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IN THE SUPERIOR COURT OF THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

PUMPKIN, LIMITED,	)
	)
Plaintiff,	)
	)
v.	)
	)
UTILITY SERVICES OF ALASKA, INC., d/b/a COLLEGE UTILITIES CORPORATION,	)
	)
Defendant.	)
_____	)

Case No. 4FA-18-02118 CI

PUMPKIN, LIMITED'S REPLY TO COLLEGE UTILITIES CORP.'S OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Assuming for the purposes of argument that there is in fact a valid section line easement (SLE) across Pumpkin Limited's (Roe's) property, the central question in this case then becomes whether a utility may use the SLE on Roe's property without exercising the power of eminent domain and paying just compensation. The inescapable answer is "No."

While College Utilities Corporation (CUC) fails to address United States v. Gates of the Mountains Lakeshore Homes, 732 F. 2d 1411 (9th Cir. 1984) (Gates of the

Mountains), dismissing that case as "uninstructive and irrelevant,"[1] Gates of the Mountains and the United States Supreme Court cases upon which it relies are the controlling precedent in Roe's favor. A proper understanding of this requires a bit of a history lesson.

When Congress passed R.S. 2477 in 1866, it passed two companion statutes, R.S. 2339 and R.S. 2440, which addressed rights of way over public land for water purposes.[2] At that point, shortly after the Civil War, Congress did not envision the Industrial Revolution that was soon to come. "Obviously this legislation was primitive."[3]

By the turn of the century electrical and water utilities had become commonplace. In response, Congress passed legislation in 1896 and 1901, and "§§ 2339 and 2340 were thus superseded."[4] In particular, the February 15, 1901 legislation which is codified at 43 U.S.C. § 959 includes utilities engaged in "the supplying of water for domestic, public, or any other beneficial uses."[5] 43 U.S.C. § 959 empowers the Secretary of the Interior to permit utilities to use rights of way through public lands and correspondingly requires a utility to obtain a revocable permit if it wishes to use a right of way over public lands.[6]

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[1] Opposition at 10.
[2] See Utah Power & Light Co. v. United States, 243 U.S. 389, 405, 37 S.Ct. 387, 390, 61 L.Ed. 791 (1917); United States v. Gates of the Mountains Lakeshore Homes, Inc., 732 F.2d 1411, 1413 &n.4 (9th Cir. 1984).
[3] Utah Power & Light, 243 U.S. at 405, 37 S.Ct. at 390.
[4] Id., 243 U.S. at 406, 37 S.Ct. at 390; see Gates of the Mountains, 732 F.2d at 1413.
[5] See Swendig v. Washington Water Power Co., 265 U.S. 322, 327-28, 44 S.Ct. 496, 497, 68 L.Ed. 1036 (1924).
[6] See Utah Power & Light, 243 U.S. at 407-08, 37 S.Ct. 390-91; Gates of the Mountains, 732 F.2d at 1413.

In Utah Power & Light, the utility claimed that it had vested rights to occupy public lands with improvements it had constructed "all after 1896 and nearly all after 1901."[7] The utility first contended that its "claims must be tested by the laws of the state in which the lands are situated rather than by the legislation of Congress."[8] The Court rejected the utility's claim, explaining "that the power of Congress is exclusive, and that only through its exercise in some form can rights in lands belonging to the United States be acquired."[9]

The utility then contended that it had acquired rights under R.S. 2339 and R.S. 2340.[10] But the Court easily rejected that contention because all of the utility's improvements were constructed after §§ 2339 and 2340 were superseded by the subsequent federal legislation and the utility had not received a permit under 43 U.S.C. §959.[11]

43 U.S.C. §959 was at issue again in Swendig. There a homestead patentee asserted that the issuance of the homestead patent necessarily revoked the permit issued to a utility under 43 U.S.C. §959, so that the utility should be required to exercise the power of eminent domain to acquire an easement and thus pay just compensation.[12] In ruling against the patentee, the Court held that because the homestead entry occurred

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[7] Utah Power & Light, 243 U.S. at 403, 37 S.Ct. at 389.
[8] Id.
[9] Id., 243 U.S. at 404, 37 S.Ct. at 389.
[10] See id., 243 U.S. at 406, 37 S.Ct. at 390.
[11] See id., 243 U.S. at 406-08, 37 S.Ct. at 390-91.
[12] See Swendig, 265 U.S. at 322-24, 44 S.Ct. at 496.

after the 1901 passage of 43 U.S.C. §959, the entry was subject to that statute and thus when the patent issued, the patent was subject to the pre-existing utility permit until such time as the Secretary of the Interior revoked the permit.[13]

Fast-forward then to 1984 when Gates of the Mountains was decided. That case involved an R.S. 2477 right of way, American Bar Road, established by legislative declaration under Montana law on March 21, 1901, a little over a month after the passage of 43 U.S.C. §959.[14] The utility argued that it did not need a permit because in 1901 Montana law "recognized a right to run utilities along a highway right of way, making lawful the use of the American Bar Road for utilities."[15] The Ninth Circuit succinctly rejected the utility's claim:

> We disagree. By the time of the American Bar Road grant in March 1901, Congress had adopted a federal rule that power transmission is not within the scope of an R.S. 2477 highway right of way and had excluded any implied borrowing of state law on this point.[16]

The Gates of the Mountains Court relied principally on the United States Supreme Court's decision in Utah Power & Light.[17] In essence, because R.S. 2339, R.S. 2340, and R.S. 2477 were enacted together as part of the same act, they should be read and applied

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[13] See Swendig, 265 U.S. at 327-32, 44 S.Ct. at 497-99.
[14] See Gates of the Mountains, 732 F.2d at 1412-13.
[15] Id. at 1413.
[16] Id.; see _____
[17] See Gates of the Mountains, 732 F.2d at 1413.

together; thus, "*Utah Power* is especially strong authority on the scope of R.S. 2477."[18] Indeed, to hold otherwise would make R.S. 2477 an illogical loophole through which utilities could simply bypass the intent of Congress in enacting 43 U.S.C. §959.

And the reasoning of Gates of the Mountains is only bolstered when one considers the logic of Swendig, a dispute between a federal homestead patentee and a utility whose federal permit predated the homestead entry. In contrast, the homestead entry in Roe's case occurred in 1949 so that the ability for a utility to obtain a permit ended upon patent.[19] Now, nearly 70 years later, CUC is seeking a free ride, claiming to be able to construct a water line through Roe's property under the guise of an R.S. 2477 SLE without exercising the power of eminent domain and paying the constitutionally-required compensation.

Nor is the required exercise of eminent domain obviated by what any enactment of the Alaska legislature may say or any decision of the Alaska Supreme Court may suggest. Because the 1949 homestead patentee of Roe's property, Lynn Hollist, acquired the property without any utility encumbrance under federal law, neither of the statutes upon which CUC relies -- AS 19.25.010 and AS 40.15.030 -- can simply declare a utility easement to exist as a matter of state law without running afoul of the Takings Clause of the United States and Alaska Constitutions.[20] The same holds true to the extent that CUC would rely upon the Alaska Supreme Court's decision in Fisher v. Golden Valley Electric

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[18] Id. at n.4.
[19] See Swendig, 265 U.S. at 331, 44 S.Ct. at 499.
[20] See _____ .

Association, 685 P.2d 127 (Alaska 1983) to declare that CUC many use the SLE over Roe's property without the exercise of eminent domain and corresponding payment of just compensation.[21]

In fact, Fisher is distinguishable from Roe's case because Fisher did not concern or consider the effect of 43 U.S.C. § 959 and the related United States Supreme Court decisions in Utah Power & Light and Swendig. As it was, Fisher predates Gates of the Mountains by more or less one year. Had Gates of the Mountain been decided before Fisher and then been brought to the Fisher Court's attention, Fisher would have been in agreement.

Notably, the Fisher Court relied upon United States v. Oklahoma Gas & Electric Co., 318 U.S. 206, 63 S.Ct. 534, 87 L.Ed. 716 (1943) (Oklahoma Gas & Electric) for the general rule that the conveyance of land by the United States is to be construed according to the law of the State where the land lies unless there is evidence to the contrary.[22] The Fisher Court then expressly stated, "Here we have been cited at no evidence indicating that this general rule should not be applicable."[23]

Here Roe has provided the Court with the evidence necessary to determine that Alaska law does not govern whether a utility may make uncompensated use of an R.S. 2477 right of way over Roe's private property. There is 43 U.S.C. §959, the United

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[21] See _____ .
[22] See Fisher v. Golden Valley Electric Association, 685 P.2d 127, 130 (Alaska 1983).
[23] Id.

States Supreme Court's decisions in Utah Power & Light and Swendig, and the Ninth Circuit's decision in Gates of the Mountains.

Moreover, in Gates of the Mountains, the Court addressed the United States Supreme Court's decision in Oklahoma Gas & Electric. The Court distinguished Oklahoma Gas & Electric because: (1) the statute under which that right of way was granted expressly incorporates state law, whereas R.S. 2477 does not; and (2) the Oklahoma Gas & Electric Court held that 43 U.S.C. §959 did not apply to the Indian land at issue, whereas under Utah Power & Light, 43 U.S.C. §959 clearly does apply to land crossed by an R.S. 2477.[24]

DATED at Fairbanks, Alaska this ____ day of July, 2018.

KRAMER and ASSOCIATES
Attorney(s) for Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the
foregoing document was mailed/email/hand-delivered
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[24] See Gates of the Mountains, 732 F.2d at 1414.