private purposes did not disturb the tax status of the property. The tax sale was void because ownership by the city was the only condition of exemption. Although the Springville opinion came down before Utah matured to statehood in 1896, the effect of prior judgments was continued by article 24, § 1 of the Utah Constitution.

\textsuperscript{18} 104 Utah 365, 140 P.2d 335 (1943).
vailed. In Duchesne the state acquired land previously owned by private interests through foreclosure of mortgages the state had acquired from a state-owned trust. Upon acquisition by the state, the lands were removed from the tax rolls. The court addressed the contention of Duchesne County that the property should be reinstated upon the tax rolls because the state held the property in a proprietary capacity and the constitutional exemption provision exempted only state property held in a governmental capacity. The plurality opinion noted that “[i]t is conceded that if the state holds title in its governmental capacity, the property is exempt from taxation under the constitutional mandate.” 19 The opinion then determined that the government could not hold land otherwise than in a governmental capacity, and, therefore, the land must be exempt from taxation. This reasoning was adhered to by only two of the five justices. The majority of the justices, in concurring separate opinions, found reference to the governmental-proprietary distinction unnecessary because mere ownership of the land by the state required a finding of exempt status. 20

In 1976 the Utah Supreme Court, in the case of University of Utah v. Salt Lake County, 21 reaffirmed its position that the constitutional exemption provision requires that property be owned by public entities to be exempt. The university leased property under a five-year lease with an option to purchase. The university was in possession and use of the property and had agreed to pay all taxes levied upon it. Such facts were not enough, the court held, to provide the university with legal title to the property. The property was not, therefore, owned by a subdivision of the state and was subject to taxation. 22

C. Exempt Entities

In determining the taxability of the interests of Los Angeles and St. George in the Warner Valley electrical generating plant, discussion will center on whether the municipalities are included among the public entities specifically exempted and, if so,
whether they own the property within the meaning of the exemption provision.  

1. St. George

The City of St. George is organized and incorporated under the laws of the State of Utah. As such, St. George obviously is among the entities contemplated by the provision exempting from taxation the property of "cities . . . [and] municipal corporations."   

2. Los Angeles

Because Los Angeles is a foreign municipality, whether or not its property interest is exempted under Utah's exemption provision is not as easily determined. While no Utah cases are on point, the case of City Council v. Timmerman, decided by the Fourth Circuit, is informative:

Unless otherwise expressed, all legislation of a state relating to cities and towns refers to the cities and towns of that state, and not of another state or country. This is for the reason that the state has no control of cities and towns in other states, and from a governmental standpoint no interest in them. For a state to attempt to promote the development of cities and towns outside of its borders by exempting property owned by them from taxation exacted of its own citizens would be so anomalous and contrary to legislative history and governmental policy that nothing but the clearest affirmative expression would warrant such an inference.


24. UTAH Const. art. 13, § 2.

25. 233 F. 216 (4th Cir. 1916).

26. Id. at 219.
Additional case law from other jurisdictions sustains the *Timmerman* concept. For instance, a waterworks plant owned by a Missouri municipality but located in Kansas was held to be taxable in Kansas.27 The Kansas Supreme Court declared that when a foreign municipality enters the realm of another state it does not carry with it any of the attributes of its sovereignty and is thereby subject to the laws of the state it enters just the same as any proprietor.28 An interstate toll bridge owned and operated by a Wisconsin municipality, but spanning the St. Croix River so that a portion of the bridge rested in Minnesota, was held to be taxable by the State of Minnesota.29 The Minnesota Supreme Court’s reasoning in *State v. City of Hudson* further clarified the law regarding taxation of foreign municipalities: “The public and sovereign character of the state owning property in another state ceases at the state line, with the consequence that its ownership of property in the foreign state is in its corporate capacity without any sovereign or public attributes.”30

The Utah Supreme Court would likely follow the established precedent of these other jurisdictions. Several policy arguments support this conclusion. To allow Los Angeles the same exempt status as St. George would be inequitable. The Warner Valley Project will create an immediate need for expansion of public services and facilities during its construction phase and will extend that need throughout the life of the project, working hardships on local government already hard pressed to provide adequate coverage in those areas. While new residents brought to the area by the project will provide some tax revenue, the revenue will not provide the money necessary to adequately meet the

28. Id. at 185, 116 P. at 253.
29. *State v. City of Hudson*, 231 Minn. 127, 42 N.W.2d 546 (1950). *But see City of Louisville v. Babb*, 75 F.2d 162 (7th Cir. 1935), *cert. denied*, 295 U.S. 738 (1935), which also involved a toll bridge spanning a river into another state. The district court had determined that the portion of the bridge located in Indiana was taxable by Indiana since the bridge was owned and operated by Louisville, Kentucky. The district court found unconstitutional a statute enacted by the Legislature of Indiana that specifically exempted “[a]ny bridge . . . when owned either by the State of Indiana . . . or by another state or by any municipality or political subdivision of such other state.” Act of Mar. 11, 1929, ch. 94, § 1, 1929 Ind. Acts 296 (current version at IND. CODE ANN. § 6-1.1-10-3 (Burns 1978)). The circuit court reversed.
initial growth problems. Mobile home cities, proper waste treatment, adequate police protection, sufficient educational facilities, and construction and maintenance of roads are all challenges facing local officials. Solutions to these growth-related problems will require immediate and substantial capital outlay, primarily by Washington County. If the property of Los Angeles is held to be exempt from ad valorem taxation, revenues from the Warner Valley Project will not likely be sufficient to provide the capital outlay monies required by the accelerated growth.

Adverse environmental effects are also legitimate concerns of county officials. Los Angeles will have a fifty percent ownership interest in the new generating facility and will be entitled to half the generated power, yet it will be immune from these related concerns. While taxing Los Angeles will not eliminate environmental problems, taxation will aid in finding solutions and reducing inequities. The exemption provision of article 13, section 2 of the Utah Constitution should not be construed to include Los Angeles within the terms of the public entities exemption.

D. The Question of Ownership

Historically, the Utah Supreme Court has found the ad valorem tax exemption provision to be unambiguous and not open to construction. It has, therefore, exempted all municipal interests. Previous cases, however, have dealt with a municipality’s ownership and control of the entire property; the court has not yet been confronted with a municipality’s minority interest. Where a municipality owns only a twenty-five percent interest in property under consideration, as will St. George, the exemption provision may be subject to construction.

1. Implications from another ownership jurisdiction

Analysis of the taxability of St. George’s minority interest may be benefited by case law from another jurisdiction. In Georgia, ownership has been the test for exemption from ad valorem tax...
taxation. All "public property" of that state has been exempted.\footnote{34. Ga. Code Ann. § 92-201 (1974).}

An interesting concept was discussed by the Georgia Supreme Court in \textit{Cleveland v. Stewart}.\footnote{35. 3 Ga. 283 (1847).} In dictum, the court stated:

Another class of public corporations are those which are founded for public—although not political or municipal—purposes, and the whole interest in which belongs to the government. Thus, a bank, organized by the government for public purposes, is a public corporation if the whole of the stock and all the interest in it, reside in the government.\footnote{36. Id. at 291 (citations omitted).}

A subsequent Georgia Supreme Court decision implied that ownership of less than the entire property might result in taxation of that property. In \textit{Sigman v. Brunswick Port Authority},\footnote{37. 214 Ga. 332, 104 S.E.2d 467 (1958).} the court found the property of the port authority to be public property and exempt from taxation. In partial support of its finding, the court stated, "No private interest exists in the property of the Authority. The members thereof may not use it for private gain or income."\footnote{38. Id. at 335, 104 S.E.2d at 470-71 (emphasis added).}

The implication that a private interest in the property might result in taxation of otherwise exempt property deserves consideration. Applying this analysis to the Warner Valley Project, St. George’s interest may not be “municipal” or “public” property exempt from ad valorem taxation since the city will not own the entire interest in the project.

2. \textit{Comparison to federal tax concepts}

An examination of federal tax decisions provides additional information for evaluating St. George’s exempt status. As a general rule, states are not taxable by the federal government; yet, when a state engages in business of a private nature, it may open itself to federal taxation. This principle is illustrated by \textit{South Carolina v. United States}.\footnote{39. 199 U.S. 437 (1905).} South Carolina had engaged in the liquor business and the United States demanded payment from the state of license taxes imposed generally on all persons dealing in intoxicating liquors. The United States Supreme Court found that the state and its agencies were not exempted from the license tax. The state, by participation in private business, forfeited its
immunity from taxation.\textsuperscript{40}

Another argument against exemption of St. George's interest may, by analogy, be drawn from the Internal Revenue Code. For federal tax purposes, "a joint undertaking merely to share expenses is not a partnership."\textsuperscript{41} The parties are taxed as separate entities. However, when more than simple coownership and cost-sharing is involved, an agreement becomes a partnership for income tax purposes regardless of the intention of the parties.\textsuperscript{42} In Revenue Ruling 68-344,\textsuperscript{43} four utilities owned undivided interests in an electrical generating facility, shared costs of operating the facility, and also shared the electrical energy generated by it. The Internal Revenue Service took the position that for federal income tax purposes the utilities had gone beyond a mere sharing of costs and had entered into a partnership.

Applying that ruling to the instant situation, it may be reasoned that by entering into such an undertaking with undivided interests, the participating utilities become a partnership for tax purposes. It is doubtful that tax immunity would be extended to the partnership.

3. \textit{Purpose of the exemption provision}

A look at the underlying rationale of the exemption provision may be helpful in determining the breadth and scope of the municipal immunity provision. Shortly after Utah's municipal immunity provision was adopted, three basic policies embodied in tax immunity provisions were isolated: first, a desire to prevent governmental functions and activities from being interfered with or impeded; second, a desire to avoid the useless formality of permitting the government to tax itself; and third, a desire to alleviate the problems of enforcement.\textsuperscript{44} Application of these policies to the present case may provide justification for exempting St. George's interest in the Warner Valley Project from taxation.

First, taxing St. George's interest would have an effect on the interest rate of the revenue bonds to be acquired. In that limited sense, the activities of St. George would be impeded. In addition, the revenue bonds are to be secured solely by the interest in the property itself and revenues generated; no tax monies are to be used. As ad valorem taxes are assessed directly against the prop-

\textsuperscript{40} Id. at 463.
\textsuperscript{41} Treas. Reg. § 1.761-1(a) (1966).
\textsuperscript{42} Kern, \textit{supra} note 1, at 79.
\textsuperscript{43} Rev. Rul. 68-344, 1968-1 C.B. 569.
\textsuperscript{44} O. Pond, \textit{Law of Public Utilities} § 404 (3d ed. 1925).
Any unpaid tax assessed would result in a claim against the property.\textsuperscript{45} Second, considering the sovereign state as a whole, for one political subdivision to tax another would mean that money taken from one pocket would be put into another. The costs of administering the tax make it economically impractical to impose since no benefit accrues to the state as a whole. Finally, the problem of enforcement may also have an effect on the taxability of St. George's interest. The remedy for unpaid taxes is to satisfy the tax lien by a sale of the property or interest upon which the tax is due.\textsuperscript{46} Any unpaid assessment would not result in liability to the city or require payment by tax monies.\textsuperscript{47} A tax sale could, however, result in the property interest falling into outside hands, thereby increasing electrical costs to the residents of St. George.\textsuperscript{48}

Many changes in governmental functions have occurred since the turn of the century, however, when the above municipal immunity policies were propounded. Modern notions as to the extent of municipal functions were likely not foreseeable to the framers of the state constitution.\textsuperscript{49} An exemption similar to the present constitutional provision appeared in a territorial law of 1876.\textsuperscript{50} A constitutional provision permitting a municipality to own and operate a utility, however, was not added to the constitution until 1933.\textsuperscript{51} Even if the framers intended municipally owned utilities generally to be exempt, clearly they could not have foreseen a situation such as is presented by the Warner Valley Project. Electrical power was in its early stages of development. It is possible the framers did not intend to exempt such municipal property interests. Additionally, exemption of St. George's interest may not be realistic as exemption fails to recognize the distinct interests of various subdivisions of the state. A substantial

\textsuperscript{45} A tax debt creates a lien against the property assessed. \textit{Utah Code Ann.} § 59-10-3 (1953).

\textsuperscript{46} \textit{Utah Code Ann.} § 59-10-33 (1953).

\textsuperscript{47} A statutory sale of property removes a tax lien against it even if the proceeds of the sale are insufficient to satisfy the delinquent taxes assessed. San Juan County v. Jen, Inc., 16 Utah 2d 394, 401 P.2d 952 (1965).

\textsuperscript{48} O. Pond, \textit{supra} note 44, at § 864. Mr. Pond suggested:

\textit{[T]}he motive and purpose of the municipality is to secure adequate and efficient municipal public utility service for its citizens at the most reasonable possible rate which is often in sharp contrast to the very natural attitude of the privately owned municipal public utility in its desire to receive the greatest possible return on its investment . . .

\textsuperscript{49} \textit{See generally} South Carolina v. United States, 199 U.S. 437, 456 (1905).

\textsuperscript{50} Utah territorial laws provided, "Property belonging to the United States, this Territory, or any county, city, or town thereof . . . are exempt from taxation." \textit{Comp. Laws of Utah} § 359 (1876).

\textsuperscript{51} \textit{Utah Const.} art. 11, § 5.
capital outlay will be required to cope with the population influx problems associated with the construction of the Warner Valley Project. Most of that capital outlay will come from Washington County, the situs of the project, with costs to be shared by county residents. All of St. George's electrical power allotment will go to the residents of St. George; other county residents will not receive the benefit of additional electrical power. To require county residents residing outside of St. George to share equally in the project costs without receiving the benefits of additional power casts upon them an inequitable burden. Taxing the interest of St. George would redistribute the tax burdens of county residents more in line with the benefits they receive. The benefit of an equal tax burden may outweigh other policies arguing for exemption.

4. Summary

While Los Angeles clearly becomes subject to ad valorem taxation when operating in Utah, there remains some question regarding St. George's tax status. There is a risk that a municipality strips itself of its tax immunity when it acquires a minority interest in a "partnership" entity. Furthermore, the inequities of the tax burden to be placed on county residents living outside the City of St. George and the uniquely modern nature of the project argue against the conclusion that St. George should receive the benefit of tax immunity for its interest in the project. The courts of Utah have declared, on the other hand, that the policy of the state is to exempt all publicly owned property. Ownership has been the only test.53 This policy of exempting property owned by municipalities is an obstacle not likely to be overcome.54

III. USE AND POSSESSORY TAXES

A. Background

Although, under the M'Culloch doctrine, the land to be leased for the Warner Valley Project may not be taxed directly because it is owned by the federal government,54 the use or posses-

52. See notes 16-22 and accompanying text supra.
53. The courts will probably relegate any narrowing of the ownership requirement to the legislature.
54. Federal governmental immunity from state taxation was first enunciated in M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Maryland's attempt to impose a tax on a federally created bank prompted Chief Justice Marshall's oft-quoted phrase: "[T]he power to tax involves the power to destroy." Id. at 431. Justice Marshall also
TION of the land by the project may be subject to taxation.\textsuperscript{55} A Utah statute,\textsuperscript{56} which has been held to be a constitutional limitation on the \textit{M'Culloch} doctrine,\textsuperscript{57} provides for "a tax upon the possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation, when such property is used in connection with a business conducted for profit."\textsuperscript{58} Although the tax is levied on use or possession, the amount of the tax is the same as an ad valorem property tax on the property.\textsuperscript{59} 

reasoned "that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress." Id. at 436. Early applications of the \textit{M'Culloch} immunity by courts were sweeping. See Note, The Doctrine of Intergovernmental Tax Immunity and its Effect upon Lessees of Federal Property, 21 U. Prr. L. Rev. 697, 698 (1960). In recent years, however, federal immunity from state taxation has deteriorated, or at least has been circumvented.\textsuperscript{55} In 1953 Michigan, steering clear of state taxes directly on federal property itself, enacted legislation designed to tax the use of federal property in the hands of federal contractors. Act of June 10, 1953, Pub. Act 1953, No. 189, \textsuperscript{5} 211.181, 1953 Mich. Pub. Acts 252 (codified at Mich. Comp. Laws Ann. § 211.181 (Cum. Supp. 1978-1979)). The constitutionality of that legislation was challenged in two significant 1958 Supreme Court cases. United States v. City of Detroit, 355 U.S. 466 (1958), involved a private corporation's lease of property from the federal government. The Court held that private corporations were not shielded from state taxes even though part or all of the financial burden of the taxes eventually might fall on the government. The tax was levied upon the private lessee and not upon the government or its property. In a companion case, United States v. Township of Muskegon, 355 U.S. 484 (1958), a private corporation used a manufacturing plant owned by the United States in performing several supply contracts the corporation had with the government. There was no formal lease and no rent was charged. The corporation used the plant under a terminable permit and agreed not to include any part of the cost of facilities furnished by the government in the price of goods supplied under the cost-plus-fixed-fee contracts. Again, the interest was held taxable by the state. After the Supreme Court affirmed the basic design of the Michigan tax, the way was open for other states to follow suit, which Utah quickly did.\textsuperscript{56} Utah Code Ann. § 59-13-73 (1963).\textsuperscript{57} Thiokol Chem. Corp. v. Peterson, 15 Utah 2d 355, 393 P.2d 391 (1964). Thiokol, a company engaged in the research and development of the Minute Man missile under a cost-plus contract, was assessed over $125,000 in taxes for property in its possession that was owned by the United States. Contentions that the incidence of the tax fell upon the United States, that Thiokol had no taxable interest in the property, and that the statute was unconstitutional because it was both discriminatory and discriminatorily applied were not successful. Although the court did find that the statute had not been applied to state-owned property, it concluded that the statute was not intentionally misapplied and, hence, not discriminatory against Thiokol. Id. at 361, 393 P.2d at 395-96. The major difference between the Utah tax and the Michigan tax after which it was patterned is that Utah's applies to the use of both real and personal property, unlike the Michigan tax, which applies to the use of real property only. The following statutes tax the use or possession of exempt property: Michigan—Mich. Comp. Laws Ann. § 211.181 (Cum. Supp. 1978-1979); Nevada—Rev. Rev. Stat. § 361.157, 159 (1977); Utah—Utah Code Ann. § 59-13-73 (1953).\textsuperscript{58} Utah Code Ann. § 59-13-73 (1953).\textsuperscript{59} Id. § 59-13-74.
In contrast to ad valorem taxes, however, no lien attaches to the property upon assessment of use taxes, though failure to pay the tax results in a debt due the county.

B. Use Tax Provisions

The use tax provisions of the Utah Code delineate four basic prerequisites to taxation. The property must be: (1) possessed or beneficially used; (2) exempt from taxation; (3) enjoyed by a private individual, association, or corporation; and (4) used in connection with a business conducted for profit. The first two requirements may be dismissed summarily as being satisfied in the present case. The leasehold interests of St. George and Los Angeles in the federal lands are possessory and unquestionably beneficial to each. Additionally, the property of the federal government upon which the project is situated is not subject to ad valorem taxation. Remaining for consideration are the last two requirements. If it is determined that St. George and Los Angeles are "private" corporations for the purposes of the Warner Valley Project and use the property in connection with a business conducted for profit, the municipal interests will be taxable by the state and its subdivisions.

1. Private?

It must first be determined whether the municipalities of Los Angeles and St. George become private entities when operating an electrical generating plant. Los Angeles takes a private status upon entering Utah because a municipality is universally considered private in a foreign state. For different reasons, under the Utah use tax statute St. George may also be considered private in its role in the Warner Valley Project.

The Utah use tax specifically applies to private corporations. Municipal corporations are not commonly thought to be private.

60. Id. § 59-13-75.
61. Id. § 59-13-76.
62. Section 59-13-73 levies a tax on the use or possession of property; it does not levy an ad valorem tax directly against the property itself. Article 13, § 2 of the Utah Constitution exempting "property of . . . cities [and] municipal corporations" does not apply to use taxes because the constitutional exemption provision applies only to ad valorem taxes. See State Tax Comm'n v. City of Logan, 88 Utah 406, 415-17, 64 P.2d 1197, 1201-02 (1936); 16 E. McQuillin, supra note 9, § 44.57. For a detailed history and analysis of § 59-13-73, see Note, The Utah Tax on the Use of Tax-Exempt Property, 9 UTAH L. REV. 415 (1964).
65. See notes 26-30 and accompanying text supra.
A distinction between the two terms is made in another tax statute aimed at certain corporations "whether the corporations are municipally or privately owned."66 Legislative use of the term "private corporations" and exclusion of the term "municipal corporations" from the use tax provisions may manifest an intent by the legislature to exempt municipal corporations from taxation. It should not be concluded, however, that a municipality can never be considered private. The governmental-proprietary distinction67 that has arisen mainly in the area of tort liability provides a useful basis for determining when, if ever, a municipality is functioning in a private capacity for tax purposes.68 Proprietary in nature, in tort law, is equivalent to private in nature.69 Consequently, if the governmental-proprietary distinction is applicable

67. For a concise history of the emergence of the governmental-proprietary distinction, see Duchesne County v. State Tax Comm'n, 104 Utah 365, 140 P.2d 335 (1943). Every jurisdiction but South Carolina and Florida has accepted the distinction between "governmental" and "proprietary" functions. Davis v. Provo City Corp., 1 Utah 2d 244, 247 n.1, 265 P.2d 415, 417 n.1 (1953); W. Prosser, The Law of Torts § 131, at 979 (4th ed. 1971).
68. In the United States, governmental entities have generally been subject to tort liability when performing proprietary functions, but immune when performing governmental functions. W. Prosser, supra note 67, at 978-80. The trend, however, is away from tort immunity; in fact, there is a steady march to eliminate it altogether. In Jivelekas v. City of Worland, 546 P.2d 419 (Wyo. 1976), the court defined sovereign or governmental immunity as the "principle [that] holds that the state, its subdivisions and municipal entities may not be held liable for a tortious act perpetrated while engaged in a governmental function." Id. at 425 (footnote omitted) (emphasis added). Justice Rose in writing the majority opinion advocated the abolishment of governmental immunity; the two other justices dissented as to that issue but eventually concurred in Oroz v. Board of County Comm'rs, 575 P.2d 1155 (Wyo. 1978). The Wyoming Supreme Court in Oroz completely abrogated governmental immunity from tort liability in that state. In following the trend away from immunity, the court cited the appendix to Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975), which indicated that 30 states, as of Mar. 30, 1973, had completely or partially abolished immunity. The Wyoming court noted that other states had taken action since the Hicks opinion, raising to 36 the number of states following the trend. 575 P.2d at 1157.

The appendix in Hicks is not entirely correct. It incorrectly lists Utah as a jurisdiction having abolished governmental immunity. Utah Code Ann. § 63-30-3 (Supp. 1978) provides, "Except as may be otherwise provided in this act, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function . . . ."

The New Mexico Supreme Court, following the trend away from immunity, noted that it had "long recognized that the doctrine [of immunity] is not applicable to municipalities when engaged in a proprietary function," and then proceeded to abrogate immunity when engaged in a governmental function. Hicks v. State, 88 N.M. 588, 590, 544 P.2d 1153, 1155 (1975).

69. In wrestling with the governmental-proprietary character of municipalities, the courts have equated "proprietary" capacity with "private" or "corporate" capacity. W. Prosser, supra note 67, at 977-78.
to the Utah use tax provisions and St. George's interest in the Warner Valley Project is ruled to be proprietary in nature, St. George's interest in the project will meet the private enjoyment requirement of the use tax provision. There are reasons to believe that the Utah Legislature, cognizant of the governmental-proprietary distinction, could have intended to tax municipalities functioning as utilities.

Under the governmental-proprietary test applied in Utah, St. George's interest in the project will probably be found to be proprietary. The state's Governmental Immunity Act specifically immunizes governmental entities "from suit for any injury which results from the exercise of a governmental function." The factors to be considered in determining whether a function is governmental or proprietary are: (1) whether the act is for the common good of the entire state and is generally regarded as a public responsibility, (2) whether there is any special pecuniary profit or corporate benefit to the city, and (3) whether it is of such a nature as to be in competition with free enterprise.

Application of these factors to the Warner Valley Project indicates that the project could be considered proprietary. The project is not for the benefit of the state at large, or even for the entirety of Washington County; it will furnish power to St. George only. Furnishing electrical power cannot be considered a public responsibility because private corporations also perform this function and the operation of utilities by municipalities is voluntary rather than compelled. Moreover, the city competes with private utilities and will receive revenue from the sale of electrical energy. Consequently, the city will definitely benefit from the facility.

In addition to the above analysis, case law of neighboring states supports the classification of a public utility as proprietary in a taxation setting. And, importantly, the United States Supreme Court has stated that "[i]t is no part of the essential

70. UTAH CODE ANN. § 63-30-3 (Supp. 1978).
73. See UTAH CONST. art. 11, § 5; UTAH CODE ANN. § 10-8-14 (1953).
74. City of Phoenix v. Moore, 57 Ariz. 350, 113 P.2d 935 (1941); Town of Pine Bluffs v. State Bd. of Equalization, 79 Wyo. 262, 333 P.2d 700 (1958). The Idaho Supreme Court recognized that an electrical utility is generally conceded to be proprietary in nature, noting, "that in the operation and distribution of electrical power the City of Idaho Falls [was] acting in a proprietary capacity." Hunke v. Foote, 84 Idaho 391, 396, 373 P.2d 322, 324 (1962) (quoting the trial court's finding).
governmental functions of a State to provide means of transportation, supply artificial light, water and the like."

Utah's governmental-proprietary function test and case law from other jurisdictions provide strong arguments for treating the City of St. George as "proprietary" and, therefore, "private" for purposes of applying the use tax to the city's interests in the Warner Valley Project. Doubts should be resolved in favor of taxation. The Utah Supreme Court has indicated that the use tax statute should be broadly interpreted to effectuate the purpose of its enactment, which was "to close any gaps in the tax laws by imposing a tax on any property possessed or used in connection with a business for profit which was otherwise exempt." Subjecting municipalities such as St. George and Los Angeles to the use tax would not contravene the express language of the statute and would allow a "gap" in the tax laws to be closed.

2. Business entered into for profit?

St. George and Los Angeles might be able to avoid taxation under Utah's use tax provisions despite the conclusions drawn above if it can be shown that the Warner Valley Project is not a business entered into for profit. However, the determination that both municipalities play proprietary roles is nearly dispositive of the business for profit question as well. Satisfaction of the second prong of Utah's proprietary test requires a finding of special pecuniary profit or corporate benefit; in fact, public utilities have been generally conceded to be competitive businesses for profit in those jurisdictions that have considered the question.

The case against Los Angeles is even more conclusive than the one against St. George. Activities carried on by municipalities outside their native states are almost universally classified as businesses conducted for profit. For example, in *City of Cincinnati v. Commonwealth ex rel. Reeves,* the Kentucky Court of Appeals construed an income tax exemption for corporations not organized or conducted for pecuniary profit. The court conceded that while Cincinnati was not organized or conducted primarily for profit, it did have the expectation of pecuniary benefits in the particular activity of acquiring and conducting its railroad enterprise. Therefore, it was not exempt from taxation on the income derived from the railroad enterprise.

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77. 292 Ky. 597, 167 S.W.2d 709 (1942).
While the weight of analysis supports the conclusion that St. George and Los Angeles will be operating a business conducted for profit within the meaning of the use tax provisions, there is a Nevada Supreme Court ruling, based on a situation similar to that presented by the Warner Valley Project, reaching the opposite conclusion. However, the Nevada case is not controlling upon Utah courts and can, moreover, be attacked for faulty reasoning. *Clark County v. City of Los Angeles*78 involved a power generating project operated by Los Angeles and the Metropolitan Water District of Southern California (MWD). The generators and related facilities were owned by the federal government, but, like Utah, Nevada had enacted legislation rendering taxable the lease or other use of exempt property.79

The Nevada Supreme Court held that Los Angeles and MWD were not engaged in a business for profit within the meaning of the statute because they were serving governmental needs.80 The justices reasoned that “[a]lthough the respondents obtain surplus funds, these are not distributed to private shareholders as dividends, nor are there private shareholders.”81

The flaw in the court’s reasoning may be traced to a misapprehension of the scope of three California cases82 cited as support for the holding. The implication throughout those three cases is that to have a “profit” a private shareholder or individual must receive a benefit. The cases were decided under section 214 of the California Revenue and Taxation Code83 which exempts nonprofit (religious, hospital, or charitable) corporations from ad valorem taxation.84 Besides referring to an ad valorem rather than a use

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80. The basic issue of the case was whether the rights to and use of hydroelectric generators and related facilities on the Nevada side of Hoover Dam by Los Angeles and MWD were subject to taxation by Nevada under its use tax. It was asserted in crossclaims filed against Clark County that taxation was not proper because “the State of Nevada had elected to receive annual payments of $300,000 from the Federal Bureau of Reclamation in lieu of any taxes by the State or its subdivisions, thereby ‘preempting’ the subject of taxation.” Brief for Appellant at 3, Clark County v. City of Los Angeles, 91 Nev. 309, 535 P.2d 158 (1975) (citation omitted).
81. 91 Nev. at 312, 535 P.2d at 160.
tax, section 214 is separate and distinct from the state constitutional provisions exempting the property of cities and municipalities. Since municipal property is exempted elsewhere, section 214 and cases decided under it need only focus on those corporate organizations that have shareholders. Wholesale application of the tests developed under section 214 of the California Revenue and Tax Code to cases under the Nevada use tax statute results in a comparison of apples and oranges.

The precedential value of the Clark County case is easily outweighed by the authorities equating private and proprietary functions with businesses conducted for profit. A municipality should be considered as engaged in a business for profit under the use tax statute when it obtains surplus funds from a business that itself constitutes a proprietary function.

IV. CONCLUSION

As municipally owned utilities seek to combat the energy shortage by combining their capital resources with other utilities

85. The California Constitution provision provided that:

In addition to such exemptions as are now provided in this Constitution, the Legislature may exempt from taxation all or any portion of property used exclusively for religious, hospital or charitable purposes and owned by . . . corporations . . . not conducted for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

CAL. CONST. art. 13, § 1c (1879, repealed 1974, current version at art. 13, § 4) (emphasis added). The first phrase of § 1c is critical to understanding the content and breadth of the provision. The property of cities and municipal corporations had been expressly exempted by § 1 of art. 13: "[P]roperty . . . such as may belong to this State, or to any county, city and county, or municipal corporation within this State shall be exempt from taxation . . . ." CAL. CONST. art. 13, § 1 (1879, repealed 1974, current version at art. 13, § 3). Since all municipal property was exempted elsewhere, § 1c refers to and is focused only upon corporations that have private shareholders or similar organizational structures. Consequently, it is understandable and even expected that the phraseology of the provision be couched in nonmunicipal terms. There was no need to adopt construction or wording designed to include municipalities, which have no shareholders, because municipalities had been previously expressly exempted.

86. Unlike the situation in the California cases, municipalities were not expressly exempted elsewhere in the Nevada statutes at issue in Clark County. No indication, either express or implied, appeared in the Nevada statutes that municipalities were designed to be excluded from taxation. A “business conducted for profit” was not defined, nor did the statutes require on their face the existence of private shareholders or a distribution of dividends. The Nevada statutes were as conducive to an interpretation that municipalities acting in proprietary capacities should be included as businesses conducted for profit as to an interpretation that they should be excluded. In addition, the California provisions have reference only to ad valorem taxation while the Nevada statutes involve a tax on possession or use. The purpose, construction, and focus of § 214 of the California Revenue and Taxation Code derived from § 1c of that state’s constitution are not identical to those of the Nevada statutes.
in a commonly owned installation, the question of the taxability of municipal interests in public utilities will emerge. In jurisdictions where the use of the property also has significance for tax exemption purposes, the governmental-proprietary distinction will play a vital role.

The breadth of the property and use tax statutes is the critical issue to be resolved. Are Los Angeles and St. George exempt from the payment of an ad valorem tax levied directly upon the electrical generating plant itself and accompanying improvements? And, are their possessory leasehold interests in federal land exempt from use taxation?

It appears certain that the property interests of Los Angeles, as a foreign municipality in Utah, will be subject to both ad valorem taxation and use taxation. The taxability of the interests of St. George, a domestic corporation, is a much more difficult question.

St. George will not likely be subjected to an ad valorem tax on its interest in the electrical generating plant. Utah courts will probably find the policy of exempting publicly owned property an insurmountable obstacle and will construe the exemption provision broadly to include any ownership interest. But, since the policy of tax exemption is generally confined to the area of ad valorem taxation, greater latitude is available to the courts in interpreting the use tax provisions. Since the Utah Supreme Court has held that the use tax provisions of the Utah Code were enacted to close any gaps in the tax laws, it is likely the court will close a gap by finding St. George subject to the Utah use tax.

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