The Land Board v. The Vail Valley

BY JOHN DUNN

Once upon a time, back in 1996, the Colorado State Board of Land Commissioners (the Land Board) cut a deal with a Vail Valley developer named Bob Brotman. The deal was that Brotman would escrow $1.8 million (a lot of money back then), and in return the Land Board would convey to Brotman the "school section" of land located just south of the unincorporated Town of Edwards and just one valley to the west of the Arrowhead Ski Area (then separate from the Beaver Creek Resort). The escrowed money was to be used by the Land Board to acquire other real estate, to complete what was characterized in their agreement as an "exchange." Five years later, the residents of Vail had learned a lot more about the Land Board and the Colorado Enabling Act through *Brotman v. East Lake Creek Ranch, L.L.P.*[1]

A Short History Lesson

Brotman offers a crash course on what a "school section" is and how the State Board of Land Commissioners came to exist. Essentially, the original 13 states had title to a lot of real estate. But new states admitted into the union, the first of which was Ohio, had no title to any real estate; public lands were owned by the federal government. Somehow it was agreed, and Thomas Jefferson is rumored to have had a hand in it, that the federal government would convey to each new state two "school sections" in each township of land for the support of the "common schools." A section is 364 acres of land.

So it was for Colorado in 1876. The Colorado Enabling Act provided for the grant of school sections to this state, and the Colorado Constitution established the Land Board to manage the lands. At the time of *Brotman*, the Land Board was managing approximately 3 million surface acres and 4 million mineral acres of land. As background, while not really pertinent to this story, the Constitution was amended, effective January 1, 1997, to increase the Land Board membership from three to five persons, to establish Board term limits, and to modify the Board's land management mission. The Land Board of today is not the Land Board of 1996.

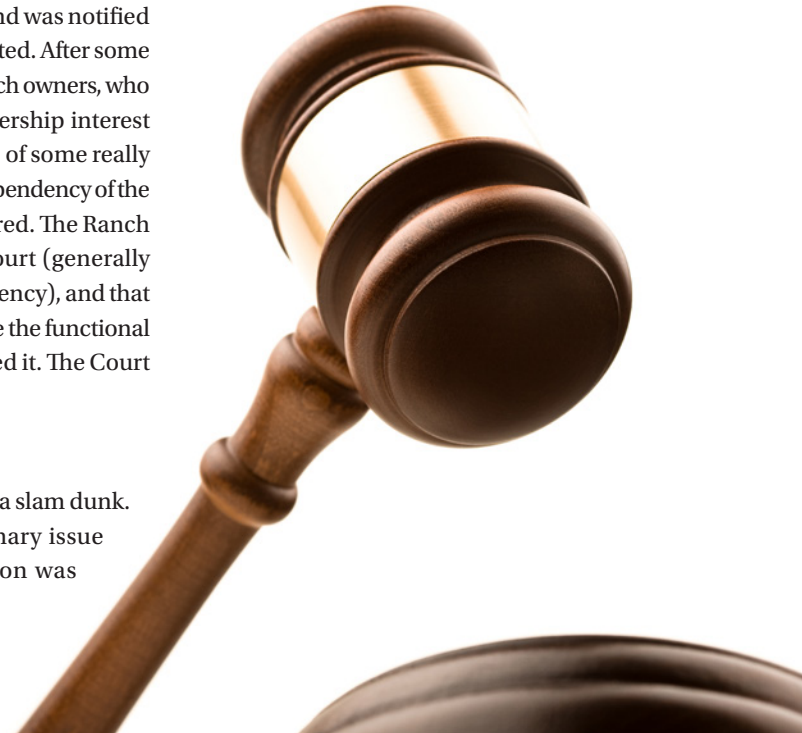
To return to the story, the Enabling Act and CRS § 36-1-124 then provided, and still provide today, that any sale of land by the Land Board must be at public sale after published notice, and this was not done for the Brotman deal. The Land Board's theory was that the deal was an exchange and not a sale, obviating the need of public notice or a public sale.

Thus it was a backroom deal, but it did not go unnoticed. East Lake Creek Ranch, L.L.P. (the Ranch) had for years leased the school section as part of its ranching operation and was notified that the lease was being terminated. After some digging around by one of the ranch owners, who happened also to have an ownership interest in *The Denver Post* and the help of some really good investigative reporters, the pendency of the deal with Brotman was uncovered. The Ranch filed suit in Denver District Court (generally venue for suits against a state agency), and that court found the "exchange" to be the functional equivalent of a sale and enjoined it. The Court of Appeals affirmed.[2]

The Question of Standing

That part of the case was sort of a slam dunk. But the hook was the preliminary issue of standing. The school section was landlocked, but Brotman had a constitutional right of access. Access logically would have been through the land owned by the Ranch (although the appellate courts disagreed), which was fully accessible from U.S. 6 and south through the East Lake Creek Valley on the East Lake Creek Road. So the Ranch pitched the argument to the trial court that it was an adjacent property owner at risk of being subject to condemnation of access through its ranch land, giving it standing to challenge the transaction. The trial court didn't buy that argument but did conclude that the Ranch had derivative "taxpayer standing," and in effect it was bringing a derivative action on behalf of the Land Board to cancel the deal. The Court of Appeals disagreed but concluded instead that the Ranch had direct standing as a taxpayer and as a beneficiary of the school lands trust to enjoin the unlawful expenditure of funds by a state agency.

The concept of "standing" can be a pretty murky area of the law. One suspects that a court may first look at the case on the merits and, if it has strong feelings about the merits, then find a standing basis to hear the case. For example, one wonders how US Congressional members have standing to challenge election results (other than their own) or for that matter to challenge the constitutionality of legislation adopted by their predecessors. But I digress. The point here is that the trial court and the



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Court of Appeals were both sufficiently shocked by the deal that they were willing to do a long reach for a standing basis.

In our Supreme Court, cooler heads prevailed. Justice Bender did a scholarly analysis of the Colorado Enabling Act and concluded that its effect was to create a trust for the "common schools," and therefore only the schools as beneficiaries of that trust had standing to challenge a Land Board action. The Court relied in part on *Branson School District RE-82 v. Romer*,[3] in which case three school districts and two school children unsuccessfully challenged the 1997 constitutional amendment.

The School Board Swoops In

Fought the fight and lost on a technicality? Not quite yet. A lot of open space champions were monitoring this, and one suggested a meeting with the Eagle County School Board. Not surprisingly, the school board unanimously voted to authorize suit in its name against the Land Board. Not only that, but having the school board as plaintiff offered the opportunity to challenge the same kind of deal with respect to the school section just north of Edwards. This meant that 1,280 acres of the Vail Valley could be saved from development.

All that was needed was service of process and entry of a temporary restraining order by the Denver District Court (and to add a nice touch, the duty judge was a past president of the Colorado Bar Association). About that time, Ken Salazar took office as attorney general. Rather than reflexively oppose the complaint, as his predecessor had done, Salazar took his own close look at it. He hiked the school section adjacent to the Ranch and bit the bullet. Soon after that, the state breached its agreements with Brotman and declined to perform them. Rumor has it that he received an alternative opportunity.

And that is how the Vail Valley was saved from the development of an additional 1,280 acres of sprawl around the unincorporated Town of Edwards, which some might say itself mars the Eagle County landscape. But that is a story for another day.

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John Dunn has been practicing law for over 55 years. After 15 years in Leadville, he moved over the pass to the Vail Valley. Over that long time, he has specialized in representing local governments throughout the central mountains. Dunn practices law in Vail with Mountain Law Group, LLC. He is a CBA past president and the current chair of the CBA Amicus Briefs Committee.

NOTES

1. *Brotman v. E. Lake Creek Ranch, L.L.P.*, 31 P.3d 886 (Colo. 2001).
2. *E. Lake Creek Ranch, L.L.P. v. Brotman*, 998 P.2d 46 (Colo.App. 1999).
3. *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998).