

In the  
**Supreme Court of the United States**

ALAMO LAND & CATTLE CO., INC.,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

No. 74-125

Washington, D.  
October 14, 1975  
and  
October 15, 1975

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## IN THE SUPREME COURT OF THE UNITED STATES

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 ALAMO LAND & CATTLE CO., INC., :  
 :  
 Petitioner, :  
 v. : No. 74-125  
 :  
 STATE OF ARIZONA, :  
 :  
 Respondent. :  
 :  
 -----X

Washington, D. C.

Tuesday, October 14, 1975

The above-entitled matter came on for argument at  
 2:48 p.m.

## BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
 WILLIAM O. DOUGLAS, Associate Justice  
 WILLIAM J. BRENNAN, JR., Associate Justice  
 POTTER STEWART, Associate Justice  
 BYRON R. WHITE, Associate Justice  
 THURGOOD MARSHALL, Associate Justice  
 HARRY A. BLACKMUN, Associate Justice  
 LEWIS F. POWELL, JR., Associate Justice  
 WILLIAM H. REHNQUIST, Associate Justice

## APPEARANCES:

J. GORDON COOK, ESQ., Ten Hundred Luhrs Building,  
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 for the petitioner.

PETER C. GULLATO, ESQ., Assistant Attorney General,  
 State Capitol, Phoenix, Arizona 85007, for the  
 respondent.

I N D E X

ORAL ARGUMENT OF:	<u>Page</u>
J. GORDON COOK, ESQ., for the Petitioner	3
PETER C. GULLATO, ESQ., for the Respondents	21
REBUTTAL ARGUMENT OF:	
J. GORDON COOK, ESQ.	39

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 74-125, Alamo Land and Cattle Company against Arizona.

Mr. Cook.

ORAL ARGUMENT OF J. GORDON COOK ON BEHALF  
OF PETITIONER

MR. COOK: Mr. Chief Justice, and may it please the Court: I am sure you recognize the basic proposition at issue herein which is simply whether or not allowing a lessee of Arizona school trust land to share in condemnation proceeds except as to the value of improvements violates the trust.

The court of appeals below when it reversed the district court recognized this by saying that provision, referring to the fifth amendment, would guarantee to Alamo the right to compensation if they had obtained from Arizona a property right superior or equal to the trust.

So it really turns upon an interpretation of the trust and turns upon whether or not the trust did permit a property right to be created in the lessee.

When you look at the provisions of the trust, I submit, you find as Justice Rehnquist said in the Lassen case the Act is silent. He said there concerning whether or not a special rule created by the Arizona Supreme Court as to condemnation should be allowed on the face of the trust, the Act's silence obligates us to examine its provisions.



My opponent puts a lot of reliance upon Lassen. But I say that Lassen is not contrary to my position. I would like to point out that what happened in Lassen was the Arizona Supreme Court for some reason not following recognized Arizona statutory principles as to condemnation on school trust lands, in Lassen, footnote 11, there is an explanation of Arizona condemnation law. Arizona condemnation law does say that when a right-of-way is taken, as to the actual land taken -- I am not now talking about any severance damages to the remainder -- that that right-of-way agency must pay for that land.

Now, the Arizona Supreme Court as to school trust lands didn't follow it. There is really no good reason why it didn't follow it because it was against Arizona law, and they said as to school trust lands, well, we think that because there is a benefit to the remainder not taken, that is offset by whatever is taken for the right-of-way.

Well, that's not what Arizona law is. So I am saying that all Lassen amounts to is that it says that the regular rules of condemnation law are applicable to school trusts, and that's all I urge upon you is application of the regular rules of condemnation law.

I refer in part to a quotation from Lassen appearing at 87 S. Ct. 584. "It," referring to the enabling Act, "intended instead that Arizona would use the general powers of sale and lease given it by the Act to accumulate funds with which it

could support the schools."

I submit to you that if we consider those general powers, there is no evidence below that there was a violation of the general powers simply because the State of Arizona in the lease did not insert a condemnation clause. By a condemnation clause I mean a clause that says that upon the taking of the land by condemnation, only the landlord gets the proceeds.

Now, this by Congress --

QUESTION: Arizona would have been free to adopt such a policy as a matter of leasing if it wanted to. You are just saying it didn't have to under the terms of the enabling Act.

MR. COOK: Precisely. Exactly the major point of my argument.

Now, I would like to first --

QUESTION: The policy of including in each case such a provision.

MR. COOK: No, not at the time.

QUESTION: I say, the policy to which my brother Rehnquist was referring was the policy, as I understood your answer to his question that the policy that you agreed that Arizona could follow would be to put a provision in its leases, a so-called condemnation clause.

MR. COOK: It could.

QUESTION: Yes. I just wanted to be sure I understood your answer to my brother Rehnquist's question.

MR. COOK: Yes, sir.

QUESTION: That's the policy that you and he were talking about.

MR. COOK: Yes, sir.

I don't think it should be a firm policy; I think it should depend upon the exigencies of the circumstance and where the land is located, how leasable it is.

QUESTION: Yes. But you both agree that such a provision could have been put in and could in the future be put into any lease.

MR. COOK: Precisely.

QUESTION: By the State.

MR. COOK: Yes, sir.

I would like to first discuss two cases that your Court when certiorari was granted handled together, and that's the Fuller case -- and incidentally, Mr. Fuller is the president of the Alamo Land & Cattle corporation, and these are adjoining properties developed almost at the same time. So here we are again, except you have a different lawyer on behalf of Alamo than the one representing Mr. Fuller.

The Fuller case and the Almota case were both taken by Your court at the same time, and both of those recognized general principles that I submit did protect one other than the

owner of the land.

Now, in Fuller you had the issue of whether or not in determining the value of fee land taken by the Federal Government, whether any increase in value of that land by virtue of its use with Taylor Grazing land was something that could be compensable.

And in the Almota case -- there was some dissent in that case, too -- the question was whether as to a railroad siding the jury or the trier of fact upon condemnation could consider a nonlegally enforced expectancy of renewal which had gone on for some number of scores of years, and the majority held it could.

I don't wish to predicate my case upon whatever arguments you had between you as to the majority and the dissent in that particular case because here Alamo's right was more than a mere expectancy. Here Alamo had a right, which I have shown by two Arizona cases, to sue one who would upon renewal of the lease be awarded the releasing privilege.

QUESTION: Except if there were a reclassification, and what does that mean?

MR. COOK: That is what all the evidence below is about, and that simply means that the use is a higher use and therefore more rent, and upon reclassification there is also a preferred right of renewal to the lessee. For example, if it's determined the land is suitable for agricultural purposes,

and there was substantial evidence below it wasn't, then it would be reclassified agricultural. If it was then reclassified to commercial purposes -- what the trial below was all about was how many years would it be until the land would be reclassified for commercial purposes, the evidence being that but for the dam the nearest paved road was 30 miles away, the land, as you can see on a map that I have referred to in a statement of facts, some 70 or 80 miles from the nearest big city, it's truly isolated, remote Arizona land. And there was no evidence below, I submit, to show that but for reclassification, Alamo would not have continued in possession.

QUESTION: The evidence would allow at least two ten-year renewals before any possibility of reclassification.

MR. COOK: Yes, sir. And I had even argued below that upon reclassification again there was a preferred renewal right of Alamo to continue to lease for commercial purposes which had --

QUESTION: Who had the function of reclassification?

MR. COOK: The State Land Commissioner.

QUESTION: I see.

MR. COOK: He testified and he didn't say anything at all to the contrary on this issue.

QUESTION: That's what I didn't fully understand in the record, who does the reclassifying and when and what triggers it. That's probably not very relevant to the basic



issue in this case, but I was just curious.

MR. COOK: So what I was trying to say, gentlemen, when you consider the two cases that I have referred to, the Fuller case and the Almota case, they do recognize that one not the owner does have fifth amendment rights upon the condemnation.

I would like to point out in the Fuller case even though the Taylor Grazing permits were only for periods of one year, you didn't say that just because it's only a one-year right and because that is at the whim and caprice of the government, that for that reason there couldn't be any condemnation rights in the lessee. Instead, you examined the Taylor Grazing Act, and instead you said that Act specifically said that nothing should create any right, title, interest, or estate in and to the lands. And no such wording exists in the Arizona Enabling Act. It doesn't say there cannot be created any right, title, interest or estate in the lands. All the provisions say is if the land is disposed of by the State--which didn't happen here, the State didn't dispose of the land--it's done so at the appraised value, and if there's a contrary disposition, there is a breach of the trust and it becomes null and void.

Now, if you look at the Congressional Record, and I have examined it, you will find nothing helpful and probably the best part of the Congressional Record, the only part I can

find that has any bearing is in the Arizona Supreme Court decision in Lassen which refers to the Senate record. And there what they were talking about was some abuses where some of this land was given by the Federal Government by Enabling Acts to the States, and the politicians found ways that would make Watergate seem like kindergarten to get those lands back into their hands for not really fair prices. And there was a great -- I'm sorry. There was an appendix to the Senate report referred to in the Arizona Supreme Court decision in Lassen which went into some of the abuses in the New Mexico tall timber cases.

That's what Congress had in mind when it was saying if the State sells the land, it should be at this fair appraised value. They didn't say anything about condemnation, they didn't talk about condemnation.

Now, let me ask a question of you gentlemen if I can. I've got some time to go. I notice it's 3 o'clock. Do we adjourn now or do I continue?

MR. CHIEF JUSTICE BURGER: We adjourn at 3 o'clock. Has your red light gone on? It has gone on.

We will resume at this point tomorrow morning.

MR. COOK: Thank you.

[Whereupon, at 3 p.m., the argument in the above-entitled matter was recessed, to resume on Wednesday, October 15, 1975.]

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## IN THE SUPREME COURT OF THE UNITED STATES

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ALAMO LAND & CATTLE CO., INC.,	:	
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Petitioner,	:	
	:	
v.	:	No. 74-125
	:	
STATE OF ARIZONA,	:	
	:	
Respondent.	:	
	:	

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Washington, D. C.

Wednesday, October 15, 1975

The above-entitled matter came on for further argument  
at 10:07 a.m.

## BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM O. DOUGLAS, Associate Justice  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice

## APPEARANCES:

J. GORDON COOK, ESQ., Ten Hundred Luhrs Building,  
11 West Jefferson Street, Phoenix, Arizona 85003,  
for the petitioner.

PETER C. GULLATO, ESQ., Assistant Attorney General,  
State Capitol, Phoenix, Arizona 85007, for the  
respondent.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in Alamo Land & Cattle Company against Arizona.

Mr. Cook, you may proceed. You have about 18 minutes remaining.

ORAL ARGUMENT OF J. GORDON COOK (RESUMED)

ON BEHALF OF PETITIONER

MR. COOK: Thank you. Mr. Chief Justice, and may it please the Court: If I may spend just a minute briefly reviewing what I said yesterday.

My position yesterday was that the Lassen case is not opposite to my client's position, and I seize upon wording in the Lassen case that refers to general powers of sale and lease given to the State by the Act. And my proposition is that it was for the State to decide whether it should or should not insert a condemnation clause. I point out that there was no evidence below that would indicate that the State acted unreasonably in inserting, or not inserting, a condemnation clause.

I distinguished the Fuller case, which I mentioned is a companion case almost, because there the Taylor Act specifically said that nothing shall "create any right, title, interest or estate in and to the lands," meaning therefore upon condemnation by the Federal Government it wouldn't have to pay for any right to the fee lands because of any increase in value because of the right to use the Taylor

Grazing lands. But there is no such wording in the Enabling Act that would prohibit Arizona by not inserting a condemnation clause from creating a right to the lessees.

I realize that Lassen says we must nevertheless conclude that the purposes of Congress require that the Act's designated beneficiaries derive the full benefit of the grant. But there is no testimony below that they didn't. There is no testimony below that one way or the other it was or was not necessary to insert a condemnation clause in order to lease. I remind you of the fact that statistics show that there is a lot of remote land in Arizona, that there is a lot of Federal land in Arizona. Of the 72 million acres of land in Arizona--and I get this from the 61st Annual Report of the Arizona Land Department--of the 72 million plus acres only 11,500,000 are privately owned, 51 million is Federally owned, 9 million plus is owned by the State. And in these remote areas, as the testimony showed, often there is not a lot of fee ownership land.

By the Fuller case you have already said that upon condemnation, the Taylor Grazing increment in value is not compensable. So I say, and I ask you to realize, that if you say that there is no compensation allowed for the lessee's interest, then a very valuable tool in financing may be lost, and I am backed up in that by the amicus curiae brief of different banks and by the fact that New Mexico takes the



position by an amicus curiae brief in opposition to that of Arizona.

Now, I would turn, then, to analyzation of the lease because the court of appeals below when it decided that there was no property right created in Alamo said it was not then necessary to discuss the lease provisions. It is now. There is nothing in the lease that prevents my client's position. My opponent seizes upon the word "vested," but that simply means that the right of the lessee is subject to no contingencies. And we discussed yesterday the fact that here in the event there is reclassification, the lessee could be ousted from possession.

I have cited a myriad of cases in my briefs, particularly in the reply brief, on pages 5 and 11, that I think are without contradiction that say that just because the landlord could terminate the lease doesn't mean that the tenant does not have a compensable interest upon condemnation, that it's merely an evidentiary factor to be considered. There is no law that he cites to the contrary.

QUESTION: Mr. Cook, wouldn't it be likely if we were to decide in your favor on the Enabling Act question and to say that the Enabling Act does not require Arizona to put a condemnation clause, that we would send it back to the Ninth Circuit or perhaps to Judge Craig in the district court for a determination as to what in fact the construction of the lease

was under Arizona law?

MR. COOK: I think by necessity since the lease came in evidence, that was already constructed by Judge Craig.

QUESTION: But it was left open in the Ninth Circuit.

MR. COOK: It was merely left open in the Ninth Circuit because the Ninth Circuit said that since it interpreted the Enabling Act to not create a property right, there was therefore no Fifth Amendment compensation to my clients, they therefore did not have to pass upon the question whether the lease precluded the rights. But I submit that Judge Craig did because the lease came in evidence and we argued that below. I think you can properly pass upon the lease at this level.

QUESTION: Even though the Ninth Circuit didn't?

MR. COOK: It said it didn't have to reach it, but the trial court did. It was at issue.

QUESTION: Don't we usually give the intermediate court an opportunity to pass on the question if they have not passed on it?

MR. COOK: I must confess I have not researched that specific question as to whether you do or you don't. I thought you could pass upon it because the district court did.

QUESTION: The value of the land was stipulated to in this case?

MR. COOK: Yes, sir.

QUESTION: And that stipulation was based on an

appraisal?

MR. COOK: Yes, sir.

QUESTION: Is that appraisal in the record?

MR. COOK: Yes, sir.

QUESTION: And it was based on the -- Part I piece was based on the value of the land for grazing purposes, and the other included a valuation on recreational purposes, the highest use was one piece was recreation?

MR. COOK: No, sir.

QUESTION: What was it? Both for grazing?

MR. COOK: Yes, sir.

QUESTION: And it was based on a unit basis that this land would run so many cattle per acre?

MR. COOK: No, sir.

QUESTION: What was the basis for the appraisal?

MR. COOK: That was my second part. The primary basis is that the land had added value in conjunction with the use -- with Alamo's ...

QUESTION: I know that's what you argued, but I just wanted to know what the appraisal was based on that's in the record.

MR. COOK: It said it in the appraisal.

QUESTION: What did it say? Where is that in the record?

MR. COOK: The appraisal contained a statement, and

I believe it's on page 21 of the Appendix. I referred to that. It said that consequently the market value of these riverbed lands is inseparable from their usefulness in connection with the dry grazing areas on both sides of the river, which desert areas are useful only in water and livestock control and dependable forage can be relied upon.

And, below, Mr. Davis, at the transcript on pages 86 and 87, said -- and that was Alamo's appraiser -- as I understand the statement, he gave consideration to the fact that the State lease land is a part of an operating unit and has value because it serves as part of that unit with the dependable irrigated forage.

QUESTION: You think the appraisal would have been different if the appraisal had occurred at the expiration of a lease which had no renewal on it? Let's assume the land just wasn't leased and wasn't located -- and it was not leased to somebody who owned the adjoining land, would the appraisal have been the same? Or do you know?

MR. COOK: That was the testimony before -- Mr. Davis said under those circumstances it would be worth \$40,000 to \$50,000. This is remote land. It's really in Timbuctoo. Without the dam it's 30 miles from the nearest paved road, has no value at all except for grazing purposes. And what the position below was is that when there is dependable pasture land that's irrigated with a water supply

like Alamo had, you then are not dependent upon the lack of rainfall in Arizona and dependent upon having to sell your cattle because there is no feed upon the desert, you can then take your cattle into the pasture land and keep them until we get more rain and then you can utilize the Taylor Grazing and State lease grazing. And that was the testimony below and that's why the appraiser for the Government said what he said.

Now, I submit that his conclusion was wrong. He said, "Well, I think as a matter of law that the State is entitled to get it all." But I submit to you that as basic evidentiary law --

QUESTION: That is a conclusion.

QUESTION: It's not for an appraiser to decide on it.

QUESTION: Yes.

MR. COOK: Thank you.

So in considering the proposition, I would refer you to wording in the Nebraska case where it said there was nothing in the Nebraska Act -- and I submit there is nothing in the Arizona Act -- that would assume to save the State harmless in a situation of condemnation from a diminution in the market value of the State's right through the creation of a leasehold.

Now, all of the cases that, to my knowledge, in the West had interpreted these Enabling Acts all came to the conclusion that there was a property right upon condemnation of the lessee. And this had been going on for years. And I set



forth that authority in my reply brief, and I mention one quote from an Oklahoma case, the fact that land is always for sale or lease renders the right to buy it at the appraisal or to release a valuable one.

If we turn to basic agency law and trust law, I submit upon a hypothetical situation -- let's just presume this would be a trust, a living trust or a trust by will and that the terms of the trust were such as are often found that gives the trustee the full discretion to decide the terms of a contract or the terms of a lease. It's basic agency law that the authority to lease means in a usual or reasonable manner. I've set forth that law in my reply brief on page 5.

It's basic trust law when you are dealing with how the trustee has exercised his authority -- I'm not dealing with an accounting situation now -- that when he exercises his authority, it is presumed to be reasonable until there is evidence to the contrary. In other words, no evidence below that Arizona acted unreasonably in not inserting the condemnation clause. There was no evidence below whether or not the insertion or lack of insertion of such a clause was necessary in order to lease. So there just isn't anything to show that Arizona acted unreasonably under those circumstances.

QUESTION: Did the Government file an amicus brief on the merits or just at the petition stage?

MR. COOK: Did not file one on the merits, just at

the petition stage. And it raised a point that has not been raised here, and that is it challenged the method of valuation.

QUESTION: And its position was something I take it you disagree with, that if we agree with you on the Enabling Act, there shouldn't be a remand. They say there should be, I guess.

MR. COOK: What they really said in their brief was that they submitted, they agreed there was a compensable right in the lessee, but they wanted to utilize a short-term lease method of valuation. And this came from a longstanding battle between the United States and New Mexico where New Mexico --

QUESTION: The United States stipulated to the valuation, didn't it?

MR. COOK: Yes, sir. But they were talking about valuation of the lessee's interest. And they used a short-term lease method of valuation where you try to show that the rents in fact are cheaper than the reasonable rental value. We used a different method of valuation below that --

QUESTION: If we agree with you on the Enabling Act, is that issue still open?

MR. COOK: It was not challenged. There wasn't any challenge below to our method of valuation. The challenge below was simply not that our method was wrong in giving the lessee what it got. The challenge below was simply that the

lessee in any event could get nothing except the value of its improvements, which was some \$3,000.

QUESTION: And the United States has never intervened in this case?

MR. COOK: No, sir, the United States didn't at the trial do anything but sit there and observe.

QUESTION: What concern does the Government have with the method of evaluation when it stipulated to the amount recoverable as damages?

MR. COOK: Well, I just mention that because Justice White had mentioned the Government's --

QUESTION: I think the Government has an interest in -- it's just probably a general interest -- in how to value lessee's interest in other cases they may have to pay for. And I think they do have some general interest in what the law is in the Ninth Circuit with respect to this, or in any other circuit.

MR. COOK: I would agree with that, but I was pointing out in this particular case they had no interest.

If I can just reserve a couple or three minutes, I would like to.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Gullato.

ORAL ARGUMENT OF PETER C. GULLATO ON BEHALF

OF RESPONDENT

MR. GULLATO: Mr. Chief Justice, and may it please

the Court: The more that I read the Lassen case and the Enabling Act, the more difficult I find it to reconcile petitioner's arguments with the provisions of the Act and provisions of the Lassen case.

Without going into a great deal of detail, I think that from a general reading of the Lassen case, it can be easily detected that the Arizona restrictions on the use of their Enabling Act lands are much stricter than they are in practically any other State. And the reason for this was that the lands were being diverted to private use and the monies derived therefrom were being used for other purposes, for private advantage.

QUESTION: Mr. Gullato, can I ask you, except for the Enabling Act, would you agree that under the Petty case there is a compensable interest in the lessee?

MR. GULLATO: Without the restrictions on the Enabling Act, I have no quarrel with the general condemnation law of both Federal and at the State level that a lessee has a compensable interest in .. without a condemnation clause.

QUESTION: Let's assume there is no Enabling Act here, or let's assume we rule against you on the Enabling Act point, would you agree that this amount of money that was paid in the court for the United States should be divided between the lessee and the lessor?

MR. GULLATO: Well --

QUESTION: I mean, if there is a compensable interest in the lessee --

MR. GULLATO: If there is a compensable interest in the lessee, then it would have to be determined based on the relative rights, and I think that --

QUESTION: And those relative rights were determined in the district court.

MR. GULLATO: They were determined -- I don't agree with the determination at the district court level because they applied -- they misapplied the law. And this was the final argument in my brief.

QUESTION: But you didn't raise that in the --

MR. GULLATO: I raised it in the final argument in my brief, I raised it at the trial court, and I raised it at --

QUESTION: The court of appeals?

MR. GULLATO: -- the court of appeals.

QUESTION: That issue is still open?

MR. GULLATO: That issue is still open, but I think it's open more as a matter of law than as a matter of fact.

QUESTION: What was your position?

MR. GULLATO: The position is that in the event that the lessee has a compensable interest, that it can only be determined based on the actual life of the present lease. And you can't speculate on a renewal. And this is consistent



with all the cases we have cited.

QUESTION: Did you put a dollar value on that?

MR. GULLATO: I have put a multiple dollar value on that. There were two or three different ways you could arrive at a value, and these were what we argued to the court below, trial court, and to the Ninth Circuit, and these are set forth in my brief.

QUESTION: How much less than the \$57,000?

MR. GULLATO: Well, if you go on just the basis of the life of the lease, then it comes to \$19,000 as opposed to \$57,000 for a 26-year term. If you go on the basis of the highest sale of any cattle unit on State-leased land, it comes down to approximately \$6,000, and I have set that forth in my brief, and this was testimony that was elicited from Mr. Davis on cross-examination.

I'd like to point --

QUESTION: I'd like to ask you before you leave this, do you think the issue in this case is -- do you think what's at issue before us turns on what you call the Enabling Act?

MR. GULLATO: Um-hmm.

QUESTION: Now, that was repeated, however, there was a State statute, too, by the Arizona legislature?

MR. GULLATO: Right. The Arizona legislature enacted --

QUESTION: Your claim is under the Arizona statute?

creating a compensable interest in the lessee is forbidden?

MR. GULLATO: I don't think Arizona statutes create a compensable interest in the lessee.

QUESTION: I know they don't create one, but you think it forbids it, forbids creating a compensable interest in the lessee? Violates --

MR. GULLATO: I think the provision is in the State Constitution and it's practically a rescript of the Enabling Act.

QUESTION: All right. But it still is a State Constitution?

MR. GULLATO: Yes.

QUESTION: You think that is -- my real question is: Is this issue a matter of State or Federal law?

MR. GULLATO: The Enabling Act restrictions are imposed by Congress, so therefore it is a question of Federal law.

QUESTION: Does the State repeat it in its constitution?

MR. GULLATO: If you come back --

QUESTION: And the question is, and as the court of appeals tell us, that the Arizona Constitution forbids creating a compensable interest in the lessee, isn't that correct?

MR. GULLATO: That's correct, but they also say that the Enabling Act forbids it, that they --

QUESTION: That may be, but they also are saying the Arizona Constitution forbids it.

MR. GULLATO: Well --

QUESTION: I can't help but think that's -- we usually don't disagree with courts of appeals on construing a State statute or a State constitution. And you would be happy if we didn't, I suppose.

MR. GULLATO: I suppose.

QUESTION: But you think this is a matter of Federal law?

MR. GULLATO: I think the interpretation and application of the Enabling Act is a matter of Federal law. Now, the interpretation and application of the State constitution, I think, is a matter of State law just so it's consistent with the -- or not in opposition to any Federal statutes.

QUESTION: I don't suppose that the State constitution has to mean what the Enabling Act means. For example, suppose the Enabling Act does not, as you say it does, include a prohibition, but the State constitution does. What then?

MR. GULLATO: I think that the restrictions placed on use of the trust lands by Congress can be tightened but they can't be loosened. In other words the State can make a more restrictive use of the trust, but they can't make a less restrictive use of the trust.

QUESTION: Well, here they may in fact in the State constitution have made a more restrictive use.

MR. GULLATO: Yes.

QUESTION: If that's so.

MR. GULLATO: When you look at the conclusion of the Lassen case, this Court held that Arizona could go ahead without complying with the auction procedures on a direct sale of land to the condemning authority as long as it used a standard which nearly reproduces the result of the auction.

Now, under the Enabling Act and under the State constitution, the only way that land is sold out of the trust is for it to be put up for public auction -- first, for it to be appraised, to be advertised for 10 weeks, to be put up for public auction, and to be sold to the highest bidder at not less than the appraised value. And on the distribution of the proceeds, the entire value of the land goes to the trust and the lessee only gets the value of the improvements.

And I would like to disagree with Mr. Cook. An examination of the Enabling Act shows that the restrictions were placed on the trust that says that the trust can only be used for the purposes set forth and it cannot be sold or leased for any purpose inconsistent with the trust unless the trust is fully compensated, except that it authorizes the legislature to lease the land for various purposes, grazing, agricultural, domestic, commercial--and in commercial this has

a rather broad definition of any use not otherwise set forth -- for mining purposes, for oil and gas exploration and leasing, and also it states in this same provision that the legislature is authorized to protect the lessee for the value of his improvements, and on the sale of the property the lessee shall be paid by either the succeeding lessee or the succeeding purchaser.

So the Enabling Act does address itself to what the lessee is entitled to on the sale of property.

QUESTION: Supposing, Mr. Gullato, that you win your argument on the Enabling Act here and the case goes back and the Arizona Land Department continues to hold auctions for these kind of leases but inserts a condemnation clause because we say that they have to, your bidding in that case is going to be lower because of the condemnation clause than without the condemnation clause, isn't it? You've taken away one of the elements of value in the land if you told the lessee that he will not get anything in the event of condemnation.

MR.GULLATO: Well, if you're looking at, as this case we are, in grazing, the method for determining grazing rental of land is set forth by statute in Arizona Revised Statutes 37-255, I believe -- 285 -- as set forth in my brief. It's a statutory determination based on the percentage of the price of cattle multiplied by the number of the sections' carrying



capacity. In other words, the price that Arizona gets for the rental is a minimal price based on the economic return to the rancher for what he gets from the cattle.

QUESTION: It's an open public bidding, isn't it?

MR. GULLATO: Oh, not on the determination of the rental value of the land or on the leasing. If land comes up for lease that hasn't been leased before, what the State Land Commissioner does is he reviews the application to see who can make the most successful use of the land that will result in the best return to the trust. Every decision that the Land Commissioner makes is ultimately directed toward what is the best interest of the trust and how are we going to be able to produce the most revenue, not how is the lessee going to be able to make the best profit off of the land.

QUESTION: Is there no competition then at all in the bidding for the land? Can't someone bid so much per acre per year and someone else come in and bid something more than that?

MR. GULLATO: No. No. What's done first is the value of the land, the market value of the land for lease purposes is made by appraisal, and the land is not leased for less than that appraisal.

QUESTION: OK. Well, then, wouldn't an appraiser appraising the market value of the land for lease purposes take into consideration the fact that there was a condemnation

clause in the lease and value it at a lower figure for that reason? Because you've taken away one of the elements of value that would be in the lease.

MR. GULLATO: I don't think, from what I know of the demand for State leases, that this really would make any difference in the rental value at all, especially of grazing leases.

Now, you see, on a commercial lease or on an agricultural lease, the lessee is protected for the value of his improvements, and he will be paid for those in any event if the land is sold or leased to someone else. And for another lessee to come in and pay for those improvements really makes it quite burdensome once the land is developed. So I don't think it's really going to affect the market value of the land at all.

QUESTION: You don't think an appraiser in appraising two identical parcels, one with a condemnation clause and one without it, would make any distinction in the value?

MR. GULLATO: Not when you look at the terms and conditions of the lease, whether or not you have the hard core condemnation clause that Mr. Cook is referring to, when you have a provision that the land can be reclassified to another purpose, and under that event the lessee doesn't have an absolute right to release the land under those circumstances. He has a preference, but still the best interest of the trust

is going to be served rather than the lessee's interest. When you look to the fact that the lease provides that nothing in the lease shall create a vested interest.

Now, I think extending this out to include the language that was used under the Taylor trust is sort of a hollow argument. I think that what we are looking at is we are looking at an attempt by the State to say to the lessee, "Look, you don't have any rights in this land; all we are doing is giving it to you to lease. In order to accommodate the administrative function it's going to be longer than for a term of a month-to-month or a year-to-year. We will give a 10-year lease subject to these conditions where, one, we can relinquish it to the United States; two, we can end up granting easements for multiple purposes across the land; three, it can be reclassified; and, four, you would have no vested interest." It seems to me when you take all these together, what you are doing is you are saying in effect, "Look, you don't have any rights and the lease can be terminated. It can be terminated on 30 days." Suppose we come across a parcel of land that the State wants or the United States wants that's under a grazing lease, and they want to develop it in reference to a recreational purpose. And we will say the Park Service. If there is a demand for that land for other than grazing, then the highest and best use is not being served, and we go to a reclassification, and in

that event the lease is terminated. The lessee doesn't have any greater rights than a 30-days right to continue occupancy.

I really don't see that the length of the lease has any bearing on his rights when you look at the specific terms of a lease.

QUESTION: Then you say in effect that you don't need the Enabling Act to reach the result you want to reach. It's already reached by the provisions of the lease itself.

MR. GULLATO: Well, that was one of my arguments below and that's one of the arguments that I am making here.

QUESTION: And that was rejected by Judge Craig and not passed on by the Ninth Circuit.

MR. GULLATO: That's right.

I would like to point out that Mr. Cook said the highest and best use of this land was determined by the appraiser to be grazing.

On page 30 of the abstract at the beginning paragraph referring to parcel 304, the appraiser, and the only appraiser that we have, determined that the recreational-oriented homesite would be the best market. And on page 32 at the bottom paragraph with reference to parcel 305, the appraiser determined that the major of the value of this section is its residential ranch headquarters, speculative recreational value, and reliably predictable multiple usefulness.

Now, none of these highest and best use values are

based on the grazing value. The value of the land is separate and apart. And in Federal condemnation law what the appraisal function is is first to determine what the parcel is, what is its highest and best use, and the value of that particular parcel.

QUESTION: All that the court of appeals actually decided was that under the Enabling Act Arizona's trustee had no power to grant a compensable interest.

MR. GULLATO: That's right.

QUESTION: And all these arguments you have now been making don't address that question.

MR. GULLATO: OK.

QUESTION: You support that holding, do you?

MR. GULLATO: I support that holding.

QUESTION: Why?

MR. GULLATO: I suppose that holding because the Enabling Act provides that the land was granted to the State of Arizona in trust for the use of the common schools. And it says disposition of any of the lands or any of the monies or thing of value, directly or indirectly derived from the lands contrary to provisions of this Act shall be deemed as breach of the trust.

Therefore, what we can do with the land was limited. The method that we can dispose of the land, namely, through the auction procedures and the sale and the appraisal, is



restricted. The use to which we can put the money after the land is sold is restricted. The only thing we can do is put it in the trust fund and use the revenues from that trust fund for the support of the common schools.

It also says that no mortgage or other encumbrance of the said lands or any part thereof shall be valid in favor of any person for any purpose under any circumstances whatsoever.

It seems to me that that is as direct a statement saying that a mortgage isn't valid against State lands as possibly can be written.

Now, Arizona has recognized that a lessee may need money in order to develop land, and therefore the legislature has authorized the mortgage of the lessee's rights which ends up letting the value of the improvements be leased, and upon the sale or on a default of the mortgage, the mortgage company can foreclose on the lease and the lessee's interest. But it never, the statute involved never, permits the State land to be prejudiced because if you do let State lands be sold to satisfy a mortgage --

QUESTION: I gather your argument is that in the face of those provisions in the Enabling Act, the State couldn't do anything different anyway.

MR. GULLATO: That's right.

QUESTION: If it tried to give a compensatory property right to a lessee, it couldn't, because of the Enabling Act.

MR. GULLATO: That's right.

QUESTION: That's your argument.

MR. GULLATO: Yes. And I think the argument is supported by the language in the Lassen case and also in the --

QUESTION: Then, of course, you go on and say in any event, anything that the State did do, whether by constitutional or statutory provision, is perfectly consistent with the prohibition against granting a compensable property right.

MR. GULLATO: That's right.

Now, when you look at U.S. v. Irving, it says, "Words more clearly designed to create a definite and specific trust could hardly have been chosen." This was cited in the Lassen case. I think that this supports a conclusion, the position of the State with reference to the compensable interest.

QUESTION: Mr. Gullato --

MR. GULLATO: Yes, sir.

QUESTION: -- as I understand what you have said, it's your view that there is no compensable value in the lease whether the transaction is a sale or condemnation and that that results from the Enabling Act without regard to Arizona law.

MR. GULLATO: Yes.

QUESTION: In other words, if it were straight sale --

MR. GULLATO: If there's a straight sale, there is no possibility under Arizona law or under the Enabling Act for the lessee to participate in the value of the land award, or the value of the purchase price.

QUESTION: Let's put ours on the lower side for the moment. Do you construe the Act itself as preventing any compensable interest in a valid lease where there is a sale rather than a condemnation?

MR. GULLATO: When the Act speaks in terms of no land shall be sold except for the full appraised value and the trust has to be compensated for the full appraised value of the land, I think, yes, that the Enabling Act prohibits the lessee from participating in the proceeds of the sale.

QUESTION: But you have already agreed that in a private transaction that full value of land subject to a lease would take into account the value of the unexpired term of the lease.

MR. GULLATO: Uh, yes -- of course, taking into consideration the specific terms of the lease and whether or not there was a condemnation clause. I don't think that the private -- that this land can be dealt with as private land because of the conditions imposed by the Enabling Act and by the State constitution.

QUESTION: Do you cite any authority in your brief dealing with the question of a sale and the value is recoverable

under those circumstances?

MR. GULLATO: The authority that I cite is the State statutes.

QUESTION: They rely on the State statutes.

MR. GULLATO: And the constitution and the Enabling Act, and I don't have --

QUESTION: But no case under the Enabling Act itself which says that there is no compensable value regarding a lease on a straight sale.

MR. GULLATO: You can go to the Nebraska case which the trial court relied on and which the Ninth Circuit distinguished. And in that case the Eighth Circuit determined that under the Nebraska Enabling Act a lessee had a right to participate in the award.

However, when you look at the terms of the Nebraska Enabling Act, the Enabling Act just made a direct grant to the State and there were no restrictions on the use or disposal of lands. And therefore, under the Nebraska Enabling Act, that decision seems correct and consistent with the general condemnation law on a lessee's rights.

However, when you look at the restrictions that Arizona has under its Enabling Act, I don't think the two cases can be reconciled. So the Ninth Circuit distinguished the case, and I think rightly so. That's the whole purpose and intent of Congress in imposing the restrictions was that there

was a dissipation of the trust without having the revenues generated from the sale of the land going to the trust fund for the use of the beneficiary. That's exactly what they were trying to accomplish by imposing these restrictions.

QUESTION: In other words, the Nebraska Act didn't have any counterpart of section 28 of the Arizona Act.

MR. GULLATO: None at all. And I cited the Nebraska Enabling Act, that portion of it, I believe it's section 7, in my brief, and it just grants the land to the State.

It's interesting, though, that a trust concept relying on the Lassen case was imposed by the Nebraska district court even after the Lassen case came down, and said, well, these are trust lands and the Federal Government has to pay for rights-of-way over the trust lands, which they hadn't been doing before.

QUESTION: Mr. Gullato, I take it, then, you disagree with the Solicitor General when he says in his amicus curiae brief submitted in connection with petition for cert that it can fairly be said that two decisions, that is, the Nebraska case and the one below here, represent a conflict in approach to the question of statutory interpretation presented here.

MR. GULLATO: Oh, I totally disagree with that. As a matter of fact, I disagree with the whole concept, or the whole concept of the U.S. Solicitor, especially when you



consider that from the onset of this case, in view of the fact that the United States Attorney is supposed to be the ultimate overseer of the trust and we endeavored to get support of the U.S. Attorney in the case and the Phoenix office, at least, agreed with us and went along with the concept that the lessee had no compensable interest, and the first I was aware that the United States was taking a different position was when they filed this brief.

QUESTION: I suppose the S.G. is superior to the Phoenix office.

MR. GULLATO: I suppose so. So we have a great difference of opinion there. But I think if the United States is the ultimate overseer of the trust and their ultimate responsibility is to be an advocate on behalf of the trust, I don't see that this position is really consistent with the best interest of the trust. I don't think that their analyzing and seeing a conflict between those two cases is correct. I think what you have to do is you have to look at each trust responsibility and determine what the responsibility is.

QUESTION: The United States is not so much the overseer, it's the grantor of the trust, the trustor.

MR. GULLATO: Also under the Enabling Act, the U.S. Attorney has the ultimate responsibility for the enforcement of the trust provisions. So they can come in any time Arizona

is violating the trust provisions, they can come in and take --

QUESTION: It's up to the grantor generally to complain, the grantor and/or the beneficiaries to complain if the trust provisions aren't being applied.

MR. GULLATO: I suppose.

It sort of would create a situation, I suppose, that if the United States had come or attempted to defend the trust in this type of an action where it's a Federal condemnation, they would have a very difficult time stating a claim because it would be the United States suing the United States, and in other words, they are withdrawing lands for a particular purpose under the administration of the State but still under the control of the United States and Congress, and they are suing to condemn them for another purpose. And I think it would have to be worked out administratively.

QUESTION: Um-hmm. A little bit analogous to the position of Arizona in the Lassen case.

MR. GULLATO: I think so. We find ourselves fighting each other a lot.

I'd like to conclude with this remark: If we are going to nearly reproduce the results of the auction, as Lassen prescribes we must do if we are going to have sales other than at public auction, in order for this Court to not establish a dual standard in the distribution of State funds, I think the only solution is to determine that just as

in a sale of public lands through the auction procedures, that the State and the trust must derive the full benefit of the sale of the lands. And I think to conclude that a lessee has a compensable interest only in a condemnation case and not under any other circumstance really doesn't make a uniform, consistent application of the trust and doesn't constitute what I would say results in the trust being compensated for the full appraised value of land taken out of the trust.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Gullato.

Do you have anything further, Mr. Cook?

REBUTTAL ARGUMENT OF J. GORDON COOK ON

BEHALF OF PETITIONER

MR. COOK: Yes. I will try to be very brief, and I think I can answer some of the questions that have been posed here.

The Lassen decision below refers to an Arizona Supreme Court decision that compares the Enabling Act Section 28 with Arizona's constitution. The citation is 181 Pacific 2d 336, and it shows that they are the same. There are a couple of minor distinctions that are not at issue herein. There is an excellent annotation that appears at 1 A.L.R. 3d that is entitled "Condemnation Property State Law." That particular annotation refers to a decision of your Court in the Powelson case which provides that in determining

a Fifth Amendment question you can interpret State law, and that appears in the annotation on page 481.

Arizona has consistently by its statutes interpreted this right as being a property right. In fact, Arizona in a statute referred to in both my briefs, the reply page 10 also in a situation where there was condemnation for the purpose of parks specifically said the lessee's right was "a property right." I believe one of the Justices asked whether or not there were any decisions of Enabling Acts of other States. There are. There is New Mexico in the Chavez case cited in my briefs specifically interpreted the renewal rights under school trust lands to be compensable. The same thing is true in Oklahoma. You can find that in pages 6 through 10 of my reply brief. Wyoming is interpreted as a property right. That's been a consistent interpretation in the West.

On pages 5 and 11 of my reply brief I set forth a myriad of cases that say that although the landlord could terminate the lease, the lessee still has a compensable property right.

I would like to mention the question relative to the appraisal of the Government. On page 21 of the appendix, under the section "Highest and Best Use," you can see from reading that that the appraiser of the United States is referring to the highest and best use as grazing. Later on he speculates about residential. But that's what he says is

the highest and best use under that particular heading.

And may I say the whole trial below was on one issue, and that was when would the property be reclassified for residential purposes, and it was determined that Alamo would stay until that happened. And that was by Judge Craig determined to be for 26 years. That's what it was all about below. And there was no opposition to that particular testimony.

And I close by saying in response to some of the questions of Justice Rehnquist there is nothing left to speculation as to whether or not with a condemnation clause you would lose a source of lessees. And I say the question is real because that's why New Mexico supported the petition and that's also why the bank supported the petition. And even though you can't have free bidding because the State does set the lease price, we don't know what will happen as to whether or not you lose the source of lessees. And I think that's why throughout the years in the West none of these States have tried to insert a condemnation clause in the lease.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:55 a.m., the argument in the above-entitled matter was concluded.]