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Texas Wesleyan Law Review

Volume 18 | Issue 3 Article 22

3-1-2012

Utah

Frederick M. MacDonald Esq.

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Recommended Citation
Frederick M. MacDonald Esq., *Utah*, 18 Tex. Wesleyan L. Rev. 661 (2012).
Available at: https://doi.org/10.37419/TWLR.V18.I3.21

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UTAH

By: Frederick M. MacDonald, Esq.[1]

The Utah judiciary is not known to often address cases affecting substantive oil and gas law. However, during the period from September 2010 through to August 2011, significant rulings were issued in three cases. No significant legislative or administrative oil and gas development occurred during that period.

1. Fred MacDonald is a shareholder of the energy law firm of Beatty & Wozniak, P.C., and is based in its Utah office. He practiced twenty-two years with the Salt Lake City natural resources law firm of Pruitt Gushee and, upon its dissolution, joined Beatty & Wozniak in January, 2008. He received his B.S. in Engineering from Purdue University in 1983 and his J.D. from the Valparaiso University School of Law in 1986. His practice is concentrated in oil and gas law, including title examination of Federal, fee, State of Utah, and Indian lands, coalbed methane development, unit formation and operation, and administrative practice before the Utah Board of Oil, Gas and Mining and U.S. Interior Board of Land Appeals.
Fred is a member of both the Utah and Tenth Circuit Court of Appeals Bar Associations, having served as chairman of the Utah State Bar's Natural Resource Section from 1997-1998. He is an active member of both the Utah and American Associations of Professional Landmen, currently serving as chair of the AAPL's Form 610 JOA Revision task force and on its forms and public lands committees, and previously serving on its coalbed methane committee. Additionally, Fred is actively involved with the Rocky Mountain Mineral Law Foundation, currently serving on the faculty of the biennial Federal oil and gas leasing short course and previously serving as a trustee-at-large. Fred is the author of *Coalbed Methane Units: Making The Square Peg Fit The Round Hole*, Regulation and Development of Coalbed Methane, Paper No. 7 (Rocky Mtn. Min. L. Fdn. 2002), *The New AAPL Form 610 Coalbed Methane Checklist: Making The List And How To Check It Twice*, 27 Energy & Min. L. Inst. Ch. 4 (2006), and *Preparing and Finalizing the Unit Agreement: Making Sure Your Exploratory Ducks Are In A Row*, Federal Onshore Oil and Gas Pooling and Unitization, Paper No. 8 (Rocky Mtn. Min. L. Fdn. 2006), and lectures regularly on various oil and gas issues. He has been listed in the *Best Lawyers in America* and *Super Lawyers of the Mountain States* in the area of oil and gas law annually since 2007 and 2008, respectively, and was named *Best Lawyers* 2012 Salt Lake City Oil and Gas Lawyer of the Year.

DOI: https://doi.org/10.37419/TWLR.V18.I3.21
Published by Texas A&M Law Scholarship, 2022

I. Eminent Domain May Not Be Used to Secure Access Across Off-Lease Lands to Leasehold

In *Marion Energy, Inc. v. KFJ Ranch Partnership*, the Utah Supreme Court, in a four-to-one decision, held that the term "mineral deposits," as used in Utah's eminent domain statute,[2] was ambiguous and, under strict construction in favor of a landowner, is interpreted as excluding oil and gas deposits.[3] As a consequence, a mineral lessee of the Utah School and Institutional Trust Lands Administration ("TLA") could not utilize eminent domain to secure access to its leasehold across adjacent off-lease private lands.[4]

Marion Energy, Inc. ("Marion") was the lessee under two leases issued by TLA. The leases covered the oil, gas, and hydrocarbons underlying lands owned by the surface estate owner, KFJ Ranch Partnership ("KFJ"). KFJ also owned, in fee, both the surface and mineral estates on the lands adjacent to those covered by Marion's leases. Marion desired to drill two wells upon its leaseholds. However, due to topographic restraints, Marion deemed it impossible to access the proposed drill sites without crossing the off-lease lands owned in fee by KFJ. Marion attempted to negotiate with KFJ for an approximate four mile access road easement, encompassing approximately fifteen acres, across KFJ's fee lands, but those negotiations failed. Marion, together with TLA, then brought a condemnation action against KFJ for the easement.[5]

Marion and TLA's suit against KFJ was predicated upon Utah Code Ann. § 78B-6-501(6)(a), which permits the exercise of private eminent domain for the construction of "roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting, or other reduction of ores, or the workings of mines, quarries, coal mines, or mineral deposits including minerals in solution."[6] After commencement of the action, KFJ moved to dismiss on the basis that the cited statute did not authorize the power of eminent domain to take lands for roads to access oil and gas deposits.[7] The state district court, after briefing and hearing, granted KFJ's Motion to Dismiss. It specifically found that the cited statute omitted the terms "oil" and "gas" from the list of substances for which lands can be condemned for roads.[8] Moreover, the Court found that the use of

2. UTAH CODE ANN. § 78B-6-501(6)(a) (LexisNexis Supp. 2011).

3. Marion Energy, Inc. v. KFJ Ranch P'ship, No. 20090796, 2011 WL 3652398, at *7 (Utah Aug. 19, 2011).

4. *Id.*

5. *Id.* at *1.

6. § 78B-6-501(6)(a).

7. *Marion Energy, Inc.*, 2011 WL 3652398, at *3.

8. *Id.* at *4.

DOI: 10.37419/TWLR.V18.I3.21

those terms in other sections of the eminent domain statute[9] reflected the Utah Legislature's intent to exclude oil and gas from the provisions of Utah Code Ann. § 78B-6-501(6)(a).[10] Marion and TLA then appealed to the Utah Supreme Court contending the district court ignored over one hundred years of precedent demonstrating that the phrase "mineral deposits" includes oil and gas and that any interpretation of that phrase to the contrary creates an absurd result.[11]

The Supreme Court framed the central question for its review as "whether Subsection 6(a)'s use of the phrase 'mineral deposits' encompasses the terms 'oil' and 'gas' and thereby provides Marion with the authority to condemn KFJ's property to build a road to access its leased oil and gas deposits."[12] After reciting its recognized canons of statutory construction, including the presumption that omissions in statutory language are deemed purposeful and that any ambiguity in any eminent domain statute must be strictly construed in favor of the property owner and against the condemning party, the Court concluded Marion only could exercise eminent domain if subsection 6(a) expressly granted or clearly implied by its plain language.[13]

Finding the term "mineral deposit" to be ambiguous, the Supreme Court held that subsection 6(a) did not provide such an express grant or clear implication. After review of numerous Utah cases and other statutes, the Court concluded that "the term 'mineral deposits' does not have a single ordinary accepted meaning."[14] Instead, the phrase's meaning may vary and must be interpreted based upon the context in which it is used.[15] Because the context of subsection 6(a) does not indicate the Legislature's intent to include oil and gas, the Court concluded the phrase is susceptible to two differing, reasonable interpretations and therefore is ambiguous. Consequently, with the statute deemed ambiguous, pursuant to the construction canon requiring that an ambiguity be strictly construed in favor of the landowner, the Court ruled Marion and TLA lacked eminent domain authority to take KFJ's land for the road.[16]

The Supreme Court also concluded that its decision did not yield an "absurd result." Initially, Marion and TLA had argued that to construe "mineral deposits" to exclude oil and gas would allow one landowner to effectively prevent TLA from accessing and exploiting its oil and gas deposits for the benefit of its beneficiaries, a clearly important

9. *See e.g.*, UTAH CODE ANN. § 78B-6-501(6)(d) (authorizing private eminent domain for "gas, oil or coal" pipelines, tanks, and reservoirs and subsurface stratum for underground storage of "natural gas").

10. *Marion Energy, Inc.*, 2011 WL 3652398, at *2.

11. *Id.*

12. *Id.*

13. *Id.* at *3.

14. *Id.*

15. *Id.*

16. *Id.* at *3–5, *7.

and prioritized purpose as recognized by the Legislature in other statutory provisions. Additionally, Marion and TLA argued that such a construction would give the parties the power of condemnation to transport and store the resources[17] but curiously not the ability to produce them; the dissent found this argument persuasive.[18] However, the Court rejected those arguments, stating Marion and TLA have alternative rights of access, such as those *on the leasehold* expressly granted under Utah Code Ann. § 53C-2-403.[19] Of course, that reasoning fails to account for Marion's argument that topographical factors rendered such on-lease access "impossible."

Interestingly, neither Marion nor TLA sought reconsideration of the decision. Furthermore, the Author finds it intriguing that, although cited by Marion and TLA in their appellate brief, the Supreme Court failed to address the special and unique rights of access to TLA lands confirmed under the holding of *Utah v. Andrus*[20] (the "Cotter decision"), or address the common law doctrine of easement by necessity if, as Marion asserted, the lands were totally landlocked and otherwise inaccessible.

II. Secretary of Interior Must Issue Federal Oil and Gas Leases at the Completion of a Successful Competitive Bid Process

In *Impact Energy Resources, LLC v. Salazar*, the United States District Court for the District of Utah, Central Division, held that the United States Secretary of Interior is required under the provisions of the Mineral Leasing Act of 1920 (the "MLA"), to issue Federal oil and gas leases within sixty days following receipt of payment by the highest bidder at a competitive lease sale.[21] However, because the successful bidders in this case failed to initiate their lawsuit to force such lease issuance within ninety days as required under other provisions of the MLA, their claims were time barred.

This case involves the infamous December 19, 2008 Federal oil and gas auction held in Salt Lake City, the last auction held under the Bush administration's jurisdiction which was disrupted by the bidding antics of Timothy DeChristopher, an environmental protester. The corporate plaintiffs were the successful bidders of nine parcels at that sale, and the Bureau of Land Management ("BLM") accepted and cashed their checks for the initial payments, bonus bids, and final year rentals.[22] The nine parcels were among seventy-seven other parcels

17. *See* Utah Code Ann. § 78B-6-501(6)(b) (LexisNexis Supp. 2011).
18. *Marion Energy, Inc.*, 2011 WL 3652398, at *5, *15.
19. *Id.* at *6.
20. 486 F. Supp. 995 (D. Utah 1979).
21. Impact Energy Res., L.L.C. v. Salazar, Nos. 2:09-CV-435, 2:09-CV-440, 2010 WL 3489544, at *4 (D. Utah Sept. 1, 2010).
22. *Id.* at *1–3.

DOI: 10.37419/TWLR.V18.I3.21

subject to a lawsuit filed two days prior to the sale by the Southern Utah Wilderness Alliance ("SUWA") in the United States District Court for the District of Columbia (the "D.C. Court").[23] On January 17, 2009, the D.C. Court issued a restraining order enjoining BLM from issuing the contested leases.[24]

On February 6, 2009, Secretary of Interior Ken Salazar, newly appointed by President Obama, issued an intra-agency memorandum directing the Utah BLM State Director to withdraw the seventy-seven leases. On February 12, 2009, the Utah BLM State Director sent letters to the corporate plaintiffs advising them of the Secretary's directive, the withdrawal of their nine parcels from leasing, and authorizing a refund of the payments made. The corporate plaintiffs immediately appealed that decision to the Interior Board of Land Appeals ("IBLA") in an effort to exhaust their administrative remedies. On April 9, 2010, the IBLA issued a decision refusing to hear the appeal on the basis that it lacked jurisdiction because the Secretary had already approved the actions taken by the Utah BLM.[25] On May 13, 2009, the plaintiffs filed an action in the Federal District Court in Utah, claiming the Secretary and the Utah BLM's decision to withdraw the leases after the sale exceeded their statutory authority or, alternatively, that their actions were arbitrary and capricious.[26]

While acknowledging that under 30 U.S.C. § 225(c) the Secretary has discretion to determine which Federal parcels may be leased, the court concluded that his discretion is limited to pre-sale decisions about whether or not to offer the lands for leasing.[27] Conversely, the court found that 30 U.S.C. § 226(b)(1)(A) mandates that once the Secretary decides to lease a parcel, he "shall" accept the highest bid from a responsible qualified bidder, and the lease "shall" be issued by him within sixty days following receipt of payment by the bidder.[28] The court rejected the Secretary and BLM's argument to defer to their determination that the leases could be withdrawn at any time, stating the language of § 226(b)(1)(A) was clear, unambiguous, and mandatory.[29]

Notwithstanding, the court then concluded that the ninety-day statute of limitations under 30 U.S.C. § 226-2 to challenge a decision of the Secretary commenced with the issuance of the February 6, 2010 intra-agency memorandum, not with the mailing by the Utah BLM Director of the letters to the plaintiffs on February 12, 2009.[30] The court found that because the Federal government was involved and

23. *Id.* at *1–2.
24. *Id.* at *3.
25. *Id.*
26. *Id.* at *3–4.
27. *See id.* at *5 (citing 30 U.S.C. §§ 226(b)(1)(A), 226(c) (2006)).
28. *Id.* at *4 (citing § 226(b)(1)(A)).
29. *Id.* at *7.
30. *Id.* at *8–9 (citing 30 U.S.C. § 226-2 (2006)).

this suit against it involved a waiver of sovereign immunity, any statute of limitations must be strictly construed in favor of the government.[31] The court found that the February 6, 2009 intra-agency memorandum constituted the Secretary's final decision and the February 12, 2009 letters to the plaintiffs as mere procedural acts enforcing the Secretary's final decision; the letters did not serve to reopen the Secretary's decision.[32] The court rejected the plaintiffs' argument that the statute of limitations tolled until they received the letters because no equities requiring tolling existed. They had prior ample notice of the Secretary's decision: a widely distributed press release, a notice filed in the D.C. Court action, and individual letters.[33] Furthermore, in the IBLA appeal, the plaintiffs expressly asked the IBLA which of the two actions (the intra-agency memorandum or the letters) constituted the Secretary's final action for appellate purposes. Although the IBLA did not answer the question, the court deemed this sufficient evidence that the plaintiffs were on notice that the limitations period may have begun to run on February 7, and therefore they had sufficient time to comply.[34] Accordingly, the court ruled the plaintiffs had filed their lawsuit one day too late and granted judgment in the defendants' favor. The plaintiffs moved for reconsideration, which the court rejected by order entered January 20, 2011.[35]

This case is currently on appeal to the Tenth Circuit. In addition, it should be noted that the Federal District Court for the District of Wyoming, in *Western Energy Alliance v. Salazar*, rejected the Utah court's holding that the Secretary was mandated *to issue* the leases within sixty days of receipt of payment, instead ruling the Secretary must issue a decision on whether or not the lands *are to be leased* within sixty days of receipt of payment.[36] Obviously, this frames the contradicting holdings to be resolved by the Tenth Circuit.

III. DeChristopher Sentenced to Two Years and $10,000 Fine

Relating to the *Impact* case discussed immediately above, on July 26, 2011, Judge Dee Benson of the United States District Court for the District of Utah sentenced Timothy DeChristopher to two years in prison and a fine of $10,000 for his actions at the December 19, 2008 lease auction.[37] At the auction, DeChristopher registered as a bidder

31. *Id.* at *8.
32. *Id.*
33. *Id.* at *9.
34. *Id.*
35. Order Den. Mot. for Relief, *Impact Energy Res.*, 2010 WL 3489544 (No. 2:09-CV-435).
36. W. Energy Alliance v. Salazar, No. 10-CV-0226, 2011 WL 3737520, at *3 (D. Wyo. June 29, 2011).
37. Judgment, U.S. v. DeChristopher, 2011 WL 3269197 (D. Utah July 28, 2011) (No. 2:09-CR-000183-001).

and filled out the Bidder Registration Form (the "Form"), which required certification that: (1) he was a good-faith bidder; (2) he had the intention to acquire a lease on the offered lands; (3) a winning bid constituted a legally binding commitment to accept the lease; and (4) if he was the successful bidder, he would tender a specified percentage of the winning bid, whether or not the lease subsequently issued.[38] The Form also expressly advised DeChristopher of the criminal consequences of tampering with the bidding process.[39]

DeChristopher then bid on numerous parcels, many of which he bid up, then pulled out. He was the high bidder on fourteen parcels, covering over 22,000 acres and totaling $1.7 million. He later admitted he never had an intention of paying for the leases and ultimately failed to tender the requisite amounts at day's end. He claimed that his tampering with the bidding process was necessary to stop unlawful governmental action and prevent exacerbation of global warming and climate change.[40] He was subsequently charged with two felony counts, violation of the Federal Oil and Gas Leasing Reform Act and making false statements.[41] Ruling on a pre-trial Motion in Limine, the court held DeChristopher could not present to the jury his "choice of evils" defense.[42]

On March 3, 2011, after a jury trial, DeChristopher was convicted on both counts by a jury. He faced a maximum sentence of up to ten years in prison and up to $750,000 in fines. In imposing a lesser sentence, Judge Benson cited DeChristopher's continued recalcitrance and defiance and public statements that civil disobedience is justified in fighting climate change—specifically citing DeChristopher's post-trial statements in which he encouraged others to similarly "buck the system."[43] If not for that "continuing trail of statements," the Judge indicated DeChristopher might not have faced prosecution, let alone prison.[44] "The offense itself, with all apologies to people actually in the auction itself, wasn't that bad."[45] The Judge suggested that DeChristopher had other legal avenues to challenge issuance of the leases, as reflected by the D.C. Court case brought by SUWA which ultimately stopped the leases he was concerned with from being issued. "I'm not saying there isn't a place for civil disobedience, but it can't be the order of the day."[46] Judge Benson also refused to require

38. U.S. v. DeChristopher, No. 2:09-CR-183, 2009 WL 3837208, at *2 (D. Utah Nov. 16, 2009).
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at *5.
43. Brandon Loomis, *DeChristopher Sentenced to Prison, 26 Protestors Arrested*, SALT LAKE TRIBUNE (July 28, 2011), http://www.sltrib.com/sltrib/news/52263987-78/dechristopher-federal-prison-leases.html.csp.
44. *Id.*
45. *Id.*
46. *Id.*

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DeChristopher to pay restitution for the asserted losses sustained by the BLM and the energy companies who had bid against him.

DeChristopher's attorneys have filed an appeal of his conviction to the Tenth Circuit.

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DOI: 10.37419/TWLR.V18.I3.21