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State of Utah v. James L. Hatch and Della L. Hatch : Brief of Respondents

Utah Supreme Court

Olsen and Chamberlain; Attorneys for Defendants and Respondents;

In the
Supreme Court of the State of Utah

STATE OF UTAH,
Petitioner,

—vs.—

JAMES L. HATCH and DELLA L. HATCH,
Respondents.

Case. No. 8937

PETITION ON BEHALF OF THE STATE OF UTAH FOR REHEARING AND BRIEF IN SUPPORT THEREOF

WALTER L. BUDGE,
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ARROW PRESS, SALT LAKE

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PETITION FOR REHEARING

The State of Utah hereby petitions this Court for a rehearing and reconsideration of this case on the following grounds:

I.

EXCHANGES WITH THE UNITED STATES CANNOT LOGICALLY BE INCLUDED UNDER SECTION 65-1-14 AND EXCLUDED UNDER SECTION 65-1-15.

II.

SECTION 65-1-15 IS NOT AMBIGUOUS AND ITS INTENT IS CLEAR.

III.

NO EVIDENCE EXISTS OF ADMINISTRATIVE PRACTICES WHICH WOULD THWART THE PLAIN PURPOSE OF THE LAW.

IV.

THE UTAH CONSTITUTION CONTEMPLATES DECISION BY FIVE JUDGES NOT FOUR JUDGES.

In support of the grounds above stated, the following brief is submitted.

Respectfully,

WALTER L. BUDGE,
Attorney General, State of Utah

DENNIS McCARTHY,
Special Assistant, Counsel for Petitioner

I.

EXCHANGES WITH THE UNITED STATES CANNOT LOGICALLY BE INCLUDED UNDER SECTION 65-1-14 AND EXCLUDED UNDER SECTION 65-1-15.

The majority opinion disposes of this important case by deciding but two issues. First, the majority decides what it denominates a "preliminary question": Whether the State Land Board has authority to exchange state owned lands with the United States. To this an affirmative answer is given. Secondly, the majority determines what it calls "the critical question": Whether in an exchange of state owned lands with the Federal Government, minerals were reserved to the State subsequent

to the enactment of Section 5575X, Laws of Utah 1919 (now Section 65-1-15, U.C.A., 1953). This is answered in the negative.

A close examination of the rationale' by which the majority opinion reaches its decision on each of these questions is revealing. Consider first the preliminary question, the authority of the State Land Board to exchange lands with the United States. The majority properly recognizes that authority for such a transaction must be found in the state statutes. The opinion states: "Such authority must be found in Sections 65-1-14, 65-1-27, 65-1-70, U.C.A., 1953." The opinion then quotes the essential language of the first two sections, namely 65-1-14 and 65-1-27, apparently in the belief that these two sections more nearly support its point of view. But the third section, 65-1-70, is neither quoted nor discussed. Indeed, after its initial citation, it seemingly disappears forever from the case, since it is neither cited nor referred to again.

We must conclude, therefore, that the majority's conclusion with respect to the source of authority of the State Land Board is not seriously based upon the provisions of 65-1-70. As pointed out in appellant's prior briefs, at the time of the exchange transaction involved in this case, Section 65-1-70 (formerly Section 5618) provided that "no exchange shall be made by the land board until a patent for the land so received in exchange shall have been issued by the government of the United States to such proprietors or their grantors." It is obvious that the statute neither contemplates nor authorizes an ex-

change of lands with the United States itself. Further, the statute's limited authority is restricted to situations where the exchange is necessary "in order to compact . . . the land holdings of the state," whereas the undisputed evidence in this case contradicts that any purpose "to compact" was involved. Perhaps these considerations deterred the majority opinion from quoting or seriously relying upon 65-1-70 as a source of power for the State Land Board.

Apparently, the majority felt, however, that some reliance could be placed upon Section 65-1-27 (formerly Section 5580) as a source of authority, since the essential provisions of this statute are quoted as follows: ". . . The land board is hereby empowered to cancel, relinquish, or release the claims of the state to, and to reconvey to the United States, any particular tract of land erroneously listed to the state, or any tract upon which, at the time of selection, a bona fide claim has been initiated by an actual settler." Without ambiguity, the grant of authority contained in this section is strictly limited to two situations (1) to land erroneously listed to the state, and (2) to land on which a bona fide claim has been initiated by an actual settler. Nothing could be more specific. The statutory language does not touch upon or refer, in even the remotest sense, to any grant of power to the State Land Board to make exchanges of state owned school sections with the Federal Government. It seems inconceivable that the three able judges who joined in the majority opinion could have placed much reliance, if any at all, upon Section 65-1-27 as constituting the necessary grant of authority to the State Land Board.

We believe that the majority opinion necessarily must have relied primarily upon the provisions of Section 65-1-14 as constituting the source of the authority of the State Land Board. In 1925, the date here pertinent, that statute read as follows:

> "Section 5575. *Control of State lands—lease —sell, etc.—reserve.* The State land board shall have the direction, management and control of all lands heretofore, or which may hereafter be granted to this State, by the United States government, or otherwise . . . for any and all purposes whatsoever . . . , and shall have the power to sell or lease the same for the best interests of the State and in accordance with the provisions of this chapter and the constitution of this State; . . . And provided, further, that in all cases lands containing coal or other minerals shall be reserved from sale. . ." (1925 Session Laws of Utah, Chap. 31, Sec. 5575)

We agree with the majority opinion that the above quoted section and its companion section, Sec. 5575X2 (now 65-1-17) relating to the authority of the State Land Board to sell the surface of state owned lands, probably constitute the basic authority — if any exists — of the State Land Board to make an exchange of lands with the United States. Certainly, if the Land Board has such authority, it must be found within the framework of these two sections, 65-1-14 and 65-1-17.

But assuming this interpretation of the pertinent statutes by the majority opinion, certain conclusions inevitably must follow. Sections 65-1-14 and 65-1-17 confer no express authority on the State Land Board to

exchange lands with the Federal Government. Certainly, the language of 65-1-14 giving the Board the "direction, management, and control" of state lands falls short of conferring the necessary authority to make such an exchange. In fact, the only express authority contained in 65-1-14 to alienate state lands, either the fee or the surface, consists in the conferred power to "sell." Necessarily, it must be assumed, therefore, that the majority opinion implicitly concludes that the power to "sell" conferred on the Land Board by the two cited sections includes an "exchange" with the United States. And we agree — so far as surface rights to state owned lands are concerned. The limited number of decisions in point, tend to support such a construction of the word "sell." *Newton v. State Board of Land Commissioners,* 37 Idaho 58, 219 Pac. 1053; *Bridgforth v. Middleton,* 184 Miss. 632, 186 So. 837.

The majority opinion then turns to the "critical question" whether Section 5575X (now 65-1-15) applies to an exchange of state owned lands with the Federal Government. Here the majority reaches a diametrically opposite conclusion from the logical implications of the answer given to the "preliminary question" with respect to the authority of the State Land Board. The majority interprets Sections 5575X as not including an exchange with the United States. In so determining, the majority necessarily reverses the very reasoning implicit in its conclusion that a "sale" under Section 5575 includes an exchange with the United States.

Section 5575X states:

> "All coal and other mineral deposits in lands belonging to the State are hereby reserved to the State. Such deposits are reserved from sale except upon a rental and royalty basis as herein provided and the purchaser of any land belonging to the State shall acquire no right, title or interest in or to such deposits. . ." (1919 Session Laws of Utah, Chap. 107, Sec. 5575X)

It is to be noted that Sections 5575, 5575X and 5575X2 all were enacted by the 1919 Legislature as a comprehensive single chapter of laws relating to the "control of state lands." Since they were enacted as companion statutes, they must be read together and construed together. They are in *pari materia* in every sense of that term. If the power of the Land Board in Section 5575 to "sell" state lands includes an exchange of lands with the Federal Government, then the reservation of mineral deposits from "sale" in Section 5575X cannot logically be read to exclude such an exchange. A "sale" under 5575 cannot include an exchange with the United States, and a "sale" under 5575X exclude an exchange with the United States, without doing violence to the entire statutory scheme. In so construing these related sections, the majority opinion is unsound and illogical, we respectfully submit.

It is significant that Section 5575 (65-1-14), the very section which the majority opinion cites as the authority of the State Land Board to make exchanges with the Federal Government, itself contains a mineral reservation. By its terms it reserves from "sale" "*in all cases*

lands containing coal or other minerals." If, as the majority opinion holds, Section 5575 authorizes exchanges with the Federal Government, would the majority opinion also exclude exchanges with the Federal Government under Section 5575 of lands known to be mineral, notwithstanding the language expressly reserving such lands from "sale"? To do so would violate the clear statutory intent. So also, to construe similar language reserving all mineral deposits from "sale" under 5575X as excluding exchanges with the United States just as clearly would be contrary to the manifest legislative intent.

It is of interest to note that the 1959 Session of the Utah Legislature, in reenacting Section 65-1-15 added the following provision:

> "And provided further that, when making indemnity selections using vested school lands as base, the board (State Land Board) may release to the United States the state's mineral interests in the base lands provided the state acquires the mineral interests in the selected public domain." (Laws of Utah, 1959, Chap. 131, Sec. 65-1-15)

Here again, the intent of these related statutes is made clear. If the sweeping mineral reservation of 5575X (now 65-1-15) had been intended not to apply to exchanges with the Federal Government, it certainly was unnecessary for the legislature in 1959 to enact a statute expressly empowering the State Land Board to release the state's interest in minerals in exchanges with the Federal Government. If, as the majority opinion holds, Section 65-1-15 permits exchanges with the Federal

Government without a mineral reservation, the 1959 amendment scarcely need have been enacted. Obviously, the legislature thought the 1959 amendment necessary, for the reason that it considered Section 65-1-15 as it existed did not authorize exchanges with the Federal Government without a mineral reservation.

II.

SECTION 65-1-15 IS NOT AMBIGUOUS AND ITS INTENT IS CLEAR.

As stated, the majority opinion determines the so-called "critical" question in this case by concluding that the mineral reservation statute, Section 5575X, Laws of Utah 1919 (now 65-1-15, U.C.A. 1953) does not include exchanges of vested state lands with the United States. According to the majority, this conclusion in turn is based on a "look to its (the statute's) purpose in the light of its history and background." Laying aside for the moment the merits of the so-called "history and background" cited, let us examine the legal principle which sanctions such a look at the "history and background."

It is simple hornbook law that legislative history and background may be resorted to in construing a statute only if the statute is ambiguous. 50 *Am. Jur.*, Statutes §225. Is the statute here involved in that category? The first sentence of the statute reads:

> "All coal and other mineral deposits in land belonging to the state are hereby reserved to the state. . ."

Wherein is the ambiguity in this simple, straightforward, all inclusive sentence? Would it be less ambiguous if it read:

> "All coal and other mineral deposits in land belonging to the state are hereby reserved to the state, *including the minerals in state owned school sections exchanged with the Federal Government.*"

We submit that the suggested addition adds no meaning to the statute not fully contained in the language used. Either the reservation means what it says or it means nothing. No research into history or background is necessary to explore its meaning. It means what the words in their simple, ordinary and customary usage clearly state — that *all* minerals in lands belonging to the state are hereby reserved to the state. In the light of the plain meaning and obvious intent of this unambiguous reservation, we submit that the majority opinion errs in attempting to read an exception into the statute by consulting "history and background" to determine the statute's "correct application."

Let us now consider the "history and background" relied upon by the majority opinion. Disappointingly, we find it consists of nothing more than a report by a Committee (not even a legislative committee) appointed by the then Governor in 1917, to conduct an audit and investigation of state agencies, including among others the State Land Board, to uncover discrepancies in the management and disposition of public funds. The Committee's subsequent report to the Governor, among other things, cited examples of favoritism practiced by the

Land Board in making sales of state lands to certain individuals and contained suggestions for elimination of this practice. The report also recommended that the sale of all state lands be suspended for five years. It contained no reference to exchanges of land with the Federal Government, except an incidental suggestion that the state should take steps to secure favorable national legislation to permit the exchange of worthless school sections within forest reserves.

The mineral reservation statute, Section 5575X was enacted by the 1919 Legislature soon after the submission of this report to the Governor. As stated by the majority opinion, the report "contains no suggestion or intimation that anything was amiss in the exchanges with the federal government." From the fact of this omission, the majority then leaps to the conclusion, that "it is quite apparent that the legislature intended no such (mineral) reservation in such exchanges (with the United States)."

In all candor, we respectfully ask whether this is a fair and reasonable deduction to make as to probable legislative intent with respect to the sale or other disposition of state owned lands to the Federal Government? The legislature obviously rejected the suggestion of the Governor's committee for a moritorium on the sale of state lands, but instead enacted an all inclusive mineral reservation statute. Because a committee's report to the Governor fails to mention anything concerning exchanges with the Federal Government, does it really become "quite apparent" from such omission that the legislature intended to exclude exchanges with the Federal Govern-

ment notwithstanding the inclusive language of the statute? Significantly, the report involved is not even a report of a legislative committee, but of a committee appointed by a Governor two years previous. The report in no way concerns itself with the subject of a reservation of minerals in state owned lands. It is entirely silent with respect to the matter of whether minerals should be reserved in transactions with the Federal Government or any one else. Surely, evidence of legislative intent must be based on less flimsy stuff than this!

If legislative intent is to be explored to such length, why does the majority opinion fail even to mention the one solid fact of legislative history that is available? As pointed out in appellant's Reply Brief, the 1919 Senate Journal contains a significant notation with respect to Section 5575X. The original bill was S.B. No. 58. On page 267 of the Senate Journal is the following notation:

> "Committee on Public Affairs recommends Bill for passage — with certain amendments.
>
> 1. On p. 2 beginning on line 7 strike out the following words: 'except as otherwise expressly authorized by law.'"

The Sessions Laws of Utah 1919, Chapter 107, page 302, probably sets forth the bill in approximately the same format as the original bill (no copy of the original bill is obtainable). Lines 7 and 8, page 2 of the bill as set forth in the Session Laws, contain the first sentence of the all inclusive mineral reservation, reading: "All coal and other mineral deposits in lands belonging to the state are hereby reserved by the state." Without doubt,

the phrase "except as otherwise expressly authorized by law" was a proposed modifying clause following the first sentence of the quoted statute. The striking of this phrase from the first sentence, certainly is clear evidence that the legislature intended no exceptions or limitations to its all inclusive general reservation.

Under the interpretation the majority gives to Section 65-1-15, the statute permits the conveyance of minerals in state owned lands in transactions with the United States, while at the same time prohibiting such conveyances and transactions with other persons or entities. Such a construction obviously results in an unwarranted discrimination in favor of the United States, and is in violation of Article 1, Section 24 of the Utah Constitution which requires that "all laws of a general nature shall have a uniform operation." Even though there might be circumstances under which the legislature might differentiate between an exchange of lands with the United States and an exchange with a private person, such differentiation would have to find a reasonable basis in terms of statutory language. Here the statute sets forth no basis for any such discrimination, and it contains no restrictions nor exceptions whatsoever with respect to its application.

What the majority opinion does is to take a statute (65-1-15) which is clear and unambiguous on its face, and read into it an exception in favor of the Federal Government. This we respectfully submit is unadulterated judicial legislation. Apparently, the majority indulge

in such legislative expediency because of its fear of the consequences or the upsetting effects of a decision which would confirm a literal reading of the statute. In *Newton v. State Board of Land Commissoiners,* 37 Idaho 58, 319 Pac. 1053, the Idaho Supreme Court had the same problem, but instead of "ducking" it by twisting an exception into the law, it faced up to the literal language of the state law, regardless of what "confusion in the titles to lands" might result from its ruling. We respectfully suggest that it is not for this Court to worry about the possible effects of its decision, but to apply the law as it exists. The legislature, not the Court should make changes if any are needed.

III.

NO EVIDENCE EXISTS OF ADMINISTRATIVE PRACTICES WHICH WOULD THWART THE PLAIN PURPOSE OF THE LAW.

The majority opinion concludes with what is seemingly believes is a clinching statement:

> "When the Land Board, our legislature, the United States and landowners succeeding to its interests have all treated such exchanges as vesting fee title in the United States for a period of nearly 40 years, it would seem manifestly unfair to now permit the state to assert that it had reserved the mineral rights in all such lands."

We respectfully challenge the factual basis for this statement. There is not a scintilla of evidence in the record of the case before the Court, nor in any records of the Land Board of which judicial notice may be taken, which

indicates that the Land Board regarded such exchanges as vesting fee title in the United States. True, the Selection Lists and Approved Lists are silent with respect to any mineral reservation, but the mere silence of these legal instruments cannot be considered as evidence that the Land Board "treated such exchanges as vesting fee title in the United States." In fact, successive opinions by several Utah State Attorneys General since 1931 addressed to the State Land Board or its employees are squarely to the contrary. Several of these opinions are reprinted as an Appendix to this brief. In the face of these opinions, it is inconceivable that the Land Board thought it conveyed or intended to convey a fee title without a mineral reservation, in exchanges of vested school sections with the Federal Government.

Where also is the evidence is this case or the available legislative history which indicates that the state legislature has "treated such exchanges as vesting title in the United States"? As demonstrated in our several briefs, the clear and unambiguous intent of the pertinent statutes is to the contrary. So also is the legislative history to the extent it exists as herein pointed out.

Where is the evidence of facts which establish that the United States and landowners succeeding to its interest have "treated such exchanges as vesting fee title in the United States"? Except for the self-serving assertions to that effect by counsel for the respondents and counsel for the United States and the other amicus parties, we submit that the record in this case and otherwise is barren of any such evidence.

The majority opinion also refers to certain other Utah statutes which it claims substantiate its conclusion with respect to the administrative practice of dealing with state owned lands. One such statute referred to is a 1927 Act authorizing the State Land Board to convey certain lands to the United States for use as a Migratory Bird Refuge (Chapter 56, Section 1, Laws of Utah, 1927). The majority points to the fact that this Act expressly reserves minerals and therefore indicates an intent that general statutes such as 65-1-15 do not require such a reservation where the United States is involved. But Chapter 56, Section 1, Laws of Utah, 1927, was not enacted for the special purpose of making an express mineral reservation. The Act authorized the conveyance of specified lands to the United States either as a sale or a gift. The Utah statutes did not then and do not now authorize either a gift or a sale of lands even to the United States, except in the manner provided by law. Section 65-1-29, which was in force at the time of the said special act, prescribed a definite procedure for the sale of state lands including an appraisal and a sale at not less than the appraised values. Chapter 56 was necessary, therefore, not for the purpose of making a reservation of minerals, but rather for the purpose of authorizing the basic transaction. Without a special act the State could not have conveyed the lands under the circumstances. In addition, the special act was required in order to make it clear that the conveyance was made on the condition that Senate Bill 5454, then pending before Congress, or a like bill, be enacted. In the same

session of the legislature, a resolution was adopted memorializing Congress to pass Senate Bill 5454, providing for a proposed reclamation project in the Bear Lake area.

In the light of the foregoing, it is not fair to infer from the enactment of Chapter 56, a legislative intent that general statutes such as 65-1-15 do not require a reservation of minerals in transactions with the United States. The same statute, Chapter 56, was referred to in an opinion by the Attorney General of the State of Utah, George P. Parker, dated May 28, 1931, as evidencing an intention on the part of the legislature that minerals be reserved to the State. The opinion states:

> "Right here it is interesting to note Chapter 56, Laws of 1927, by the provisions of which the legislature authorized the State Land Board to convey to the United States title to certain lands in the vicinity of the mouth of Bear River... Such condition is indicative of the determination of the legislature to safeguard the minerals of the State. I cannot find that the legislature has ever authorized any State Land Board to waive minerals to the United States in lands selected but since the year 1919 when the State mineral reservation Act became effective, it has been the policy of the State to reserve all minerals to itself and to dispose of them only by lease."

The majority opinion also refers to two statutes enacted in 1929. The footnote to the majority opinion refers to both acts as Chapter 2, Section 1, Laws of Utah, 1929. Apparently this is an inadvertent error. Chapter 2, Section 1 of the Laws of 1929, is an Act whereby the

State authorizes the acquisition by the United States by purchase, gift or lease, of certain areas of land or water for the establishment and maintenance of Bear River Migratory Bird Refuge. Chapter 2, Section 2 expressly reserves the mineral rights to the State of Utah. The primary purpose of this special legislation, like the purpose of Chapter 56, Laws of 1927, was to permit a gift or sale of lands which would not otherwise be allowed by state law. As stated, the Utah laws at that time did not permit a gift of lands and permitted a sale only on the terms set forth in Section 65-1-29, U.C.A., 1953, and its predecessor acts. Clearly, the purpose of the Bird Refuge Act was to permit the basic transaction, not to permit a reservation of minerals. The other Act which the majority opinion apparently has reference to, Chapter 1, of the Laws of Utah, 1929, authorized the State to quit claim to the United States of America, without cost, certain lands located in Township 3 North, Range 5 East, Salt Lake Base & Meridian. This special legislation was again required for the same reasons set forth above. No provision was made therein for the reservation of minerals.

The majority opinion states that the only conclusion to be drawn from the express mineral reservations and omissions in these special enactments is that the legislature and the Land Board did not consider the 1919 mineral reservation applicable to the Federal Government. We submit that the more reasonable conclusion is that such special type legislation, considered in light of the Utah statutes which did not authorize a gift of lands

and authorized a sale only for an appraised consideration, is that the legislation was necessary in order to authorize the basic transaction, i.e., to permit a conveyance of the surface rights. The inclusion or ommission of a mineral reservation was merely incidental.

But even if there were factual and evidentiary support for the quoted statement in the majority opinion concerning past administrative practices, we submit such a course of conduct on the part of the Land Board or the other administrative officers or agents involved would not be material. School section lands such as here involved are held by the State of Utah in trust, in its governmental capacity. *Van Wagoner v. Whitmore,* 58 Utah 418, 422, 199 Pac. 670, 679. It follows that the state would not be bound by any unauthorized acts of its officers or agents in connection with the disposition of such lands. *State v. District Court of Fourth Judicial District,* 51 N.M. 297, 183 P.2d 607; *Newton v. State Board of Land Commissioners,* 37 Idaho 58, 219 Pac. 1053. Compare also the opinion of the United States Supreme Court in the famous "tidelands" suit, *United States v. State of California,* 332 U. S. 19, 39-40, 67 Sup. Ct. 1658, 1668-1969. And as stated by the Supreme Court in *United States v. City and County of San Francisco,* 310 U. S. 16, 31-32, 60 Sup. Ct. 749, 757:

> ". . . We cannot accept the contention that administrative rulings — such as those here relied on — can thwart the plain purpose of a valid law. As to estoppel, it is enough to repeat that '. . . the United States is neither bound nor estopped by acts of its officers or agents in entering into an

arrangement or agreement to do or cause to be done what the law does not sanction or permit.'"

In its concluding sentences the majority opinion assumes a philosophical attitude concerning the decision reached and indicates that a contrary decision would cause confusion, chaos and unfairness in land titles. It is intimated that for this reason the wording of 65-1-15 should not be taken at its face value and given its ordinary and literal meaning — that the legislature of the State of Utah intended to preserve for the citizens of the State an inalienable interest in all minerals discovered under lands owned by the State. If such were the legislative intent, however, is it not "unfair" to warp the meaning of 65-1-15 by inserting therein an exception which is contrary to its own terms and thereby permit an illegal appropriation of state property and a deprivation of its use and benefits in so far as the residents of the State are concerned? Such an "unfairness" is particularly significant when, as the majority opinion itself recognizes, the lands which the State of Utah received in exchange for its vested school sections had been determined to be non-mineral in character. In other words, is it fair to approve a system of exchanges under circumstances where the Federal Government as an exchangor received mineral right from the State of Utah, but the State of Utah received only lands determined to be non-mineral, even though surface values were considered equivalent?

Furthermore, it must be realized that in any judicial proceeding dealing with titles one party must lose and one party must win. That which is "fair" in the mind

of the prevailing party often seems "unfair" to the other party. Despite this personal approach, the American Judicial System always has recognized that that which is "fair" is an impartial judicial decision predicated upon law and not upon sympathy nor upon what seem to be resultant complexities or vexing problems. Our judicial system has been criticized most in those situations where courts, for sociological, political or other convenient reasons, have strayed from a purely judicial approach to arrive at results which seemingly are consistent with the times or the present political temper. In so doing, it has not been uncommon for courts to utilize statutory interpretation as a device to make a statute appear to say exactly what it does not say. In utilizing this approach, statutory interpretation becomes the sceptre by which some courts suddenly become endowed with legislative powers. Certainly, by the process of utilizing statutory interpretation to make 65-1-15 state that minerals shall not be reserved in exchanges with the United States, when in fact section 65-1-15 clearly and unmistakably states that *all* minerals shall be reserved, constitutes a legislative amendment to the statute which the 1919 and even the 1959 legislature would not have adopted.

IV.

THE UTAH CONSTITUTION CONTEMPLATES DECISION BY FIVE JUDGES NOT FOUR JUDGES.

This case was heard and argued before a full Court of five judges. Only four judges actually participated in the decision, however, by reason of the death of Judge

Worthen between the time of argument and the filing of the opinion. The present decision was rendered by three judges with one judge dissenting.

Although Section 2, Article VIII of the Utah Constitution provides that: "A majority of the judges constituting the court shall be necessary to form a quorum or render a decision," it is clear also that the Constitution contemplates that the full complement of five judges should hear and participate in the decision. This is made evident by the provision of Section 2, Article VIII of the Constitution stating that: "If a justice of the supreme court *shall* be disqualified from sitting in a cause before said court, the remaining judges *shall* call a district judge to sit with them on the hearing of such cause." (Emphasis supplied)

This Constitutional provision obviously contemplates that, absent a stipulation of the parties agreeing to a lesser number of judges, the litigants are entitled to a decision by five qualified judges. In this case, one of the five judges became disqualified by death prior to the decision of the Court. See *In re Thompson's Estate*, 72 Utah 17, 86, 269 Pac. 103, 128, holding that "disqualification" may include the death of a judge. The parties before the Court in the case at bar did not agree nor stipulate to a decision by only four judges. Under the circumstances, we submit that the Court should have called a district judge, as directed by the mandatory language of the Constitution, to sit with the rest of the Court and to participate in the decision.

It may be argued that Section 2, Article VIII permits a "majority" of the court "to form a quorum or render a decision" and that in this case a majority of three did render a decision. But a fair reading of the Constitutional provision indicates that the reference is to a majority out of five judges, not to a majority out of four judges. It is well known in connection with the judicial process that a court decision represents the composite thinking of all members of the Court, presumably resulting from an exchange of arguments and ideas between all of its members. It is entirely possible that a majority out of five judges might emerge with a very different result, than would a majority out of four judges. Who can say what influence or persuasion the missing jurist might not exert on his fellow judges?

Even if the intent of the Constitutional provision were otherwise doubtful, we respectfully suggest that in a case as important as this, and in which the consequences are so serious and far-reaching, this Court should not render a landmark decision without the benefit of a full complement of its membership.

CONCLUSION

As this Court is well aware, the issues in this case have far-reaching significance and importance. At stake is nothing less than the right of the citizens of the State of Utah to a royalty interest in oil and gas and other mineral properties worth many millions of dollars. The chief beneficiaries of such rights are the public

schools of the state, in part supported by the revenues from state school sections involved in this dispute. Although these considerations alone should not, of course, be determinative of the outcome of the case, they do constitute good reason why this Court should arrive at a final judgment only after the most thorough and thoughtful judicial consideration of the issues presented.

It is the earnest belief of the State of Utah that the majority opinion does not correctly resolve these legal issues, and that the importance of the case justifies a reconsideration by a full Court. For the reasons herein set forth, a rehearing is respectfully requested.

Respectfully,

WALTER L. BUDGE,
Attorney General, State of Utah

DENNIS McCARTHY,
Special Assistant,
Counsel for Petitioner

APPENDIX

THE STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL
SALT LAKE CITY

May 28, 1931

(SEAL)

George P. Parker
Attorney General
Lawrence A. Miner
Byron D. Anderson
M. Logan Rich
Wm. A. Hilton
Deputies

State Board of Land Commissioners,
State Capitol,
Salt Lake City, Utah.

Gentlemen:

In connection with "Indemnity School Land List 049123," filed April 1, 1930, wherein the State of Utah selected the E½ of the SE¼ of Section 11, the SE¼ of the NW¼ of Section 12, Twp. 37 South, Range 11 West of the Salt Lake Meridian, and the SE¼ of the SE¼ of Section 27, Twp. 17 South, Range 16 East of the Salt Lake Meridian, containing 160 acres, and offered to exchange therefor Lots 1 and 2 of the S½ of the SE¼ of Section 16, Twp. 22 South, Range 2 East of the Salt Lake Meridian, containing 160 acres, embraced in the Fish Lake National Forest, you refer to me letter addressed by the Commissioner of the General Land Office to the Register of the U. S. Land Office at Salt Lake

City, Utah, under date of September 15, 1930, wherein the Commissioner rules that unless the State of Utah furnishes a written coal consent under the acts of June 22, 1910 (36 Stats. 583) and April 30, 1912, (37 Stats. 105) as to the SE¼ of the SE¼ of Section 27, Twp. 17 South, Range 16 East of the Salt Lake Meridian, the lease will be held for rejection, and by reason thereof you request me to advise you whether or not in my opinion the State Land Board is authorized by our law to waive mineral rights to the United States in lands so selected and take only surface rights in such lands for the surrender of full title to the base lands.

A discussion of the laws under which Utah acquired title to its school lands in place and also of its right to surrender base lands and select other lands in lieu thereof, and the powers of the State Land Board in relation to such lands is necessary to reach a conclusion.

By Utah's Enabling Act (28 Stats. 107) the state was granted Sections 2, 16, 32 and 36 in each township of the state for the support of its common schools, and where such sections, or any parts thereof, had been sold or otherwise disposed of by the United States, other lands equivalent thereto were and are granted to the State by the Act. The Act further provides that any of such sections embraced in permanent reservations shall not at any time be subject to the grant nor to the indemnity provisions of the Act until the reservation shall have been extinguished and such lands restored to the public domain.

It will be observed that Utah's Enabling Act did not give this state the right to select other lands in lieu of Sections 2, 16, 32, and 36, or parts thereof, where the United States had, prior to survey, disposed of them, or parts thereof, and where said sections were mineral lands included in any reservation. But by the provisions of the Act of May 3, 1902 (32 Stats. 188) the provisions of the school land indemnity Act (26 Stats. 796, Act of February 28, 1891) were made to apply to the State of Utah. The School land indemnity Act provides, among other things, that in all cases where the United States has disposed of school sections in place prior to survey or any such sections are included in any Indian, Military or other reservation or are mineral lands other lands of equal acreage are appropriated and granted, and out of them the State may select within its boundaries nonmineral surveyed lands in lieu of those thus disposed of or included in reservations. But the State, by the Act, has a right to await the extinguishment of any reservation and then take the sections in place therein.

Thus, it will be seen, the State's right of selection is definitely established. The right, however, (prior to the Act of January 25, 1927) is a restricted one, because under the school land indemnity Act the State could not select known mineral lands and under the State's Enabling Act, as construed by the Supreme Court of the United States in the case of United States vs. Sweet, 245 U. S. 563, the grant did not include lands of known mineral character. Under the law as thus established it is

palpably clear that whenever the State surrenders its titled school tract, it has the unconditional right to select a tract of equal acreage in lieu thereof, and the only element to be dealt with in the selection (prior to the Act of January 25, 1927) is whether or not at the time of such selection the selected lands are of known mineral character. If such is true then the state has no right to the selected lands. If the contrary is true then the State's right to the selected lands is absolute. The rights of the States under the school lands indemnity Act have been passed upon by the Supreme Court of the United States in several recent cases. In the case of Wyoming vs. United States, 255 U. S. 489, the facts were approximately as follows:

> "The State of Wyoming waived its right to a school tract in a reservation and selected in lieu thereof a tract of equal acreage from the public lands within the state and outside of the reservation, and it performed every act which was required of it in waiving its base lands and selecting the lieu lands. The list remained in the General Land Office awaiting consideration for upwards of three years. In the meantime (two years after the selection) the selected land, with other lands, were included in a temporary executive withdrawal as possible oil land under the Act of June 25, 1910. The Commissioner then coming to consider the selection declined to approve it as made and called upon the State to either accept a limited, — surface-right, — certification of the selected land or to show cause that it still was not known or believed to be mineral. The State declined to accede to either alternative and insisted that its rights should be determined as of the time when

the waiver and selection were made, and, after applying that test, it became invested with the equitable title to the selected land two years prior to the temporary withdrawal, and at a time when that land was neither known or believed to be mineral. The Commissioner thereupon ordered the selection cancelled, not because it was in any respects objectionable when made, but on the theory that he was justified in rejecting it by reason of the subsequent withdrawal and subsequent oil discoveries in that vicinity. In the meantime the State had given a lease permitting the lessee to drill the selected land. There was no drilling or oil discovery at the time the lease was given, but thereafter drilling was prosecuted at a large cost and carried to a successful production of oil, which was four years after the selection."

The Supreme Court in passing upon the rights of the State under the facts as above stated made the following cogent remarks and rulings:

"At that time (time of selection) the State had a perfect title to the tract in the reserve and the land selected in lieu thereof was vacant, unappropriated and neither known or believed to be mineral. The list fully conformed to the directions on the subject issued by the Secretary of the Interior and was accompanied by the requisite proofs and the proper fees. Notice of selection was duly posted and published, proof thereof was duly made and the state paid the publisher's charge. Thus, * * * the state did everything necessary to show a perfect title to the land relinquished and perfect relinquishment thereof to the Government, and everything that was required either by statute or by regulation of the Land Department in selecting the lieu land instead of

the relinquished tract * * *. The question presented is whether, considering that the selection was lawfully made in lieu of the state owned tract contemporaneously relinquished, and that nothing remained to be done by the state to perfect the selection, it was admissable for the Commissioner and the Secretary to disapprove and reject it on the ground that the selected land was withdrawn two years later under the Act of June 25, 1910, and still later was discovered to be mineral land,—that is, to be valuable for oil. Or, putting it in another way, the question is whether it was admissable for those officers to test the validity of the selection by the changed conditions when they came to examine it, instead of by the conditions existing when the state relinquished the tract in the forest reserve and selected the other in its stead."

"In principle it is plain that the validity of the selection should be determined as of the time when it was made when it was made: that is, according to the conditions then existing. The proposal for the exchange of land without, for land within the reserve came from Congress. Acceptance rested with the State, and controlled by the conditions existing at the time. It is not as if the selection was merely a proposal by the state which the land officers could accept or reject. They had no such option to exercise. but were charged with the duty of ascertaining whether the State's waiver and selection met the requirements of the congressional proposal, and of giving or withholding their approval accordingly. The power confided to them was not that of granting or denying a privilege to the State, but of determining whether an existing privilege conferred by Congress had been lawfully exercised,—in other words, their action was to be judicial in its nature and

directed to an ascertainment and declaration of the effect of the waiver and selection by the State in 1912. If these were valid then,—if they met all the requirements of the congressional proposal including the directions given by the Secretary, — they remained valid notwithstanding the subsequent change in conditions. Acceptance of such a proposal, and full compliance therewith, confer vested rights which all must respect. Equity then regards the State as the owner of the selected tract, and the United States as owning the other; and this equitable ownership carried with it whatever of advantage or disadvantage may arise from a subsequent change in conditions, whether one tract or the other be affected. Of course, the State's right under the selection was precisely the same as if, in 1912, it had made a cash entry of the selected land under an applicable statute; for the waiver of its right to the tract in the forest reserve was the equivalent of a cash consideration. And yet it hardly would be suggested that the Commissioner or the Secretary, on coming to consider the cash entry, could do otherwise than approve it, if, at the time it was made, the land was open to such an entry, and the amount paid was the lawful price. * * *"

"The Land Department uniformly has ruled that the States acquire a vested right in all school sections in place which are not otherwise appropriated, and not known to be mineral, at the time they are identified by the survey,—or at the date of the grant, where the survey precedes it,— regardless of when the matter becomes a subject of inquiry and decision, and that this right is not defeated or affected by a subsequent mineral discovery. And, as respects cash entries and entries under the pre-emption, homestead, desert land, and kindrd laws, the Land Department

always had ruled that if, when the claimant has done all that he is required to do to entitle him to receive the title, the land is not known to be mineral, he acquires a vested right which no subsequent discovery of mineral will divest or disturb. And this rule has been applied by that Department, although not uniformly, to selections made in lieu of relinquished lands in public reservations. Thus, in Kern Oil Co. v. Clark, 30 Land Dec. 550, where a lieu selection under the Act of June 4, 1897, chap. 2, 30 Stats. at L. 36, 9 Fed. Stats. Anno. 2d ed p. 587, was under consideration, the Secretary of the Interior said, p. 556: 'When do rights under the selection become vested? In the disposition of the public lands of the United States, under the laws relating thereto, it is settled law: (1) That when a party has complied with all the terms and conditions necessary to the securing of title to a particular tract of land, he acquires a vested interest therein, is regarded as the equitable owner thereof, and thereafter the government holds the legal title in trust for him; (2) that the right to a patent, once vested, is, for most purposes, equivalent to a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed; and (3) that the conditions with respect to the state or character of the land, as they exist at the time when all the necessary requirements have been complied with by a person seeking title, determine the question whether the land is subject to sale or other disposal, and no change in such conditions, subsequently occurring, can impair or in any manner affect his rights.' Again, p. 560: 'These established principles, in the opinion of the Department, are applicable to selections under the Act of June 4, 1897. *The act clearly contemplates an exchange of equivalents. Such is the unmis-*

takable import of its terms. In the case of relinquishment of patented lands, title is to be given by the government for title received.' And again p. 564: 'It would be strange indeed if, by the latter Act, Congress intended that one who accepting the government's offer of exchange, relinquishes a tract to which he has obtained full title in a forest reservation, and in lieu thereof selects a tract of land which, at the time, is vacant and open to settlement, and does all that is required of him to complete the selection and to perfect the exchange, should thereby acquire only an inchoate right to the selected tract, liable to be defeated by subsequent discoveries of mineral at any time before patent, or before final action upon the selection by the Land Department. Such a construction would not only tend to defeat the objects for which the act was passed, by discouraging owners of lands in forest reservations from giving up their titles, but would be against both the letter and spirit of the Act. *Parties would be slow indeed to relinquish their complete titles if it were once understood that they could obtain only doubtful or contingent rights in return for them. It could not have been the intention of Congress that parties accepting the government's offer of exchange should be embarrassed by any such conditions of doubt and uncertainty.* * * *"

"The only exception to the general rule before stated respecting the time as of which the character of the land—whether mineral or nonmineral—is to be determined is one which, in principle and practice, is confined to railroad land grants. From the beginning the Land Department, by reason of the terms of those grants and the restrictive interpretation to which they are subjected, uniformly has construed and treated them as requiring that the character of the land be determined as of

> the time when the patents issue. * * *Barden vs. Northern Pacific Railroad Company, 154 U. S. 288. * * *Plainly the decision in that case is without bearing here, save as it recognizes that rights under other land laws are to be tested by a different rule. * * *."
>
> "And it is further significance that this court has recognized that the legislation of Congress designed to aid the common schools of the states is to be construed liberally rather than restrictively. * * *
>
> It results that the Secretary erred in matter of law in rejecting the selection, and that the District Court rightly entered a decree for the defendants."

In my mind it is perfectly plain that the real authority and duties of the Interior Department are unambiguously pointed out in the case of Wyoming vs. United States, supra, and that there is nothing therein or in the law contained that in anywise contemplates that the Commissioner of the General Land Office or the Secretary of the Interior should or have the right to demand that the State waive to the United States any minerals presumed to exist in a selected tract as a condition precedent to the approval of the selection, where the State has completely complied with the law and rules and regulations of the department relating to the relinquishment of its titled tract and the selection of a tract in lieu thereof. There is no burden cast upon the state to prove beyond question the nonmineral character of the selected lands. As unmistakeably pointed out by the Supreme Court of the United States, when the State

has done all that it is required to do in relinquishing its school tract in place and selecting another tract therefor, the department has no alternative but to approve the list without exacting or imposing upon the State conditions not contained in the law. With the selection in question we are not concerned with the question of minerals subsequently discovered, but we are concerned with the rule or principle of law announced by the Supreme Court of the United States that when the State has fully performed all of the things or acts required of it in the relinquishment and selection and furnished its proofs specified, the department has no option to exercise but is charged with the judicial duty of merely ascertaining whether the State's relinquishment and selection meet the requirements of the Congressional proposal. If that is true then the department must approve the selection. The Wyoming case, supra, was prosecuted primarily upon the power of the Land Department to demand a waiver of minerals in the selected land. The decision of the Supreme Court of the United States in that case, above quoted in part, clearly established that the requirement of the Land Department was unauthorized in law and void.

It is probably appropriate here to consider what effect, if any, the provisions of the mineral school land-grant Act of 1927, (84 Stats. 1026) has upon the relinquishment of school sections in place included in reservations and the selection of other lands in lieu thereof. By the act the several grants to the States of numbered school sections in place for the support of

the public schools is extended to embrace numbered school sections mineral in character. The school land indemnity act gives the States the right to select nonmineral lands upon relinquishment of numbered school sections in reservations. The school land indemnity Act, however, was in consonance with the settled policy of Congress relating to the disposal of known mineral lands, United States vs. Sweet, supra. This policy, however, was changed by the provisions of the Act of January 25, 1927, whereby numbered school sections in place of known mineral character passed to the States under their respective grants. Under this changed policy of Congress, it is only reasonable to conclude that Congress intended, by the Act of January 25, 1927, that the school land indemnity Act should be modified accordingly and that the States would have the right to select mineral lands from the unappropriated public domain within their borders in place of its mineral numbered school sections. This conclusion is strengthened by the ruling of the Supreme Court of the United States in the case of Wyoming vs. United States, supra, that the legislation of Congress designed to aid the common schools of the States is to be construed liberally rather than restrictively and by the further fact that the Interior Department has held that the acts of Congress permitting exchanges contemplates the exchange of equivalents.

While the act of June 2, 1910 (36 Stats. 583) as amended by the act of April 30, 1912 (37 Stats. 105) gives the Secretary of the Interior the power to accept waivers of coal in lands selected, still those acts are

not binding upon the States and do not in anywise fix or limit the rights of the States in the selection of such lands.

The next question to consider is whether or not you have express authority under State statutes to waive or relinquish the absolute rights of the State in and to its school lands; that is, have you the power and authority to waive to the Federal Government the coal or other minerals in lands selected to replace numbered school sections relinquished. By the provisions of Section 5575, Compiled Laws of Utah, 1917, as amended by Laws of 1925, page 52, you are given the direction, management and control of all lands heretofore granted or which may be hereafter granted to the State by the Federal Government, with power to sell or lease the same for the best interests of the State. By the provisions of Sections 5577 and 5580 you are authorized to make all necessary selections of lands under the various grants from the Federal Government to the State, and to take such action as shall be necessary to secure the approval of the proper officers of the United States and the final transfer to this state of the lands selected. By the provisions of Sections 5575 and 5575X all coal and other mineral deposits in lands belonging to the State are reserved to the State and can be disposed of only on a rental and royalty basis. By the provisions of Section 5575X1 all applications to purchase lands of the State shall be subject to the reservation to the State of all coal and other mineral deposits, and by the provisions of Section 5575X2 all sales of State lands shall be subject to the reserved mineral rights.

A careful reading of Title 101, Sections 5571 to 5681, inclusive, Compiled Laws of Utah, 1917, as amended by Laws of 1921 and 1925, fails to disclose any power or authority, expressed or implied, in the State Land Board to waive minerals to the Federal Government as a condition precedent to the approval of a selection by the Secretary of the Interior or as an inducement to the Secretary of the Interior to approve such selection. The power given the State Land Board "to take such action as shall be necessary to secure approval of the proper officers of the United States and the final transfer to this State of lands selected" merely means that the State Land Board shall do all that is required under existing law to be done in order to effect the relinquishment and selection, and does not give any power and authority to accept in exchange for school lands in place included in a reservation lands of lesser acreage, or lesser value, or a part of the selected lands, that is, a mere surface right, a split title, — or all of said selected lands except certain minerals; in other words there is no law giving the State Land Board power to waive coal or other minerals to the Federal Government in lands selected for school lands in place. The word "lands" as used in the laws here in question has been judicially construed to include "not only the surface of the earth but everything under or over it." Garnsey Coal Company vs. Mudd, 281 Fed. 43, Sox vs. Miracle, 160 N.W. 716. Walpole vs. State Board of Land Commissioners, 163 Pac. 848.

Right here it is interesting to note Chapter 56 Laws of 1927, by the provisions of which the legislature au-

thorized the State Land Board to convey to the United States title to certain lands in the vicinity of the mouth of Bear River and comprising a part of the bed of Great Salt Lake upon the condition that all minerals therein be reserved to the State. Such condition is indicative of the determination of the legislature to safeguard the minerals of the State. I cannot find that the legislature has ever authorized any State Land Board to waive minerals to the United States in lands selected, but since the year 1919, when the State mineral-reservation Act became effective, it has been the policy of the State to reserve all minerals to itself, and to dispose of them only by lease.

In view of the remarks herein above contained it is clear that it is my opinion, and I hold, that the State Land Board is without authority of law to waive coal or other minerals to the United States in lands selected to take the place of numbered school sections in reservations. I am further of the opinion, and so hold, that the Secretary of the Interior is without right under the Federal laws and cases hereinabove mentioned to demand of the State as a condition precedent to the approval of the selection list that the State waive the coal or other minerals in the land selected by the State. If the State has done all that it is required to do under the law in connection with the selection here in question, then as stated by the Supreme Court of the United States in the case of Wyoming vs. United States, supra, the department has only the judicial duty to determine that question and if it finds that the State has thus complied with the law it must approve the selection.

I suggest that the matter be presented to the Interior Department in the light of the views expressd in this opinion.

Yours very respectfully,
/s/ George P. Parker
Attorney General

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APPENDIX

THE STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL
SALT LAKE CITY

February 6, 1935

(SEAL)

Joseph Chez
Attorney General
John D. Rice
S. D. Huffaker
Grover A. Giles
Ralph S. Calder
Deputies

Hon. George A. Fisher, Executive Secretary
State Land Board
Building

Dear Mr. Fisher:

I acknowledge receipt of your letter of February 4, 1935, in which you state that the Land Board is considering the exchange of a large acreage of school lands

for public domain lands, with a view of consolidating the State's holdings, as authorized by the Taylor Grazing Act. You desire to know if it is necessary to have any new legislation in order to accomplish this grouping of lands.

Under the provisions of Section 86-1-58, Revised Statutes of Utah, 1933, the Land Board is authorized to exchange any of the State lands for other lands of equal value. This section, however, provides:

> "That no exchange shall be made by the land board until a patent for the land so received in exchange shall have been issued to such proprietors or their grantors."

This section should be amended permitting exchanges with the United States Government in accordance with the terms of the Taylor Act.

I also call your attention to the fact that under our present laws you are required to reserve all mineral rights when disposing of State lands. It is not likely that the Government would consent to such a reservation in the exchange of lands as contemplated by you, and for this reason I would suggest that the law be amended authorizing you to make such exchanges with the United States Government without mineral reservation, providing, of course, that the Government does not reserve mineral rights to the lands granted by it in such an exchange.

Difficulties may arise with the various State institutions regarding these exchanges, and in some instances

it may be necessary to get the consent of the institutions in order to make such exchanges. These matters, however, can be taken care of as they arise.

Most respectfully yours,
/s/ Joseph Chez
Attorney General

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THE STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL
SALT LAKE CITY

June 1, 1951

(SEAL)

Mr. Robert H. Ruggeri
Title Examiner
State Land Board
Building

Dear Mr. Ruggeri:

This is in response to your request for an opinion from this office of the following matters dealing with the disposition of state lands:

(1) May the Land Board agree with the Federal Government not to issue prospecting and mining leases on state lands already leased to the Federal Government for other purposes?

(2) If the Land Board is successful in effecting an exchange of lands with the Federal Government, can the Land Board transfer the

fee, or would it be required to reserve the mineral rights in this exchange?

As you are aware, under the provisions of Title 86, Utah Code Annotated 1943, as amended, the Land Board has been vested with the direction, management and control of all state lands. Any disposition of state lands, however, must be in accordance with the Constitution and laws of the State of Utah.

With reference to your first question, it is our opinion that the Land Board may agree with the Federal Government not to issue prospecting and mining leases on lands already leased to the Federal Government for other purposes should it be the judgment of the board that such agreement would best subserve the interests of the State.

While Section 86-1-24 provides, in part, that "The board shall cause all public lands now owned * * * or * * * which may hereafter be vested in the state, to be classified and registered and thereafter sold or leased," it is also provided in Section 86-1-18, as amended by Chapter 84, Laws of Utah 1945, and Chapter 129, Laws of Utah 1947, that "The board may lease for prospecting and mining purposes any portions of the unsold, unleased lands of the State * * *."

In interpreting similar discretionary power conferred upon the Land Board with reference to the sale of state lands, our Supreme Court held in Miles v. Wells, 22 Utah 55, 61 Pac. 534, that a court had no jurisdiction to direct by mandamus how this discretionary power

should be exercised. In the course of its opinion the court said:

> The language of Sec. 16, in this regard, is, "The board may select and contract to sell" etc. Therefore unless the term "may" is clearly shown by context of said section or by other provisions of the act to have been used in the sense of must, or if by giving to it that meaning other provisions of the statute would be neutralized, then the natural and ordinary meaning of that word must control, and said board may at their option, select and contract to sell the lands donated to the State, and applied for by a citizen, or refrain from doing so.
>
> There are no provisions of the statute which indicate that that term was used in any other than its ordinary sense. To have done so would have neutralized the plain provisions of some, and materially modiifed others, of the sections of the statute hereinbefore cited.

With reference to your second question, we are of the opinion that the board is not authorized to effect an exchange of lands with Federal Government without a reservation of all coal and other minerals. We have not been able to find any express or implied authority for the Land Board to effect an exchange of lands except that contained in Section 86-1-58, which provides as follows:

> In order to compact, as far as practicable, the land holdings of the state, the board is hereby authorized to exchange any of the land held by the state for other land of equal value within the state held by other proprietors; and upon request of the board the governor is hereby authorized to execute and deliver the necessary patents to such other proprietors and receive therefrom

> proper deeds of the lands so exchanged; provided, that no exchange shall be made by the land board until a patent for the land so received in exchange shall have been issued to such proprietors or their grantors.

The Land Board has been vested with the authority embodied in this section since the enactment of Section 45, Chapter XXXVII, Laws of Utah, 1897.

In 1919, however, pursuant to the provisions of Chapter 107, Laws of Utah 1919, the Legislature made an outright reservation to the state of all coal and other minerals deposited in lands belonging to the state and also provided that all applications to purchase state lands subsequent thereto be subject to such a reservation. In making the aforesaid reservation the Legislature made no distinction between "sales" and "exchanges" of state lands, but went on to provide how such deposits should be disposed of. These same provisions are now embodied substantially in Sections 86-1-15 and 86-1-16 Utah Code Annotated 1943.

A strict interpretation of the language of Section 86-1-58, supra, would permit an exchange of lands with the Federal Government only as to those lands for which a patent has been issued and which had thereafter been reacquired by the Federal Government. We believe, however, that a reasonable construction of the language, in order to effectuate its manifest purpose, would permit an exchange of lands with the Federal Government, even as to unpatented lands as long as the title thereto was still vested in the Federal Government. The exchange

would necessarily have to be in accordance with and subject to the limitations of Section 86-1-58.

In view of the foregoing legislative mandates, it is the opinion of this office that any exchange of state lands with the Federal Government must be under and pursuant to the provisions of Section 86-1-58 to "compact, as far as practicable, the land holdings of the state" and also subject to a reservation to the state of all coal and other minerals.

Very truly yours,

/s/ Clinton D. Vernon
CLINTON D. VERNON
Attorney General

THE STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL
SALT LAKE CITY

December 6, 1954

(SEAL)

E. R. Callister
Attorney General
State Land Board
Building

REQUESTED BY: Joseph P. McCarthy, Title Examiner, State Land Board.

OPINION BY: E. R. Callister, Attorney General; H. R. Waldo, Jr., Assistant Attorney General.

QUESTIONS:

1. Must the State Land Board, pursuant to Sec. 65-1-15, U.C.A. 1953, reserve mineral rights (a) in land, title to which is not vested in the state and for which a fee simple title in land is obtained in lieu thereof or in exchange from the United States; (b) in land, title to which has vested in the state in exchange for which a fee simple title in other land is obtained from the United States?

2. May the State Land Board exchange the surface rights in state land for the surface rights in federally owned land, both the state and the United States reserving mineral rights?

CONCLUSIONS:

1. (a) No.
   (b) Yes.

2. Yes.

The questions involved here arise in a variety of circumstances. The most common situation is where unsurveyed school sections are included within a federal withdrawal or other reservation. In that event the State has the option of selecting lieu land outside the reservation for the school sections lost or awaiting the cancellation or extinguishment of the withdrawal or reserve. The question may also arise where the State is desirous of con-

solidating its holdings in a block and exchanges state owned land in one area for federally owned land adjacent to state owned land in another area. The same situation may arise where the Federal Government desires a particular piece of state land for federal use and a trade is proposed.

Sec. 65-1-15 provides in part:

> All coal and other minerals deposited in lands *belonging to the state of Utah* are hereby reserved to the state.

This provision is mandatory and self-executing and gives no discretion to the Land Board. See Attorney General's opinions of May 10, 1954, No. 54-050, and April 11, 1922.

As noted above, where lieu land is taken for unsurveyed lands included within a federal reservation or withdrawal, the state is entitled to select lands outside the reservation or withdrawal, in lieu of lands included within the withdrawal. The same right is given for land lawfully occupied by a private person at the time the State's title vests. In either case the State is exchanging a potential title to land within the withdrawal for a present title in fee simple in land outside the withdrawal. It is a potential title because title to a specific school section does not vest in the State until a survey is made and accepted by the Secretary of the Interior and not then if the land is included within a federal reservation or is owned by some private person, see U.S. v. Wyoming, 331 U. S. 440. The question of whether the State has any

interest in an unsurveyed school section so as to prevent entry thereon by a private person is presently being litigated. The question raised in that case has not been directly considered by any court. Present law would indicate that the State cannot successfully assert such a claim. But even if the State were successful in this contention, the State would not have any title to the unsurveyed land for the Federal government could defeat the State's rights entirely by creating a reservation or withdrawal on such land prior to survey. U. S. v. Wyoming, supra. It must therefore be held, regardless of the outcome of the litigation, that the State has only a potential title prior to survey. It is, therefore, our opinion that an unsurveyed school section is not land "belonging to the state of Utah" within the meaning of Sec. 65-1-15 so that minerals need not be reserved where land is taken in lieu of such unsurveyed land.

This conclusion is strengthened by a consideration of the purpose of the School Land Indemnity Act of 1891 (43 U.S.C. 851, 853) under which selection of lieu land is authorized. The act contemplates an exchange of equivalents (Wyoming v. U. S., 255 U. S. 489), that is, a complete waiver by the State of all its right to unsurveyed land within a reservation or withdrawal and the granting therefor of a full fee simple title in land outside the withdrawal or reservation. The mineral reservation law of 1919 (65-1-15) was passed when the Indemnity Act of 1891 had been in effect for many years and the mechanics of which were well known. Had the Legislature intended to require a reservation of minerals

in unsurveyed land, no further indemnity land could be obtained for the "exchange of equivalents" would never exist. We cannot believe the Legislature intended such a result.

A different question is presented where title has passed to the State. In the event the mineral reservation would, in terms, apply. We can see no way to avoid this requirement even though in a given case it may operate to defeat an otherwise proper and advantageous exchange of lands between the State and the Federal government. This is in accord with an opinion of the Attorney General of February 6, 1935, but reverses, in part, the Attorney General's opinion of October 2, 1937. See also opinion of July 24, 1950, #1342.

In answer to your second question, we believe the general discretion of the Land Board in dealing with state land authorizes the exchange of surface rights in state land for surface rights in federally owned land. See 65-1-14. No conflict with the mineral reservation law is here involved for minerals are reserved by both the State and the Federal government.

Legal principles applicable to both questions here presented were discussed at length in two opinions of the Attorney General issued on March 11 and May 28, 1931. The facts of both opinions were the same. Unsurveyed school sections had been included in a forest reserve and the State had selected certain lands outside the reserve as indemnity for the school sections within the reserve. The Secretary of Interior refused to approve

the selection of the particular lands unless the State would waive its mineral rights to the lands selected. In holding that the Land Board could not waive mineral rights in the lands selected, the then Attorney General made several observations as to the law relating to such land transactions.

First, he stated that the Secretary of Interior had no authority to require a waiver of mineral rights and the Land Board had no authority to waive mineral rights in selected lands. Under the provisions of the School Land Indemnity Act of 1891, the State is entitled to select land not known to be valuable for mineral and obtain a fee simple title therefor. The selected land may contain mineral but if it is not known at the time of the selection to be valuable for mineral, the State is entitled to select it. The Attorney General ruled that the only authority of the Secretary of Interior was to reject the selection of lands known to be valuable for mineral or approve the selection of lands not known to be valuable for mineral, but no authority is given to require a waiver of mineral rights from the State. We agree with this conclusion. Wyoming v. U. S., 255 U. S. 489; Brigham City v. Rich, 34 Utah 130.

Second, the Attorney General ruled that "land" meant a fee simple title. The Land Board is only authorized to select "land" and, therefore, the Land Board may not select the surface of a piece of land and waive the mineral rights for they would not then be selecting "land." This result and the legal principle is correct, where a selection is made under the School Land In-

demnity Act, but it can have no application to exchanges of land. The Land Board by Sec. 65-1-14 is given "the direction, management and control of all lands heretofore or hereafter granted to this state." By Sec. 65-1-15 it is authorized to lease minerals; by 65-1-18 to lease for prospecting; by 65-1-29 to sell land; by 65-1-34 to sell timber. In other words the Land Board has the same authority to act as any private land owner subject, however, to its trust obligations. If it is advantageous to the State to exchange the surface of state-owned lands for the surface of federally owned lands, the State and the United States reserving mineral rights to themselves, there should be, and, in our opinion, is no legal objection to consummating such exchange. We do not disagree with the results of the opinions of March 11 and May 28, 1931. Some of the discussion of the legal principles involved were stated more broadly than necessary and should be limited to the particular fact situation discussed in those opinions.

For the foregoing reasons it is our opinion that the Land Board must reserve mineral rights in land, title to which has vested in the State, but not in land, title to which has not vested in the State. It is further our opinion that the Land Board may exchange the surface rights in state land for the surface rights in federally owned land.

Very truly yours,

/s/ E. R. Callister
E. R. CALLISTER
Attorney General