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Buck v. District Court for Kiowa County

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NO. 79SA4281

IN THE SUPREME COURT

OF THE STATE OF COLORADO

FILED IN THE
SUPREME COURT
OF THE STATE OF COLORADO

SEP 19 1979

David W. Begina

CLYDE E. BUCK AND ELSIE BUCK)
TRUSTEES OF CLYDE E. BUCK TRUST,)
ETHEL M. HIGHTOWER, ERNESTINE)
HIGHTOWER SANDERS, GERALDINE)
HIGHTOWER DUNLAP, BARBARA ANNE)
LEWIS AND JANE LAWRENCE EBERHARDT)
AS CO-TRUSTEES OF THE BERTHA LEE)
PYLES TRUST, BARBARA ANNE LEWIS,)
JANE LAWRENCE EBERHARDT, MERWIN)
DUNLAP, GERALDINE DUNLAP, V. KELLY)
LINDHOLM, EUNICE B. LINDHOLM, and)
THE LINDHOLM FAMILY FARM AND RANCH,)
LTD., A Corporation,)

Petitioners,)

vs.)

DISTRICT COURT FOR THE COUNTY OF)
KIOWA and STATE OF COLORADO and the)
HONORABLE ROBERT SANDERSON, one)
of the Judges thereof, and MISSOURI)
PACIFIC RAILROAD COMPANY,)

Respondents.)

ORIGINAL PROCEEDING

Error to the District
Court in and for the
County of Kiowa

Honorable Robert Sanderson
Judge

PETITION FOR WRIT OF CERTIORARI TO THE
DISTRICT COURT IN AND FOR THE COUNTY OF KIOWA
STATE OF COLORADO

COME NOW the Petitioners by their attorneys, JOHNSON,
MCLACHLAN & DiCOLA, and petition this Honorable Court for review
of an Order of the District Court in and for the County of Kiowa,
State of Colorado, denying Petitioners' Motion in Limine and Motion
to Dismiss a condemnation action filed by the Missouri Pacific
Railroad Company and as grounds for said petition state and allege
as follows:

1. These Petitioners are the owners of various
pieces of farm land located adjacent to the Missouri Pacific Railroad
Company's right of way located near Eads in Kiowa County, Colorado.
Respondent, Robert Sanderson, is the duly qualified and acting
judge of the District Court of Kiowa County, State of Colorado.

Petitioners are the Respondents named and served in a certain action entitled "Missouri Pacific Railroad Company, Petitioner, vs. Curtis Chester Kirby, Rex Ebert Kirby, Martin V. Kirby, Elva V. Kirby, Clyde E. Buck and Elsie Buck Trustees of Clyde E. Buck Trust, Ethel M. Hightower, Ernestine Hightower Sanders, Geraldine Hightower Dunlap, Barbara Anne Lewis and Jane Lawrence Eberhardt as Co-Trustees of the Bertha Lee Pyles Trust, Barbara Anne Lewis, Jane Lawrence Eberhardt, Merwin Dunlap, Geraldine Dunlap, V. Kelly Lindholm, Eunice B. Lindholm, John H. Holter, Alice L. Holter and The Lindholm Family Farm and Ranch, Ltd., A Corporation, Respondents," being cause number 78CV17 in said Court.

2. Petitioners were summoned as Respondents to appear before said Court in the above entitled and numbered action to respond to the Petition in Condemnation filed by the Missouri Pacific Railroad Company. In the action, Missouri Pacific Railroad Company seeks to condemn the Petitioners' land for the construction of dust dikes. A copy of the Petition in Condemnation is attached hereto as Appendix "A".

3. The Petitioners herein duly filed their Amended Answer, a copy of which is attached hereto as Appendix "B" and their Amended Motion to Dismiss and Motion in Limine, a copy of which is attached hereto as Appendix "C".

4. These Petitioners' Amended Motion to Dismiss and Motion in Limine together with their Amended Answer raised the following issues:

(a) Whether the use of the property sought to be appropriated under the power of eminent domain is public or private. These Petitioners contend that the use sought in the case at hand, i.e., the construction of earthen dikes parallel to the railroad tracks to keep dust from blowing onto the railroad tracks, is a private use and hence the railroad has no right of condemnation.

(b) Whether the railroad has the authority to condemn land for dust dikes outside of its statutory right of way. These Petitioners contend it does not.

(c) Whether the railroad was required to seek a determination by the Public Utilities Commission of the State of Colorado prior to the construction of the dust dikes. These Petitioners contend they do.

sek

5. On May 9, 1979, a hearing was held on the railroad's Petition for Immediate Possession of the subject property, which is attached hereto as Appendix "D", and upon these Petitioners' Amended Motion to Dismiss and Motion in Limine. A transcript of the railroad's evidence regarding public use is attached hereto as Appendix "E". The Petitioners' Brief and Argument in Support of Amended Motion to Dismiss and Motion in Limine is attached hereto as Appendix "F". Missouri Pacific Railroad Company's Brief and Argument in Opposition to Amended Motion to Dismiss and Motion in Limine is attached hereto as Appendix "G".

6. On July 23, 1979, the Court entered an Order, which is attached hereto as Appendix "H", denying these Petitioners' Motion to Dismiss and Motion in Limine. On August 2, 1979, the Court entered an Order for Deposit for Immediate Possession, a copy of which is attached hereto as Appendix "I". The parties have stipulated, and the Court has affirmed the stipulation by Order, which is attached hereto as Appendix "J", that immediate possession shall be stayed pending the application for and the resolution of this writ.

7. These Petitioners have no speedy and adequate remedy for review of the District Court's Order denying their Motion to Dismiss other than this Original Proceeding because as a result of the Court's Order for Immediate Possession, the railroad will permanently destroy portions of these Petitioners' farm land with the construction of dust dikes. For a description of the dust dikes to be constructed see Exhibit 1 attached to the Petition in Condemnation, Appendix "A" herein.

8. The Supreme Court should grant this writ because the District Court is without jurisdiction to proceed where the railroad seeks to condemn land for a purely private use. At the hearing on possession and upon these Petitioners' Motion to Dismiss and Motion in Limine, the assistant to the general manager of Missouri Pacific Railroad Company, James M. Stone, testified in response to the following question:

"Q And basically I think it was your testimony that it's just cheaper to buy these dust dikes than to clean off the tracks; is that right?

A Well, yes." (See Appendix "E" Page 12, Line 9-12) Mr. Stone's answer sums up the railroad's whole case. Their condemnation action was filed to save the railroad some money. Money saving is a particularly private function of the railroad and the dust dikes are not serving a public use except co-incidentally.

9. The Supreme Court should grant this writ because the District Court exceeded its jurisdiction in allowing the railroad to condemn land for the purpose sought outside of the statutory right of way. The legislature has granted to the railroad a two hundred foot right of way, C.R.S. 1973, 40-20-102. The land sought to be taken is outside of the two hundred foot right of way. In some instances, the legislature has allowed the railroad to take land outside of the two hundred foot right of way, but the case at hand is not one of those instances.

10. The Supreme Court should grant this writ because the railroad has not received a determination by the Public Utility Commission of the State of Colorado that the dust dikes are necessary.

11. The Supreme Court should grant this writ because the Court failed to make any of the findings or consider any of the factors required by Tanner v. Treasury Tunnel Co., 35 Colo. 593, 83 P. 464 (1906). The Court did not consider the physical conditions of the country, the needs of the community,

the relative detriment or benefits to the locality or the necessity of the improvement in the development of this State. As a matter of fact, Clyde E. Buck, one of the Petitioners, testified that the dust dikes are breeding grounds for noxious weeds and grasshoppers. He also testified that during blizzards, cattle are trapped against the dust dikes and suffocate. Clearly the detriments to the area caused by the dust dikes far outweigh the money saved by the railroad.

12. The Supreme Court should grant this writ because these Petitioners have no other remedy. The Petitioners' right to own real property is a fundamental substantive and substantial right. The Constitution of the State of Colorado provides in Section 15 of Article Two that property shall not be condemned except for a public use. If the railroad is allowed to take possession of the property and construct the dust dikes, these Petitioners will have no remedy because their crop land will be permanently destroyed. They will not be able to plant their crops during pendency of this action.

WHEREFORE, the Petitioners pray for an order invalidating the Order denying Petitioners' Motion to Dismiss and Motion in Limine, and for a finding that the Missouri Pacific Railroad Company has no right to condemn Petitioners' land for the purposes sought and for such other and further relief as the Court deems proper.

JOHNSON, McLACHLAN & DiCOLA

By 

ANTHONY J. DiCOLA, No. 5598
Attorney for the Petitioners
110 East Oak - P.O. Box 1298
Lamar, Colorado 81052
336-7772

APPENDIX "A"

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF KIOWA
AND STATE OF COLORADO

NO. 78CV17 DIV.

MISSOURI PACIFIC RAILROAD COMPANY,)
)
Petitioner,)

vs.)

CURTIS CHESTER KIRBY, REX EBERT)
KIRBY, MARTIN V. KIRBY, ELVA V.)
KIRBY, CLYDE E. BUCK AND ELSIE BUCK)
TRUSTEES OF CLYDE E. BUCK TRUST,)
ETHEL M. HIGHTOWER, ERNESTINE)
HIGHTOWER SANDERS, GERALDINE)
HIGHTOWER DUNLAP, BARBARA ANNE)
LEWIS AND JANE LAWRENCE EBERHARDT)
AS CO-TRUSTEES OF THE BERTHA LEE)
PYLES TRUST, BARBARA ANNE LEWIS,)
JANE LAWRENCE EBERHARDT, MERWIN)
DUNLAP, GERALDINE DUNLAP, V. KELLY)
LINDHOLM, EUNICE B. LINDHOLM, JOHN)
H. HOLTER, ALICE L. HOLTER and THE)
LINDHOLM FAMILY FARM AND RANCH,)
LTD., A Corporation,)
)
Respondents.)

PETITION IN CONDEMNATION

COMES NOW, Missouri Pacific Railroad Company, by its attorneys, Preston, Altman & Parlapiano, and respectfully shows to the Court:

1. Petitioner is a Corporation authorized to operate and operating a railroad line adjacent to the tracts of land herein described.
2. Petitioner is authorized and empowered to maintain this action under and by virtue of 1973 C.R.S. 38-1-102 and 1973 C.R.S. 38-2-101.
3. During windstorms in Kiowa County, Colorado, and elsewhere along Petitioner's tracks, drifting dust and sand caused by wind induced soil erosion has filled fence rows, ditches and

drainage structures belonging to Petitioner and has covered Petitioner's railroad tracks to the extent that the dust and sand must be removed and the tracks must be cleaned in order to operate trains safely over the tracks and avoid derailments. Petitioner has constructed dust levees along its right of way substantially in the shape and size of the dust levee shown on Exhibit 1 attached hereto.

4. Such dust levees must be built on ground extending approximately 200 feet at right angles from the center line of the railroad track being protected. Petitioner's right of way is not sufficiently wide to provide the ground and space needed for these dust levees so Petitioner needs to acquire sufficient ground for such construction.

5. Petitioner has built dust levees north of its main track between Tracts 2 and 3 described herein and adjacent to and west of Tract 9 described herein.

Said dust levees minimize and in many cases eliminate the deposits of dust and sand on Petitioner's tracks, thus reducing maintenance costs and improving the operation of the railroad.

6. Descriptions of the tracts of real property that it is necessary for Petitioner to acquire are attached hereto marked Exhibits 1 through 9. Petitioner needs to acquire surface rights only.

7. Tract 1 is owned by Curtis Chester Kirby and Rex Ebert Kirby.

8. Tract 2 is owned by Martin V. Kirby and Elva V. Kirby.

9. Tract 3 is owned by Clyde E. Buck and Elsie Buck, Trustees of Clyde E. Buck Trust.

10. Tract 4 is owned by Ethel M. Hightower, Ernestine Hightower Sanders and Geraldine Hightower Dunlap. ✓

11. Tract 5 is owned by Barbara Anne Lewis, Jane Lawrence Eberhardt as Co-Trustees of the Bertha Lee Pyles Trust, Barbara Anne Lewis and Jane Lawrence Eberhardt.

12. Tract 6 is owned by Merwin Dunlap and Geraldine Dunlap. ✓

13. Tract 7 is owned by V. Kelly Lindholm and Eunice B. Lindholm.

14. Tract 8 is owned by John H. Holter and Alice L. Holter.

15. Tract 9 is owned by The Lindholm Family Farm and Ranch, Ltd., a Corporation.

16. The compensation to be paid to the Respondents and each of them for the requisition of said tracts sought to be appropriated and condemned cannot be agreed upon by Petitioner and Respondents.

WHEREFORE, Petitioner prays:

1. That the Court determine the compensation to be paid Respondents in the manner provided by law.

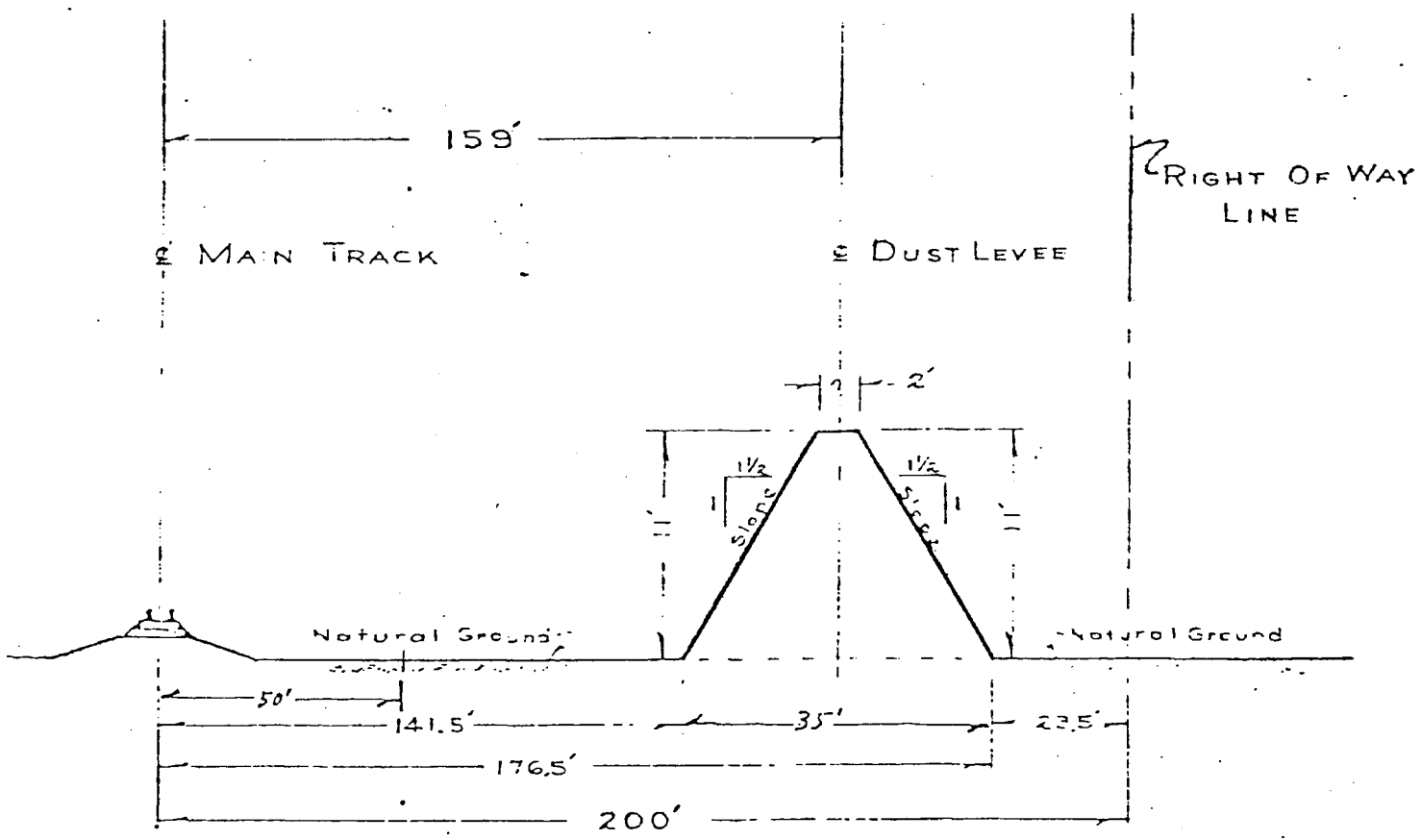
2. That Petitioner have judgment condemning all of the tracts described herein, and each of them, for use as part of the railroad right of way and property as above set forth upon making compensation therefor to Respondent owners and other parties in interest.

3. For such other relief as may be proper.

PRESTON, ALTMAN & PARLAPIANO

By 

Leo S. Altman
Registration No. 000944
Attorneys for Petitioner
501 Thatcher Bldg.
Pueblo, Colorado 81003
5457325



TYPICAL CROSS SECTION OF DUST LEVEE
 No Scale.

EXHIBIT "B"
 MISSOURI PACIFIC RAILROAD COMPANY
 CENTRAL DISTRICT

TYPICAL CROSS SECTION OF
 DUST LEVEES.



Office Dist. Engr. Oswatimie, Kans.
 Date: 12-20-35 No Scale
 By RCF File: CD 2-60

APPENDIX "B"

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF KIOWA, STATE OF COLORADO
No, 78 CV 17

MISSOURI PACIFIC RAILROAD COMPANY,)
)
) Petitioner,)
)
)
) vs.)
)
) V. KELLY LINDHOLM, EUNICE B. LINDHOLM,)
) and THE LINDHOLM FAMILY FARM AND RANCH)
) LTD., a corporation, et al.,)
)
) Respondents.)

AMENDED ANSWER

COMES NOW the Respondents above named, by and through their attorneys at law, Johnson, McLachlan and DiCola, and for an amended answer to the Petition in Condemnation filed herein state as follows:

1. These Respondents are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 14 and therefore, deny the same.
2. These Respondents admit the allegations contained in Paragraphs 13, 15 and 16.


FIRST AFFIRMATIVE DEFENSE

The Petitioner's Complaint fails to state a claim upon which relief can be based.

WHEREFORE, Respondents pray that the Petitioner be denied the right to condemn the property described in the Petition, costs, attorney's fees, and such other and further relief as to the Court seems just and proper; however, if the Court finds Petitioner has the power, authority and right to so condemn, the Respondents pray for just compensation for their land to be taken, compensation for the damage to the residue, costs, attorney's fees and such other and further relief as to the Court seems just and proper.

JOHNSON, McLACHLAN AND DiCOLA

By


ANTHONY J. DiCOLA, NO. 5598
Attorney for Respondents
110 East Oak - P. O. Box 1298
Lamar, Colorado 81052
336-7772

CERTIFICATE OF MAILING

I do hereby certify that I have this 28th day of March,
1979, mailed a true and correct copy of the above and foregoing
Amended Answer, postage prepaid, to Mr. Leo S. Altman, Attorney at
Law, 501 Thatcher Building, Pueblo, Colorado 81003.

Nancy Edleman

APPENDIX "C"

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF KIOWA, STATE OF COLORADO

No. 78 CV 17

MISSOURI PACIFIC RAILROAD)
COMPANY,)

Petitioner,)

vs.)

CURTIS CHESTER KIRBY, et al.,)

Respondents.)

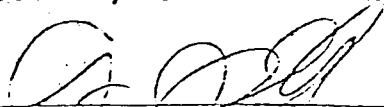
AMENDED MOTION TO DISMISS
AND MOTION IN LIMINE

COMES NOW the Respondents who move the Court for an Order dismissing the above entitled matter and for an Order limiting the hearing now set on Wednesday, May 9, 1979, to the matters listed in this Motion and as grounds therefore alleges as follows:

1. The right of eminent domain does not grant the railroad the right to take any property which it may deem desirable or profitable for the economic management of its business.
2. The land sought to be taken is outside the railroad's statutory authority.
3. The railroad has not received a determination by the Public Utilities Commission of the State of Colorado that said dust dikes are reasonably necessary.
4. Respondents have attached a brief in support of the Motion hearing.

WHEREFORE, Respondents pray for an Order dismissing the above titled matter and for an Order limiting the hearing set for Wednesday, May 9, 1979, to the issues herein.

JOHNSON, McLACHLAN & DiCOLA


ANTHONY J. DiCOLA, No. 5598
Attorney for Respondents
110 East Oak- P.O. Box 1298
Lamar, CO 81052, 336-7772

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF KIOWA, STATE OF COLORADO

No. 78 CV 17

MISSOURI PACIFIC RAILROAD)
COMPANY,)
)
Petitioner,)
)
vs.) MEMORANDUM IN SUPPORT OF MOTION
) TO DISMISS AND MOTION IN LIMINE
CURTIS CHESTER KIRBY, et al.,)
)
Respondents.)

1. The right of eminent domain does not grant the railroad the right to take any property which it may deem desirable or profitable for the economic management of its business.

At Sec. 7.5211 Nichols on Eminent Domain a discussion is had of a railroad power of eminent domain at page 7-272 it says:

"As already intimated, the mere fact that a railroad company is a public service corporation and entitled to exercise the power of eminent domain in acquiring the right of way for its tracks does not warrant the grant to such a company of the right of taking by eminent domain any property which it may deem desirable or convenient for the most economical management of its business. A common carrier serves both the public and itself. It has its public and its private functions. The public part is the exercise of its franchise for the accommodation of public travel; the private part is its incidental business, with which the public is not concerned, and which the company manages for its own interests. Whatever is necessary to the exercise of the franchise is for the benefit of the public, but that which pertains simply to its means of supply is the private business of the company."

The use by the railroad of dust dikes is a private function of the railroad and not a public function. The railroad should not be granted the right to condemn the property in question for a private purpose.

2. The land sought to be taken is outside the railroad's

statutory authority.

At C.R.S. 1973, 40-20-102 railroads are given the power to construct their rights of way. The statute states:

"40-20-102. Powers of corporation. (1) Every such corporation, in addition to the powers conferred in articles 1 to 10 of title 7, C.R.S. 1973, has the power:

(a) To lay out its road, not exceeding two hundred feet in width, and to construct the same; and for the purpose of cuttings and embankments to take as much more land as may be necessary for the proper construction and security of the railway; and to cut down any standing trees that may be in danger of falling or obstructing the railway, making proper compensation therefor;"

In the case at hand, the railroad seeks to condemn land outside its 200 foot right of way. None of the necessary grounds are plead for taking more than 200 feet.

3. The railroad has not received a determination by the Public Utilities Commission of the State of Colorado that said dust dikes are necessary.

This Court lacks jurisdiction of the subject matter herein until the railroad applies to the Public Utilities Commission for permission to condemn the land sought and construct the dust dikes.

At C.R.S. 1973, 40-4-106 it is said:

"40-4-106. Power to make rules to promote public safety. (1) The commission shall have power, after hearing on its own motion or upon complaint, to make general or special orders, rules, or regulations or otherwise to require each public utility to maintain and operate its lines, plant, system, equipment, electrical wires, apparatus, tracks, and premises in such manner as to promote and safeguard the health and safety of its employees, passengers, customers, subscribers, and the public and to require the performance of any other act which the health or safety of its employees, passengers, customers, subscribers, or the public may demand."

The Colorado Supreme Court in Colorado and Southern Railway Company, Inc., et al. vs. The District Court in and for the Tenth Judicial District of the State of Colorado, et al., 177 Colo. 162, has held in construing a portion of the same statute:

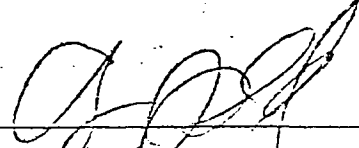
MEMORANDUM
PAGE THREE

"(3) Section 50-1-2, supra, provides in effect that a railroad may go to court to acquire property "required" by it. However, the Public Utilities Commission under section 115-4-6(2) (a), has the power to determine what property the condemning railroad can use as the "particular point of crossing." If follows logically then that the commission - not the railroad - determines what property the railroad requires."

In the case at hand, the railroad has not plead any findings by the Public Utilities Commission. Although it is Respondent's position that the Colorado and Southern Railroad Company, Inc., case (supra) applies equally to both sections of the statute, in the case at hand numerous crossings will be affected by the dust dikes and Sections (2) (a) (b) and (3) all will come into play upon the construction of the dikes.

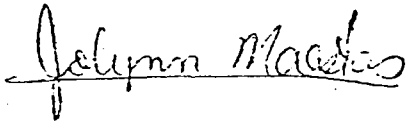
JOHNSON, McLACHLAN & DiCOLA

By


ANTHONY J. DiCOLA, No. 5598
Attorney for Respondents
110 East Oak - P.O. Box 1298
Lamar, CO 81052, 336-7772

CERTIFICATE OF MAILING

I do hereby certify that I have this 7th day of May, 1979, mailed a true and correct copy of the above and foregoing AMENDED MOTION TO DISMISS AND MOTION IN LIMINE and MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND MOTION IN LIMINE, postage prepaid, to Mr. Leo S. Altman, Attorney at Law, 501 Thatcher Building, Pueblo, Colorado 81003.



APPENDIX "D"

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF KIOWA, STATE OF COLORADO

No. 78 CV 17

MISSOURI PACIFIC RAILROAD)	
COMPANY,)	
)	
Petitioner,)	
)	
vs.)	PETITION FOR IMMEDIATE
)	<u>POSSESSION</u>
CURTIS CHESTER KIRBY et al.,)	
)	
Respondents.)	

COMES NOW Petitioner by its attorneys and shows to the
Court:

1. Incorporates by reference all averments in the Petition
in Condemnation filed herein.

2. Petitioner requires possession of the tracts which are
the subject of this action immediately in order to construct the dust
levees as soon as possible now that winter weather has gone and con-
struction work can be done.

3. Petitioner has secured title to tracts 1 and 2 described
in the Petition and desires to dismiss this action as to Respondents
Curtis Chester Kirby, Rex Ebert Kirby, Martin V. Kirby and Elva V.
Kirby.

4. That Respondents John H. Holter and Alice L. Holter were
served by the Sheriff of Otero County with copies of the Summons and
Petition herein on November 8, 1978 and are in default herein for
failure to appear and defend.

5. This Petition is filed in accordance with the provisions
of 1973 C.R.S. 38-1-105(6)e and is entitled to preferential setting

under 1973 C.R.S. 38-1-119.

WHEREFORE, Petitioner prays that this Court determine the proper deposit to be made by Petitioner with the Court for the taking of immediate possession of parcels numbered 3, 4, 5, 6, 7, 8 and 9, and upon proper hearing, enter an Order of Immediate Possession authorizing Petitioner and its contractors, agents, servants and employees to enter into and, without interference or hindrance from Respondents, or either of them, or their successors, assigns, heirs, devisees, personal representatives, guests or invitees, or any person or persons claiming by, through and under said Respondents, or either of them, to take and retain possession of said tracts, together with the right to construct thereon the said dust levee.

Respectfully submitted,

PRESTON, ALTMAN & PARLAPIANO

By *Leo S. Altman*

Leo S. Altman
Registration No. 944
Attorneys for Petitioner
501 Thatcher Building
Pueblo, Colorado 81003
(303) 545-7325

km

APPENDIX "E"

1 IN THE DISTRICT COURT IN AND FOR THE
2 COUNTY OF KIOWA, STATE OF COLORADO
3 Civil Action No. 78CV17
4

5 MISSOURI PACIFIC RAILROAD)
6 COMPANY,)

7 Petitioner,)

8 Vs.)

9 CURTIS CHESTER KIRBY, et al,)

10 Defendants.)

REPORTER'S TRANSCRIPT

Examination and Cross-Examination
of:

JAMES M. STONE

11
12 Held before the HONORABLE ROBERT SANDERSON, Wednesday,
13 May 9, 1979, in the District Court of Eads, Colorado, Kiowa
14 County.
15

16 APPEARANCES
17

18 For the Petitioner:

Leo Altman
Attorney at Law
Thatcher Building
Pueblo, Colorado

21 For the Defendants:

22 Jack DiCola
Attorney at Law
23 110 East Oak
Lamar, Colorado
24
25
26
27
28
29

1 A Yes, sir, it is.

2 MR. DiCOLA: No objection, Your Honor, if he wishes to
3 offer this into evidence at this time.

4 MR. ALTMAN: I'd like to offer Exhibit 'B' into evidence.

5 THE COURT: Exhibit 'B' is admitted into evidence.

6 Q (By Mr. Altman:) Mr. Stone, I hand you what has been
7 marked Petitioner's Exhibit 'A' and ask you to state whether this
8 correctly shows the location of the Missouri Pacific Railroad
9 Company's right of way and the tracts of land for which condem-
10 nation is sought in this action?

11 A Yes, sir, it is.

12 Q And was this prepared by the Engineering Department in
13 your office?

14 A Yes, sir, it was.

15 Q Does that Exhibit 'A' show the outline of the tracts of
16 ground that are sought in this condemnation suit?

17 A Yes, sir, individually.

18 Q And also the owners of those tracts?

19 A Yes, sir.

20 Q I'd like to offer Exhibit 'A' in evidence.

21 THE COURT: Will you let Mr. DiCola examine it? He may
22 not have a copy of it.

23 MR. DiCOLA: May I inquire of the witness, Your Honor?

24 THE COURT: Yes.

25 VOIR DIRE

26 BY MR. DiCOLA:

27 Q Mr. Stone, is Petitioner's Exhibit 'A' drawn to scale?

28 A Yes, sir.

29 Q And does Petitioner's Exhibit 'A' show the location of

1 all crossings on the tracts, both private and public?

2 A I can't personally answer that, no. There may be some that
3 were placed in after the original map was made.

4 Q When was this map made, sir?

5 A Approximately a year and-a-half ago.

6 Q Does this map show all crossings both public and private
7 that were there a year and-a-half ago?

8 A Yes, sir, it should. That is, all authorized crossings.
9 There may be some illegal crossings in there, but all authorized
10 crossings.

11 Q Private and public crossings?

12 A Yes.

13 Q Show me on the exhibit how a crossing would be designated
14 if you would, please? For instance, I know there's one up here.

15 A Like right here there's a private crossing. It gives
16 an engineering change station but a designation that it is
17 private.

18 Q I see. I have no objection, Your Honor.

19 THE COURT: Exhibit 'A' is admitted into evidence. Mr.
20 Altman, you may resume your examination.

21
22 (Continuing direct examination)

23 BY MR. ALTMAN:

24 Q Would you describe to the Court the problem with the
25 Missouri Pacific right of way and track that gave rise to the
26 Missouri Pacific's seeking to condemn the land that is sought in
27 this case?

28 A Over a period of years starting approximately 20 to 25
29 years ago we have experienced ditch track and damage and train

1 delays due to land erosion which caused dust to come down and fill
2 existing fence lines probably contributed to in part by some
3 tumble weed filling the ditches and covering the track sometimes
4 to a depth of approximately a foot. This causes train delays
5 because we cannot operate trains through dust. Our locomotives
6 have traction motors on each wheel. These traction motors are
7 just like any electric motor. They're air cooled, and they
8 suck the dust up in the motors, and they become inoperative.
9 So, therefore, we can't operate through them. We did in recent
10 years, very recent years, we had two periods in 1975 and 1977
11 where we had experienced train delays. This caused us to have to
12 complete the levy system which we started approximately 20 to
13 25 years ago on land that we acquired from the land owners on a
14 voluntary basis. We have tried to keep it that way through the
15 years, and as we acquired land privately, we would build dust
16 levies. It has gotten to this point now where it's necessary to
17 complete them.

18 Q Now, is there or is this area which is depicted on Ex-
19 hibit '1' showing the tracts of land that the railroad wants to
20 condemn through this proceedings, is this an area in which there
21 is a dust problem?

22 A Very much so.

23 Q How recently has there been a severe dust problem in this
24 area?

25 A The last really severe one, I believe, was in 1977.

26 Q And how much dust and sand accumulated on the track
27 during that period?

28 MR. DiCOLA: To which I object. There is no proper
29 foundation that this man knows how much accumulated in these

1 various areas.

2 THE COURT: Objection overruled. You may answer, Mr.
3 Stone.

4 A To my personal knowledge, in '77 we had dust accumula-
5 tion which in some places covered the fence rows all the way to
6 the top strand of wire. The ditches were filled and the dust
7 completely covered the tracks.

8 Q (By Mr. Altman:) Was it necessary for the railroad to
9 take any action in order to remove this dust?

10 A Yes, sir.

11 Q And what does that actually consist of?

12 A Well, we have to send our forces out there and remove the
13 dust until we get it below the rail or below the top of the rail
14 in order that the wheels won't carry the dust into the air and be
15 sucked into the traction motors. Then we send what we call a
16 track clearer along at a later date and clean it down to the
17 top of the ties as a general rule.

18 Q Has your office or have you made any estimate of cost
19 of acquiring this additional land for dust levies and the time
20 within which any saving would pay for this cost?

21 A Yes, sir, we have made an estimate of cost, but it would
22 be a variable based on the actual cost of the land. And we have
23 estimated that the land acquired plus the construction of the
24 levy it would cost us approximately \$150,000. And our estimated
25 annual savings based on actual removals of dust and so forth,
26 we've estimated that \$29,900 a year which would allow us to re-
27 tire the original construction and the maintenance cost of the
28 levies within less than a ten-year period.

29 Q Has the railroad had any experience with other levies in

1 this general area as to their affect on the dust accumulations?

2 A Where the existing levy system is in affect, we find
3 that we have a minimum of dust accumulation since the way the
4 levies are constructed attempts to lift the dust and carry it
5 over the tracts rather than depositing it in the fence line and
6 in the ditches and on the tracks.

7 Q Is it necessary in order to construct these levies that
8 a 150 foot strip of land be acquired next to the railroad right
9 of way?

10 A Yes, sir.

11 Q And for how long a period of time did you say that the
12 Missouri Pacific has had dust levies in operation along the
13 trackage in Kiowa County?

14 A Some of them as far back as 20 years to my personal know-
15 ledge, but our files reflect approximately some of them go back to
16 25 years ago.

17 Q Now, does the railroad consider the construction and
18 operation of these levies as part of their basic operations for
19 the railroad?

20 A Yes.

21 MR. DiCOLA: To which I object, Your Honor, that's
22 leading.

23 THE COURT: Objection is overruled.

24 Q (By Mr. Altman:) Does the existence or nonexistence
25 of dust levies have any affect on the cost of maintenance of the
26 railroad?

27 A Yes, sir.

28 Q And what is that affect?

29 A Well, with the land erosion and nonexistence of dust

1 levies, of course, on a yearly basis, we have to come through and
2 remove the dust accumulation from the ditches and the tracks
3 which brings about a continuing annual cost.

4 Q So that the existence of the levies does diminish the
5 maintenance cost for the railroad?

6 A Yes, sir.

7 Q Does the existence or nonexistence of a dust levy have
8 any affect on the security of the railroad?

9 A Yes, from an operating standpoint it does.

10 Q And what would that affect be?

11 A Well, the security that we get from the dust levies is
12 that we would minimize delays due to track obstruction. It would
13 eliminate any possible derailment of trains due to trackage ob-
14 struction.

15 Q Now, are train delays of any expense to the railroad?

16 A Yes, sir. All cars foreign or domestic are paid for
17 on a per-time or per-day basis. And these per-times are based on
18 the values of the cars and they run as high as 70 or 80 dollars
19 a day per car.

20 Q Are the Missouri Pacific Railroad cars combined with any
21 other cars?

22 A Yes, sir.

23 Q Is this a constant condition?

24 A Yes, sir, otherwise you would not have through shipment
25 of commodities.

26 THE COURT: Mr. Altman, the Court would almost take
27 judicial notice of that fact. It's quite common and a well-known
28 factor for all railroads to use numerous cars along other lines
29 for necessity.

1 Q (By Mr. Altman:) And I believe you stated, did you not,
2 that the present right of way of the Missouri Pacific Railroad
3 Company is not sufficiently wide to accomodate a dust levy on the
4 existing right of way?

5 A That is right.

6 Q You may cross-examine.
7
8

9 CROSS-EXAMINATION

10 BY MR. DiCOLA:

11 Q Mr. Stone, which of the respondents in this case had
12 dust a foot deep on tracks adjacent to their property?

13 A I can't personally say which ones they are.

14 Q Were any of them?

15 A I would say some of them were approximately a foot deep.

16 Q Which one of these respondents?

17 A I have no idea. I don't know which ones owned a particu-
18 lar piece of land.

19 Q Which piece of land, which tracts of land had dust on it
20 a foot deep?

21 A There was one piece here east of Eads here which I can't
22 pinpoint myself.

23 Q You don't know specifically about any of these respon-
24 dents, do you, sir?

25 A I know that has to belong to one of the tracts that we
26 are condemning.

27 Q Which one is it?

28 A I have no idea.

29 Q You would have a record of it, but you don't know right

1 now?

2 A Yes, sir.

3 Q You're saying that the dust fills up the ditches, are
4 you not?

5 A Yes, sir.

6 Q In Mr. Buck's land the tract is elevated.

7 A You still have to provide drainage passed that point.

8 Q Do you know what type of crops Mr. Buck raises?

9 A No, I don't.

10 Q So do you know if it's wheat land or milo land or grass
11 land?

12 A No.

13 Q Are you aware, sir, that different types of land has
14 different types of blowing potentials?

15 A Yes.

16 Q And you would, of course, know that grassland that's
17 sodded to native grass, that wouldn't blow, would it?

18 A Some would, yes.

19 Q Which of these respondents has grassland, do you know,
20 sir?

21 A I can't answer that.

22 Q And which of these respondents has land that blows, do
23 you know that?

24 A No, I can't pinpoint the one.

25 Q There's one of them?

26 A Yes, I do know that it is within the land that's being
27 condemned.

28 Q But you don't know which one of these particular ones?

29 A No, I don't know which one owns it.

1 Q When was the last time prior to 1977 that the railroad
2 had a dust problem?

3 A 1975.

4 Q And when was the last time next to that?

5 A I can't pinpoint, but I think sometime around 1971.

6 Q Wouldn't it be the 1950's?

7 A No. They also had dust problems in the 60's.

8 Q So we have 1977 there was a problem, according to you
9 there was a problem; 1975, 1970?

10 A One.

11 Q When was the next year prior to that?

12 A I can't tell you offhand, -but I know it was the 60's.

13 Q One time in the 60's there was a problem?

14 A I don't know how many times in the 60's, I had no one
15 occasion, but I can't tell you the years.

16 Q How about the 50's?

17 A I can't tell you that.

18 Q Does the Missouri Pacific Railroad keep any records of
19 maintenance of these tracks which would include when the crew
20 cleaned the tracks off?

21 A Not specifically. They would just, say, that at a certain
22 point the crews were out there removing dust from the tracks and
23 the ditches.

24 Q And isn't it true that even where ever you have dust
25 dikes you need to clean the tracks off once in a while, don't
26 you?

27 A Like I said before, it would be minimum.

28 Q Well, once or twice a year I would think?

29 A No, I don't think so.

1 Q Well, now many times?

2 A Once in two years.

3 Q And has the Missouri Pacific Railroad Company had an
4 in-house study of the relative cost of the dust dikes as opposed
5 to cleaning the tracks?

6 A Yes.

7 Q And is that a written study?

8 A Yes.

9 Q And basically I think it was your testimony that it's
10 just cheaper to buy these dust dikes than to clean off the tracks;
11 is that right?

12 A Well, yes.

13 Q I want to understand something, do you have the same
14 problem with dusting tracks that are level to the ground as you
15 do with tracks that are elevated?

16 A I can't answer that specifically. It would depend on
17 velocity of the wind and how much dust it was carrying. And I
18 would say on an embankment it would probably be less than it would
19 on level ground or on depressed land.

20 Q Which of the respondents have elevated tracks adjacent
21 to their land.

22 A I can't answer that question.

23 Q Does the Missouri Pacific Railroad keep records of train
24 delays on these portions of--on the lands in question?

25 A Yes, sir.

26 Q And those are written records?

27 A They're on the train sheets.

28 Q When was the last time there was a delay because of any
29 dust problems on any of the respondents' land?

1 A I would say in 1977 to the best of my knowledge.

2 Q There was a delay, and you have a record of that?

3 A Yes.

4 Q When was the last time prior to that that there was a
5 delay because of dust on the tracks adjacent to any of the respon-
6 dents' land?

7 A To my personal knowledge it would have been in '75.

8 Q So you actually had a train stop because of dust adjacent
9 to their land?

10 A At one time in 1977 we had trains sitting out there about
11 a day and-a-half.

12 Q Because of dust on their land?

13 A I'm not specifically saying their land. I don't know
14 what land they own specifically.

15 Q Well--

16 A That's one of them if they are the owners. (Indicating.)

17 Q But you don't know which one?

18 A No.

19 Q Have you ever had a train derailment in Kiowa County be-
20 cause of dust on the tracks?

21 A I don't have any personal knowledge of that.

22 Q Now, the railroad has a number of other dust dikes in the
23 county, don't they?

24 A Yes.

25 Q Does the railroad maintain those levies at all?

26 A Yes, they do.

27 Q How do they maintain them?

28 A Through contract.

29 Q With who?

A I believe Slodder Construction, the company that put the

1 original dikes up.

2 Q By "maintain" I mean spray for weeds and spray for in-
3 sects. Is that what you mean by maintain?

4 A No, that would be Avco who we have a contract for weeds
5 and grass spray.

6 Q Now, this is the outfit that sprays right from the train,
7 isn't it?

8 A Yes.

9 Q And when they spray from the train, they certainly don't
10 reach these dust dikes that are 150 feet from the track, do they?

11 A I don't know.

12 Q And they certainly wouldn't reach the side of the dust
13 dikes away from the tracks?

14 A I doubt it.

15 Q And, correct me if I'm wrong, but these dust levies are
16 basically constructed by digging deep ditches and taking--
17 well, digging ditches or holes in the ground. The word deep may
18 have been argumentative. Digging deep ditches and scraping it all
19 up to make a levy in the middle?

20 A That's right.

21 Q Has the railroad done any sort of ecological or environ-
22 mental study of any effect this may have on neighboring cropland?

23 A I don't believe so. I wouldn't know how to answer that.
24 But I've noticed that any crops planted behind the levies are
25 very lush this year.

26 Q But you, of course, would know that that was just due to
27 good moisture of the spring, wouldn't you?

28 A Well, coming from a farm family I would say that the
29 dust levy while it would have probably no affects on lush crop
this year, wouldn't have any affect on having a poor crop this

1 year.

2 Q You're from a farm family. Isn't it true that in these
3 ditches weeds usually grow more profusely?

4 A No.

5 Q Isn't it true that grasshoppers and other insects tend
6 to thrive in these ditches?

7 A I haven't noticed it. My experience has been usually
8 that--

9 Q Just answer my question.

10 A Well--

11 Q I have nothing further, Your Honor.

12 THE COURT: Do you have any redirect examination, Mr.

13 Altman?

14 MR. ALTMAN: Only one question, Your Honor.

15 MR. DiCOLA: Excuse me, Your Honor, before he starts, I
16 assume that you're going to put the engineer on next, and I
17 assume that Mr. Stone wouldn't know how the crossings would be
18 handled, he would. Maybe I could ask him one more question to
19 determine that.

20 MR. ALTMAN: My question concerns crossings.

21 MR. DiCOLA: I'll let you ask him first.

22 Q (By Mr. Altman:) Mr. Stone, where dikes are constructed
23 are they ever constructed across a road crossing of the railroad's
24 track?

25 A No, sir. We leave openings for access to the land where
26 a crossing exists.

27 MR. ALTMAN: That's the only question I have.

28

29

APPENDIX "F"

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF KIOWA, STATE OF COLORADO

No. 78 CV 17

MISSOURI PACIFIC RAILROAD)
COMPANY,)

Petitioner,)

vs.)

CURTIS CHESTER KIRBY, et al.,)

Respondents.)

BRIEF AND ARGUMENT IN SUPPORT
OF AMENDED MOTION TO DISMISS
AND MOTION IN LIMINE

COME NOW the Respondents who submit their memorandum of law in support of the amended motion to Dismiss and Motion in Limine.

1. The right of eminent domain does not grant the railroad the right to take any property which it may deem desirable or profitable for the economic management of its business. The taking of the Respondents' land for dust dikes is not a taking for public use.

At Sec. 7.5211. Nichols on Eminent Domain a discussion is had of a railroad's power of eminent domain at page 7-272 it says:

"As already intimated, the mere fact that a railroad company is a public service corporation and entitled to exercise the power of eminent domain in acquiring the right of way for its tracks does not warrant the grant to such a company of the right of taking by eminent domain any property which it may deem desirable or convenient for the most economical management of its business. A common carrier serves both the public and itself. It has its public and its private functions. The public part is the exercise of its franchise for the accommodation of public travel; the private part is its incidental business, with which the public is not concerned, and which the company manages for its own interests. Whatever is necessary to the exercise of the franchise is for the benefit of the public, but that which pertains simply to its means of supply is the private business of the company."

The testimony at the possession hearing by railroad representatives indicated that the proposed construction of dust dikes is an economic decision. If the Court will recall, testimony was that the dust dikes would pay for themselves in a number of years because of the reduced cost of cleaning the tracks.

The Colorado Supreme Court in Tanner v. Treasury T. M. & R., Co., 35 Colo. 593, 83 Pac. 464, stated what appears to be the test in Colorado as to what is a public use. The Court said:

"Consequently we find, in examining the authorities, that, in determining whether or not a use is public, the physical conditions of the country, the needs of a community, the character of the benefit which a projected improvement may confer upon a locality, and the necessities for such improvement in the development of the resources of a state, are to be taken into consideration."

In the case at hand the testimony by the witnesses for the Respondents indicates that the construction of the dust dikes will be a detriment to the community and the country, an ecological disaster, an eyesore, a cattle killer, an insect propagator and a weed grower.

The railroad has taken the position that the dust dikes will benefit the public by making the operation of the railroad more economical. At 26 Am. Jur. 2d Eminent Domain Sec 28, it is stated:

"Many courts have pointed out that almost any legitimate business enterprise, indirectly to some extent, may be regarded as of benefit to the public, and that an indefinite field is opened up when the doctrine is accepted that public benefit alone is sufficient to make the use a public one, warranting the exercise of the power of eminent domain. . . In Chesapeake Stone Co. v Moreland, 126 Ky 656, 104 SW 762, the court pointed out that if public use were construed to mean that the public would be benefited in the sense that the enterprise or improvement for the use of which the property was taken might contribute to the comfort or convenience of the public, or a portion thereof, or be esteemed necessary for their enjoyment, there would be absolutely

no limit to the right to take private property; that it would not be difficult to show that a factory, hotel, etc., the erection of which was contemplated, would result in benefit to the public; and that, under this power, the property of the citizen would never be safe from an invasion.

At 26 Am. Jur. 2d Eminent Domain Sec 33, it is stated

"It is a well-settled general principle that incidental benefits accruing to the public are not sufficient to make the purpose of an improvement or enterprise a public one. Thus, where the chief, dominating purpose or use is private, the mere fact that a public use or benefit is also incidentally derived will not warrant the exercise of eminent domain. The property of an individual cannot, without his consent, be so devoted to the private use of another. The controlling question is whether the paramount reason for the taking of the land to which objection is made is the public interest, to which benefits to private interests are merely incidental, or whether, on the other hand, the private interests are paramount and controlling and the public interests merely incidental. Thus, depending on the facts, a sidetrack or spur track from a railroad has in some cases been held to constitute a public use, and in others, a private undertaking not justifying the exercise of the power.

In Kinney et al. v. Citizens' Water & Light Co. of Greenwood, Ind., 90 N.E. 129, the Indiana Supreme Court in a discussion as to whether or not a spur track to an electric company constituted a public use stated, in language particularly apt in the case at hand:

Appellee's complaint, in terms, alleges that the proposed appropriation and side-track extension are necessary to the conduct of its business; but the allegation of such necessity is manifestly a mere conclusion of the pleader. It appears from the averments of the complaint that appellee is now operating its plant and engaged in furnishing Greenwood and its inhabitants with water, electric light, and other conveniences, and in the conduct of its business transports fuel and other supplies from the railroad to its plant by means of teams and wagons. Appellee voluntarily chose the location for the power plant, and, if a railroad side-track connection were indispensable or absolutely necessary to its operation,

we cannot conceive that the existing site would have been selected. The facts pleaded show only that the desired track extension would afford appellee a prudent, economical, and convenient facility in connection with the carrying on of its business, which would enable it either to make greater profits, or to serve its patrons at lower rates. If the statute authorized appellee to appropriate a right of way for the specific purpose declared in the complaint, the question of necessity would have been settled by the legislative grant; but here the authority delegated is to take only such rights of way as are necessary for the business. The way may not be necessary in the sense that it must be absolutely and imperatively indispensable to a continuance of the business; but, assuming that a way such as that sought to be taken by appellee was within the legislative intent, its use must be made to appear at least reasonably necessary to the performance of the charter powers and public obligations of the corporation. No such necessity is here shown." (Citations omitted)

2. The land sought to be taken is outside the railroad's statutory authority.

The Respondents have pointed out to the Court that C.R.S. 1973, 40-20-102 provides for a two hundred foot right of way, plus whatever is necessary for the purpose of cuttings and embankments. In the case at hand the railroad seeks to condemn land outside of its two hundred foot right of way. There is no pleading or contention that the land to be taken is for the purpose of cuttings or embankments. In Northern P. R. Co. v Smith, 171 US 260, 43 L Ed 157, 18 S Ct 794, the United States Supreme Court held that where a right of way was granted to a railroad there was a presumption that that was the amount of land needed by the railroad and it was not competent for a Court to determine that the railroad needed less land. The other side of the coin should apply in this case. The Court should not make a decision granting the railroad greater powers than are set forth in the statute.

None of the cases cited by a petitioner are the least bit comparable to the case at hand.

3. The railroad has not received a determination by the Public Utilities Commission of the State of Colorado that said dust dikes are necessary.

This Court lacks jurisdiction of the subject matter herein until the railroad applies to the Public Utilities Commission for permission to condemn the land sought and construct the dust dikes. At C.R.S. 1973, 40-4-106, it is said:

"40-4-106. Power to make rules to promote public safety. (1) The commission shall have power, after hearing on its own motion or upon complaint, to make general or special orders, rules, or regulations or otherwise to require each public utility to maintain and operate its lines, plant, system, equipment, electrical wires, apparatus, tracks, and premises in such manner as to promote and safeguard the health and safety of its employees, passengers, customers, subscribers, and the public and to require the performance of any other act which the health or safety of its employees, passengers, customers, subscribers, or the public may demand."

The Colorado Supreme Court in Colorado and Southern Railway Company, Inc., et al. vs. The District Court in and for the Tenth Judicial District of the State of Colorado, et al., 1977 Colo. 162, has held in construing a portion of the same statute:

"(3) Section 50-1-2, supra, provides in effect that a railroad may go to court to acquire property "required" by it. However, the Public Utilities Commission under section 115-4-6(2) (a), has the power to determine what property the condemning railroad can use as the "particular point of crossing." It follows logically then that the commission - not the railroad - determines what property the railroad requires."

In the case at hand, the railroad has not plead any findings by the Public Utilities Commission. Although it is Respondent's position that the Colorado and Southern Railroad Company, Inc., case (supra) applies equally to both sections of the statute, in the case at hand numerous crossings will be affected by the dust dikes and Section (2) (a) (b) and (3) all will come into play upon the construction of the dikes.

The representative of the railroad testified that the dust dikes would come right up to the roads leaving enough room for farm equipment to pass. In such a case all the crossings would be affected. All the crossings will be blind crossings and ultrahazardous to the people of the community and the Respondents. The Court should refer the matter to the Public Utilities Commission for finding as to what signalization should be done to all the effective crossings prior to the dikes being constructed.

The Respondents request oral argument before the Court prior to the Court's decision on all points raised in both briefs.

WHEREFORE, the Respondents pray that Petitioner's complaint be dismissed.

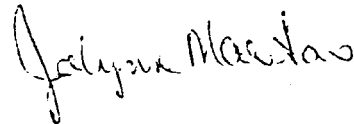
JOHNSON, McLACHLAN & DiCOLA

By 

ANTHONY J. DiCOLA, No. 5598
Attorney for the Respondents
110 East Oak - P.O. Box 1298
Lamar, Colorado 81052
336-7772

CERTIFICATE OF MAILING

I do hereby certify that I have this 15th day of June, 1979, mailed a true and correct copy of the above and foregoing Brief and Argument in Support of Amended Motion to Dismiss and Motion in Limine, postage prepaid, to Mr. Leo S. Altman, Attorney at Law, 501 Thatcher Building, Pueblo, Colorado 81003.



APPENDIX "G"

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF KIOWA
AND STATE OF COLORADO

No. 78 CV 17

MISSOURI PACIFIC RAILROAD)	
COMPANY,)	
)	
Petitioner,)	BRIEF AND ARGUMENT IN
)	OPPOSITION TO AMENDED
vs.)	MOTION TO DISMISS AND
)	<u>MOTION IN LIMINE</u>
CURTIS CHESTER KIRBY, et al.)	
)	
Respondents.)	

Respondents represented by Mr. Anthony J. DiCola in their Amended Motion to Dismiss and Motion in Limine and in Mr. DiCola's statement to the Court in Chambers present 4 issues to be decided. Respondents make the following contentions:

1. Article II, Section 15 of the Colorado Constitution provides that the Judge decides whether this is a public use. Their contention is that the taking is for private use by the Railroad.
2. A determination must be made as to the necessity for dust dikes.
3. The Colorado Statutes do not authorize the Railroad to take land outside the Statutory 200 foot right-of-way.
4. The Railroad has not received a determination by the Public Utilities Commission that the dust dikes are reasonably necessary and that the dikes are outside the 200 foot right-of-way and affect crossings.

For the purposes of determining these questions, the Court has the benefit of the testimony produced at the May 9, 1979 hearing

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RECORD TO THEIR ADDRESSES
ON 5-23-79 Karoly M. Phelps

for immediate possession and the allegations in the Petition for Condemnation which must be taken as true just as in the old practice under demurrer.

I will discuss these contentions in the order that they are stated above.

Petitioner submits that Respondents are not entitled to dismissal of the action on any of the 4 grounds.

FIRST CONTENTION

1. Article II, Section 15 of the Colorado Constitution provides that "private property shall not be taken or damaged for public or private use without just compensation", and that "the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public".

Here the use sought for dust dikes is solely for the improvement of the safety and efficiency of the operation of the Railroad and for better maintenance of track and rolling stock, and for no other purpose. The operation of the trains of the Railroad Company is a recognized public use governed by both the Interstate Commerce Commission and the Colorado Public Utilities Commission as to many of its activities.

Petitioner is a railroad operating as a common carrier. The tracks to be protected by the dust levee are the tracks of the main line of the Railroad and used by Petitioner in its business and operation as a common carrier.

Larson et al. v. Chase Pipe Line et al., 183 Colo. 76,

514 P.2d 1316 (1973) presented a similar problem as to whether a 50 foot right-of-way sought to be condemned by the Pipe Line Company was a public use. The Court held it to be a public use stating on pages 79 and 80 that the Pipe Line was operated under the jurisdiction of the Interstate Commerce Commission and therefore its operation as a common carrier was mandatory under Federal Law since the Pipe Line operated as a common carrier.

The operation of a common carrier such as Missouri Pacific Railroad Company has always been recognized as a public use, just as the operation of any other public utility.

Respondents cite Sec. 7.5211, Nichols on Eminent Domain for the proposition that the right of eminent domain does not grant the Railroad the right to take any property which has been deemed desirable or profitable for the economic management of its business, citing language from page 7-272 of that treatise.

The cases cited for the quoted language are In re Rhode Island Suburban Ry. Co. (R.I. 1905) 48 A. 590, which holds that the Court, not the Legislature, determines whether the purpose of taking is public or private. The Court further found that the Company was chartered as a servant of the public and may therefore have need of land for the exercise of its franchise--"an unquestionable public use". The Court distinguished cases where the taking was for private and individual benefit.

Another case cited for the quoted language is Chicago Great Western Ry. Co. v. Edward Jesse et al. (Minn. 1957) 82 N.W.2d 227 where the railroad was condemning a right-of-way for a 7 1/2 mile circular spur track or belt line to serve two industries. The defendants contended this was not a public use.

The Court stated at page 231 "a common carrier serves both the public and itself. It has its public and its private functions. The public part is the exercise of its franchise for the accommodation of public travel, and whatever is necessary to the exercise of the franchise is for the benefit of the public. 2 Nichols on Eminent Domain (3rd Ed.) Sec. 7.5211".

Then after discussing the necessity to take the property, "thus it must be said that use of a track serving industry is a public use, although not of precisely the same quality as that which pertains to an extension of the main line of a railroad" citing cases. And further at page 232, "there is no evidence in the record tending to show that the proposed belt line will be used for any purpose other than that for which a spur or industrial track is generally used".

Similarly here, the only use of the dust dike or levee is to protect the main line of the railroad and to improve its performance, safety and maintenance.

The rest of Sec. 7.5211, Nichols on Eminent Domain is as follows:

"The right of a railroad company to take land by eminent domain is not, however, confined to its right-of-way or the location of its tracks. Land may be taken for purposes incidental to the construction of a safe roadbed, such as for draining or supporting a cut or embankment, or for diverting a stream so as to obviate the necessity of a bridge, or for raising a highway so it will not cross the tracks at grade. After the railroad has been constructed, land may be taken for additional main tracks, if needed for expeditious public travel. A railroad may also take such land as may be required

to furnish accommodations for receiving, landing or delivering passengers and all classes of freight, such as passenger stations, freight depots, sidings, stock pens and similar structures actually used for the accommodation of the public * * * ".

Sec. 7.52 of Nichols at page 7-248.20 in discussing the fact that the right of eminent domain is granted by the Legislature to public service companies and that such corporations might have power to engage in private business, states that this fact (right to engage a private business) does not deprive it of the right of eminent domain when condemning property for public use.

"The nature of the use and not the character of the party exercising the power is the test * * *. The question is in each case whether the use for which the property is sought to be taken is public or private".

Nichols then cites Ulmer et al. v. Lime R. Co. (Me. 1904) 57 A. 1001, where the railroad sought to condemn a right-of-way for a branch from its main line to a quarry. The defense was that this was not a public purpose but for the private purposes of the railroad.

The Court stated at page 1003 that it is, of course, conceded that the ordinary purposes for which a railroad is constructed and operated--the transportation of freight or passengers--are essentially public in their nature and of great public convenience and necessity and "that the purposes of this particular railroad, so far at least of its main lines are concerned, are public, and therefore the corporation was properly invested with the right of eminent domain".

The Court then discussed whether building of the spur was a private or public purpose, stating at page 1004 that the tests are:

"If the track is to be open to the public, to be used upon equal terms by all who may at any time have occasion to use it, so that all persons who have access to do so can demand that they be served without discrimination, not merely by permission but as of right, and if the track is subject to governmental control, under general laws, as are the main lines of a railroad, then the use is a public one * * *".

The Court then cites and analyzes many cases supporting this rule.

This makes it eminently clear that the use of the dust levee by Missouri Pacific Railroad Company as an aid of reducing maintenance costs, improving the operation of the railroad and adding to the safety of the operation of the main line of the railroad is a public and not a private function or use.

Some of the cases holding that the purpose was not public and that the railroad cannot condemn include building housing for employees, constructing factories, constructing warehouses and taking property for speculation or sale or for flower gardens and parks. 29A C.J. S. 279 Eminent Domain Sec. 38b.

I found no case indicating that an aid to safer, cheaper and more efficient operation of the main track of the railroad is a private use. On the contrary, any such device or procedure must be a public use since it improves the basic operation of the railroad.

SECOND CONTENTION

2. A determination must be made as to the necessity for dust dikes.

As counsel for the Respondents stated to the Court in Chambers, "quite truthfully, there's a lot of law that the Court can

only in some instances determine the necessity; and I think that's a matter of briefs".

Calling the Court's attention to the Colorado Statutes involved, they are as follows in 1973 C.R.S.:

"38-2-101. Who may condemn. If any corporation formed for the purpose of constructing a * * * railroad line * * * is unable to agree with the owner for the purchase of any real estate or right-of-way or easement or other right necessary or required for the purpose of any such corporation for transacting its business or for any lawful purpose connected with the operations of the company, such corporation may acquire title to such real estate or right-of-way or easement or other right in the manner provided by law for the condemnation of real estate or right-of-way". (Emphasis added).

"38-1-102. In all cases where the right to take private property for public or private use without the owner's consent or the right to construct or maintain any railroad, spur or sidetrack, * * * or other public or private work or improvement * * * is conferred by general laws or special charter upon any corporate or municipal authority, public body * * * or corporation and the compensation to be paid * * * cannot be agreed upon", a condemnation suit may be filed.

The Legislature by these statutes has determined the necessity for taking by eminent domain for the purposes stated which have been underlined above.

Again citing Nichols on Eminent Domain page 4-138 Sec. 4.11; "The overwhelming weight of authority makes it clear beyond any possibility of doubt that the question of the necessity or expediency of

a taking in eminent domain lies within the discretion of the Legislature and is not a proper subject of judicial review".

The most recent of the many Colorado cases supporting this rule are:

City of Thornton v. The Farmers Reservoir and Irrigation Co. (1978) 575 P.2d 382, 389, "The determination of necessity is an essential part of the power of eminent domain, and once necessity is determined by legislative act, no further finding or adjudication is required". * * * "The determination of necessity by Thornton was not reviewable by the judiciary absent a showing of fraud or bad faith".

Prior to the 1961 amendment, 1961 S.L. page 371, which enacted our present 1973 C.R.S. 38-1-101, the question of necessity was determined by a board of commissioners, and whether the use was public or private was determined then, as now, by the Court.

In another case to the same affect, Colorado State Board of Land Commissioners v. The District Court, 163 Colo. 338, 430P.2d 617 (1967), on the question of the right of respondents in a condemnation suit to have a hearing on the necessity of the taking, the Court said at page 619 "it is well settled law that in the absence of fraud or bad faith, the determination of a public agency as to the need, necessity and location of highways or other public improvements, is final and conclusive and will not be disturbed by the Court" (citing cases).

Against the possible contention that this applies only to cities and the State Highway Department is the case of Arizona-Colo- rado Land and Cattle Company v. The District Court et al. 182 Colo. 44, 511 P.2d 23 (1973) holding as to the location of electric transmission lines of Public Service Company of Colorado which went through

the middle of a proposed small town development, after citing the above case, at page 47, "as the Trial Court inferred, a determination as to the location of a public improvement can be disturbed by the Courts if there is fraud or bad faith by the corporation seeking to condemn".

There is no pleading nor evidence of fraud or bad faith by Missouri Pacific Railroad Company.

The Legislature in 1973 C.R.S. 38-2-101 granting the railroad company the right of eminent domain and setting the procedure in 1973 C.R.S. 38-1-102 determined the necessity for taking for "right-of-way, easement or other rights necessary or required for the purpose of any such corporation for transacting its business or for any lawful purpose connected with the operations of the company" (38-2-101).

Since the Legislature has determined the necessity for the taking of this easement or real property for a lawful purpose connected with the operations of the company, the Court has no power to rule on the matter of necessity.

THIRD CONTENTION

3. The Colorado Statutes do not authorize the railroad to take land outside the Statutory 200 foot right-of-way. oad

The Colorado Statute quoted by Respondents, 1973 C.R.S. 40-20-102, grants powers to railroad corporations including the power to secure a 200 foot right-of-way plus extra land needed for cuttings and embankments.

The easement sought for the dust levee goes beyond the 200 foot width.

The same statute authorizes the railroad corporation to erect and maintain buildings, etc. needed for the construction or

operation of the railroad and certain other powers (40-20-102(e)).

The Colorado Statute was adopted in 1877 as G.L. Sec. 301. The language is the same as the Illinois Act which was adopted in 1872 and is now Smith-Hurd Ann. Stat. Ch. 114 Sec. 20-Fourth. The Illinois Statute provides for a 100 foot right-of-way.

The Illinois Court has construed this Statute in Carmody v. Chicago and Alton R. Co. (1884) 111 Ill. 69 where the Court held that a charter provision limiting the railroad to a 100 foot right-of-way did not prohibit the railroad from acquiring additional land for sidetracks, etc., stating "that section (100 foot limitation) has reference to the right-of-way for a single or double track, and certainly did not forbid the company to acquire more lands for depot grounds and sidetracks at stations".

In Toledo P. and W. R. R. v. Brown et al. (Ill. 1940) 31 N.E.2d 767 the Court quoted the Statute together with the above case. The Illinois Statute also provides that the railroad may purchase, hold and use all such real estate and other property as may be necessary for the construction and use of the railway, which language is similar to the language in the Colorado Statute on condemnation, 38-2-101 supra, giving the right to condemn for these purposes.

While the case is one for specific performance of a real estate contract, the following language is pertinent and informative from page 770:

"It will be noted that the two clauses set out in this statute provide, in one instance, for the purchase of real estate, and in the other, for the taking of real estate, and the first subdivision contemplates that real estate may be purchased for the

construction of the railway and for the use of the railway. In Carmody v. Chicago & Alton R. Co., 111 Ill. 69, it was held that the charter for a railroad did not limit its right to acquire land to a strip 100 feet in width, and did not forbid the railroad company from acquiring lands for depot grounds, sidetracks and stations. In Chicago, Burlington & Quincy Railroad Co. v. Wilson, 17 Ill. 123, the Court said: 'We cannot suppose that it was the intention of the legislature to oblige the company to acquire all the land, in the first instance, which, in any event, it should ever want, to do the largest amount of business it may ever hope to attain'. The method by which land may be acquired by a railroad is not limited but may be by 'purchase', or 'taking'.

(Ill.Rev.Stat.1939, chap. 114, par. 20, supra.) The acquisition of land by railroads is limited to the purposes necessary to accomplish the object of their incorporation, and constitute such a variety of uses as change in circumstances may bring about; it depends upon the facts in each case, but, if reasonably necessary, is generally upheld. Marsh v. Fairbury, Pontiac & Northwestern Railway Co., 64 Ill. 414, 16 Am.Rep. 564; Chicago & Northwestern Railway Co. v. Mechanics' Institute, 239 Ill. 197, 87 N.E. 933; Dickman v. Madison County Light Co. 304 Ill. 470, 136 N.E. 790.

"Indeed the language of the statute authorizes the purchase of real estate necessary for the construction of a railroad and necessary for the use of the railroad. It seems clear that the legislature contemplated that land might be necessary upon which a railroad was not actually constructed, but which would be necessary for its use, and expressly permitted it to be acquired by purchase".

This same reasoning applies here. The dust levees are reasonably necessary for the safe and economical operation of the railroad--a public use and clearly within the Colorado Statutory language (38-2-101 supra) "required for the purpose of any said corporation for transacting its business or for any lawful purpose connected with the operations of the company".

While the language in 40-20-102 has not changed over the years, Colorado has enlarged slightly the authority to condemn contained in 38-2-101 by adding to the original Statute passed in 1877, authority to condemn an easement. The addition was made in the amendment passed in 1891 and has remained unchanged as to authority to the present time. There have been other amendments which rearrange the sequence of words but which did not change the basic authority.

This additional authority to condemn easements clearly shows the legislative intent to authorize the railroad to condemn not only right-of-way--limited by 40-20-102 to 200 feet--but also, "such real estate * * * or easement or other right" in the same way that it could condemn right-of-way.

Also see Nichols on Eminent Domain 7.5211 supra.

Right-of-way, according to the Utah Court in Rio Grande Western Ry. Co. v. Salt Lake Investment Co. (Utah 1909) 101 P. 586, 589, ordinarily means "a strip of ground used or occupied by the railroad company for its track and matters directly connected therewith * * *".

"While additions may no doubt be made to the strip, such additions would not be integral parts of the right-of-way, but would be treated just as appellant's employees treated the parcel in question,

as additional parcels of land claimed by the company. When, therefore, reference is made to the right-of-way, merely, it should be limited to the right-of-way as originally taken, and not to additional parcels of land subsequently added. This, it seems, is what the courts mean when they refer to and attempted to find a right-of-way". (Emphasis added).

In Bubenzer v. Philadelphia B & W R. Co. (Del. 1905) 61 A.270, the question presented was whether the railroad could go beyond the statutory 66 foot right-of-way limit in widening the right-of-way.

Sec. 82 of the Pennsylvania Act provided that the railroad company could straighten, widen and improve the whole or portions of its line of railroad in such manner and to such extent as its board of directors may determine, and gave it the right of eminent domain. Sec. 82 also provided that "the railroad constructed under the provisions of this act shall not exceed 66 feet in width" except for cuts and embankments. The widening of the line was within the legitimate needs of the railroad.

The Court then held at page 276, "the grant of power to widen 'to such extent as its board of directors may determine upon' is as explicit a grant of power to exceed those limits as could be asked or desired. No cases presented for construction. The language in the connection is too plain and unambiguous".

Under a statute granting the railroad the power to condemn or purchase lands, timber or other materials to be used in the construction and maintenance of its road, and all necessary appendages and adjuncts plus language similar to 40-20-102(e) supra (emphasis added), the Idaho Court in Burlington Northern, Inc. v. Finneman (Idaho 1975) 530 P.2d 940, held that this authorized condemning land for classification yards.

The Court stated at page 942, "the power of eminent domain, where clearly granted, must be capable of adapting to changing times. While the present expanded classification yard is a concept of relatively recent vintage, this Court holds that under the circumstances of this case, it is an adjunct or appendage necessary for the accommodation and use of Burlington Northern's operation. Accordingly we conclude that the Respondent had the authority to exercise the power of eminent domain pursuant to I.C. 62-104(7) and (9)".

How much clearer is Colorado's Statutory authority for condemnation of easement or other right necessary for the transacting of the company's business or for any lawful purpose connected with the operations of the company.

The dust levee to improve safety and operations and to reduce maintenance costs is as essential as depot grounds, sidetracks, stations, or widening the right-of-way and certainly necessary for the transacting of the company's business.

FOURTH CONTENTION

4. The railroad has not received a determination by the Public Utilities Commission that the dust dikes are reasonably necessary, which is required since the dikes affect a number of crossings and are for safety purposes and are outside the 200 foot statutory right-of-way.

1973 C.R.S. 40-4-106(1) cited by Respondents is permissive and not mandatory. The Public Utilities Commission on its own motion or on complaint may make, but is not compelled to make orders, rules, etc. This it has done where appropriate, but no rule nor order requires the railroad to apply to the Commission for permission to construct dust

levees. These levees, according to the testimony of Mr. Stone, have been built since sometime in the 1960's and no involvement of the Commission has been had or needed.

Similarly, no order or permission of the Commission is needed to replace worn track, put out slow orders on train operations from time to time, clean the ballast or similar safety, maintenance or operating procedures.

However, subsection (2) (a) of 40-4-106 construed in Colorado and Southern Ry. Co., Inc. v. The District Court 177 Colo. 162, 439 P.2d 657 (1972) is mandatory because of the language giving the Commission power to determine "the particular point of crossing at which the tracks or other facilities of any public utility may be constructed across the tracks or other facilities of any other public utility * * * or at which the tracks or other facilities of any railroad corporation may be constructed across the tracks or other facilities of any other railroad corporation or across any public highway * * *". This language mandates that the Commission determine, order and prescribe these points of crossing based on plans and specifications to be approved by the Commission. This section together with (2) (a) and (3) of 40-4-106 gives the Commission jurisdiction over crossings and the safety protection devices to be used and whether there should be grade separation.

No such matters are involved in the construction of dust levees. No levee is to be built across any road (testimony of Mr. Stone) and no crossing of any railroad or other public utility is involved.

Hence no permission from the Commission is required.

But even if the Court is of the opinion that the Public Utilities Commission has some jurisdiction as to the construction of dust

levees, action by the Commission is not a condition precedent to the condemnation action.

1971 C.R.S. 40-5-101 requires a public utility to get a certificate of public convenience and necessity before beginning construction of a new facility, plant or system or any extension of a facility, plant or system. This is mandatory. However in Miller v. Public Service Company of Colorado, 129 Colo. 513, 272 P.2d 283 (1954) the Court said, page 517:

"On the question of it being necessary to first obtain a certificate of public convenience and necessity before seeking condemnation, the statute apparently relied upon, section 36, chapter 137, '35 C.S.A., does not contain such requirement. The pertinent part of the statute is, 'No public utility shall henceforth begin the construction of a new facility, plant or system, or of any extension of its facility, plant or system, without first having obtained from the Commission a certificate * * *'. (Emphasis supplied). Thus it appears that such certificate is not necessary for the purposes of condemnation and relates solely to the question of use after the property has been acquired by condemnation. It is difficult to conceive how the utility could logically proceed in obtaining the certificate of convenience and necessity as to the particular land or property involved before it had acquired the right to use the land or obtained title thereto by condemnation. The so-called certificate is only a permit or license to use and enjoy land that has been condemned; it is not a condition precedent to the right to condemn; and has no relationship whatever with the matter of condemnation. This being true, such an allegation of which complaint is made, here, is not necessary".

Sec. 36 chapter 137 1935 C.S.A. is now 1973 C.R.S. 40-5-101.

Contrary to Respondents' contention that Commission approval is a prerequisite to the condemnation action, the very language of the statute limits the requirement of a certificate from the Commission to those cases in which the utility contemplates the construction of a new facility, plant or system or extension thereto. The construction of dust dikes does not fall into that classification since it is simply an aid in maintenance, safety and operation and does not constitute any extension of the plant, facility or system nor any new plant, facility nor system. But even if Commission approval or determination were necessary, under the Miller case such approval would be secured after condemnation and not before.

Petitioner submits that Respondents' Amended Motion to Dismiss and Motion in Limine should be denied for the reasons set forth herein.

Since Respondents cited very little authority in their memorandum in support of their motion and are likely to be much more verbose in any reply brief filed herein, Petitioner respectfully requests permission to present oral argument to the Court either at Lamar or Eads after all briefs have been filed.

Respectfully submitted,

PRESTON, ALTMAN & PARLAPIANO

By



Leo S. Altman
Registration No. 944
Attorneys for Petitioner
501 Thatcher Building
Pueblo, Colorado 81003
(303) 545-7325

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APPENDIX "H"

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF KIOWA, STATE OF COLORADO

Civil Action No. 78CV17

MISSOURI PACIFIC RAILROAD)
COMPANY,)

Petitioner,)

vs.)

CURTIS CHESTER KIRBY,)
et al,)

Respondents.)

ORDER DENYING MOTION
TO DISMISS AND MOTION
IN LIMINE

DATE OF HEARING: May 9, 1979

PURPOSE OF HEARING: Motion to Dismiss or in the Alternative
Motion In Limine

APPEARANCES: Leo S. Altman, Attorney for Petitioner
Anthony J. DiCola, Attorney for Respondents

The undersigned having read briefs of counsel and
being fully advised in the premises:

THE COURT FINDS, CONCLUDES AND ORDERS as follows:

1. A railroad company is a common carrier in
the business of transporting passengers and freight. There-
fore a condemnation action for the construction of dust
dikes is primarily for the efficiency of its operations
and is for a public use rather than for a private purpose.

2. The construction of dust dikes is reasonably
necessary for the safe and efficient management of the
railroad which can not be constructed on the existing rail-
road right-of-way, therefore there is a necessity for the
condemnation of the land.

3. The condemnation of land for necessary purposes
other than the statutory right-of-way is not prohibited by
law.

4. It is not necessary to obtain a determination

by the Colorado Public Utilities Commission that dust dikes are necessary and affect crossings in order to maintain this condemnation action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' Motion to Dismiss or in the Alternative Motion in Limine be and hereby is dismissed.

DONE BY THE COURT this 23rd day of July, 1979.


DISTRICT JUDGE

cc: Leo S. Altman, Esq.
Anthony J. DiCola, Esq.

APPENDIX "I"

APPENDIX "J"

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF KIOWA, STATE OF COLORADO

Civil Action No. 78CV17

Filed In The District Court
Kiowa County, Colorado

Date Aug 28, 1979

Clerk of the District Court

By: Peretta J. Seibel

MISSOURI PACIFIC RAILROAD)
COMPANY,)

Petitioner,)

vs.)

CLYDE E. BUCK and ELSIE BUCK,)

TRUSTEES OF CLYDE E. BUCK)

TRUST, ETHEL M. HIGHTOWER,)

ERNESTINE HIGHTOWER SANDERS,)

GERALDINE HIGHTOWER DUNLAP)

BARBARA ANNE LEWIS and JANE LAW-)

RENCE EBERHARDT, as CO-TRUSTEES OF)

THE BERTH LEE PYLES TRUST,)

BARBARA ANNE LEWIS, JANE)

LAWRENCE EBERHARDT, MERWIN)

DUNLAP, GERALDINE DUNLAP,)

V. KELLY LINDHOLM, EUNCIE B.)

LINDHOLM, and THE LINDHOLM)

FAMILY AND RANCH, LTD., A)

Corporation,)

Respondents.)

STIPULATION
AND
ORDER

This Stipulation entered into this 27th day of August, 1979,

by and between Missouri Pacific Railroad Company by and through their attorney Leo S. Altman and the above-named Respondents by and through their attorney Anthony J. DiCola;

1. On or about the 23rd day of July, 1979, the District Court in and for the County of Kiowa, State of Colorado denied the above-named Respondents' Motion In Limine and Motion To Dismiss Missouri Pacific Railroad Company's Eminent Domain proceeding.

2. On the 2nd day of August, 1979, said District Court Ordered that the Railroad have immediate possession of the subject property upon payment of various deposits.

3. Respondents, above named, have obtained various stay of the Possession Order pending an application under Rule 21 of the Colorado Appellate Rules for Writ in the nature of Certiorari to the Supreme Court.

4. The attorney for Missouri Pacific Railroad Company has requested

that the Respondents take no action in the Supreme Court until after September 15, 1979, because he will be out of state until that time and will not be able to respond to any pleadings, if necessary.

5. The Respondents agree not to file in the Supreme Court until that date.

6. Missouri Pacific Railroad Company by and through its attorney stipulates that the Order For Immediate Possession be stayed until such time as the Supreme Court has acted on the Petition.

7. Missouri Pacific Railroad Company by and through its attorney further agrees that the Respondents shall not be guilty of laches or be untimely pursuant to any Rule of Court by delaying the said Petition until September 15, 1979.

Leo S. Altman

Leo S. Altman, No. 000944
Attorney for the Petitioner
501 Thatcher Bldg.
Pueblo, CO. 81003
545-7325

Anthony J. DiCola

Anthony J. DiCola, No. 5598
Attorney for the Respondents
110 East Oak - Drawer 1298
Lamar, CO. 81052
336-7772

APPROVED

~~DO NOT~~ THIS 28th DAY OF August, 1979, BY THE COURT.

Robert Anderson
JUDGE

DISTRICT COURT

Kiowa County, Colorado

Date Sept. 17 1979
Certified to be a true and correct
copy of the original in my custody.
Clerk of the District Court

Seal
Scott A. Seibel
Clerk