

DEC 14 2011

SALT LAKE COUNTY

By _____ Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
SALT LAKE DEPARTMENT

	:	
	:	RULING AND ORDER ON THE SPECIAL
	:	FIDUCIARY'S MOTION
IN THE MATTER OF THE UNITED	:	FOR GUIDANCE ON RESOLUTION
EFFORT PLAN TRUST, et al.,	:	OF PROPERTY TAX CRISIS
	:	
	:	
	:	Case No. 053900848
	:	
	:	
	:	Judge Denise Posse Lindberg

Before the Court for decision is a Motion filed by the Special Fiduciary (the "Fiduciary") of the United Effort Plan ("UEP") Trust seeking guidance on how to resolve a property tax crisis resulting from the refusal of many who reside on UEP land to pay property taxes on the land they occupy. The Fiduciary offers a proposal to prevent the majority of Trust assets from being lost through the sale of tax delinquent parcels.

Before addressing the merits of Motion the Court must consider whether action on said motion violates the self-imposed limitations adopted by this Court in its Ruling of April 11, 2011. See Ruling and Order Directing the Special Fiduciary to Retain UEP Trust Assets Pending Further Order of This Court, at 4 [hereinafter, the "April 11th Ruling"]. The U.S. Court of Appeals for the Tenth Circuit (the "Tenth Circuit"), before whom a related federal action is presently on appeal, authorized this Court's continuing oversight of the UEP Trust during the pendency of the appeal. See Order Staying the District Court's April 8, 2011 Preliminary Injunction Order and April 14, 2011 Show Cause Order, Case No. 11-4066 (April 27, 2011). In doing so, the Tenth Circuit expressly relied upon this Court's representation in its April 11th Ruling that in order "[t]o minimize any conflict with the federal court . . . this Court agrees that *other than those actions necessary to preserve and protect the assets of the Trust*, the Special Fiduciary should initiate no other affirmative action until there is a final appellate decision affirming, modifying, or overturning the federal court's order." April 11th Ruling (emphasis added).

In bringing this Motion the Special Fiduciary argues that the proposal he is bringing to the Court is "necessary to preserve and protect the assets of the Trust." The Arizona Attorney

General ("AZ AG") agrees with the Fiduciary and supports his proposal.¹ The Court concurs and concludes that the tax situation of the Trust is at such crisis level that it requires strong affirmative action by the Court to protect and preserve UEP Trust assets. Specifically, the facts provided by the Fiduciary persuasively show that there is a real danger of losing large portions of the Trust *res* before the Tenth Circuit can resolve the issues pending before it. Accordingly, the Court GRANTS the Fiduciary's Motion and approves implementation of his proposal, as discussed below. Although this Court is not required to do so, as a courtesy to the Tenth Circuit a copy of this Ruling will be lodged with that Court for informational purposes.

The Court also notes that the Fiduciary's Motion is *unopposed*, although counsel for all interested persons or parties were timely served with the Motion and supporting Memorandum. Moreover, in that Memorandum the Fiduciary expressly invited input from any interested individuals as to how to address the tax issues involving the Trust lands "with a minimum of litigation costs . . ." See Memorandum in Support of Motion for Guidance on Resolution of Property Tax Crisis (hereinafter "Memorandum") at 4. Notwithstanding that invitation, the only response received was that of the AZ AG, who fully supports the Fiduciary's proposed action. Pursuant to Utah R. Civ. P. 7(d), a Request to Submit for Decision was filed on November 9, 2011. Accordingly, the Fiduciary's Motion is properly before the Court for a ruling.

BACKGROUND FACTS

The UEP Trust owns many parcels of land in the Short Creek area of southern Utah and northern Arizona, including the land on which most of Colorado City, Arizona and Hildale, Utah are located. In general, those parcels have not been subdivided although different families have built homes or other improvements on UEP land. As a result, tax assessments historically have been made on a parcel by parcel basis rather than on the more traditional method of taxing individual lots. Because any given parcel may include the homes, shops, etc., of multiple individuals or families, the failure of one or more land occupant to pay a proportional share of the parcel-wide property tax can negatively impact other families that also occupy that same parcel of land. In the worst case, individuals or families who have paid their proportional share of property taxes could lose their homes because of others' non-payment.

¹The AZ AG argues that allowing Trust properties to be lost to tax sale is an outcome that is not in the interest of either the Trust or its beneficiaries. Therefore, he strongly agrees that prompt action must be taken, and the Fiduciary's proposal is reasonable and necessary to protect Trust assets. Response of Arizona Attorney General Re: Special Fiduciary's Motion for Guidance on Resolution of Property Tax Crisis, at 2. While acknowledging this Court's commitment not to undertake "affirmative action" with respect to the Trust except as necessary to preserve and protect the Trust's assets, the AZ AG believes "the crisis involving property tax delinquencies presents a situation calling for such action." *Id.*

Before the Court assumed jurisdiction over the UEP, the then-Trustees made annual assessments and collected property tax from occupants of the various Trust parcels. From those collections the Trustees then paid the property tax on the various UEP parcels.² Problems collecting the property taxes began shortly after the Court assumed jurisdiction over the Trust in 2005, but that year's property taxes eventually were paid in full. Thereafter, the Trust informed all occupants of UEP land that it would make proportional assessments based on the value of a particular home or improvement to the total assessed value of the entire parcel. With some prodding and encouragement, the property taxes for 2006 and 2007 were paid. However, since 2008 occupants of Trust lands have, for the most part, refused to pay their property taxes. As the Fiduciary reports in his Memorandum, the outstanding property taxes for 2008 (owed to both Mohave County, Arizona and Washington County, Utah) total approximately \$431,498. For 2009, the combined outstanding tax bill to the two counties came to approximately \$742,480. For 2010, the combined bill was approximately \$1,032,483. The sum of all outstanding property taxes for the 2008-2010 period is in excess of \$2 million (approximately \$2,206,461)³

As noted, if taxes are not paid on any particular parcel, anyone who lives on that parcel will be negatively impacted; those Trust residents who have paid their share of the parcel's property tax will be specifically harmed. Both present and former FLDS members occupy homes in the same parcel. The purposeful refusal of some to pay their tax assessment can significantly affect wholly innocent individuals who have met their financial responsibilities to the Trust. Moreover, the refusal of many parcel occupants to pay their taxes may already be affecting even those who otherwise would be inclined to work with the Fiduciary and pay their fees and taxes. There is no incentive to continue paying a tax assessment if doing so will not ensure that the paying occupant's property will be protected from a tax sale.

The Fiduciary reports that with respect to UEP land in Mohave County, Arizona, "[b]eginning in February 2013, UEP property with unpaid property taxes will be sold to pay the delinquent taxes. For the 2008 tax year, 59 of 132 parcels, or 45%, have tax liens that have been purchased by investors. For 2009, 81 of 132 parcels, or 61%, have tax liens purchased by investors."⁴ *Id.* In Washington County, Utah, the Trust owns 44 parcels of land. In 2008, 39 of

²It appears that under the prior Trustees, tax assessments were not necessarily made on the basis of how much land each individual or family was using. Rather, other considerations came into play, including (but not limited to) the particular family's ability to pay.

³These figures are drawn from the respective counties' web sites and include tax, penalty and interest. However, because the penalty and interest are only updated periodically, the exact amount owed will need to be determined by each County Treasurer's office.

⁴The Fiduciary advises that "[u]nder Arizona law, tax liens can be purchased by investors, who can then go to court to obtain title to the delinquent property three years from the date of the tax lien purchase." Memorandum, at 8. "[W]here a tax lien has been sold, the delinquent balance

the 44 parcels of UEP land were tax delinquent. As of the 2010 tax year, 42 of the 44 UEP parcels in Utah are in tax delinquent status. Delinquent parcels are subject to a Sheriff's tax sale when the delinquency has remained unaddressed for 5 years. Accordingly, 39 of the Utah parcels will be eligible for Sheriff's sale as early as May, 2013.

In sum, in less than 18 months the large majority of the UEP assets could be lost to tax sales because of the refusal of many occupants to pay their proportional share of the property taxes.⁵ Because of the large amount of money owed in tax assessments (in excess of \$2 million), it is imperative that the Fiduciary take action *now* to secure a steady and predictable stream of tax payments in order to collect sufficient funds to pay in full the delinquent taxes and prevent tax liens/sales beginning in early 2013.

THE FIDUCIARY'S PROPOSAL

According to the Fiduciary, "currently there is a shortage of housing in Colorado City, Arizona and Hildale, Utah." As a result, the Fiduciary has received regular inquiries by Trust beneficiaries who are in need of housing regarding the availability to Trust homes.⁶

The Fiduciary proposes to inform those whose homes, businesses, etc., are located on UEP parcels in tax delinquent status that those properties will be made available for occupancy by those who complete a Petition for Benefits and comply with certain specific requirements.⁷ Current occupants of Trust property who (a) are not up to date in their tax and occupancy payments, and (b) refuse to correct the situation in a timely manner consistent with the Fiduciary's occupancy requirements, will be subject to eviction proceedings.

The Fiduciary hopes notice that eviction proceedings will be initiated will create

must be paid" by the Trust as owner of record, and the entire delinquent balance for all years must be paid at one time; no partial payments are allowed.

⁵The Fiduciary indicates that among the strategies being employed by FLDS adherents who object to the Court's oversight of the UEP Trust is "not to pay the property taxes and allow the property to go to tax sale, where they can then purchase the Trust property free and clear" of the Court's oversight and the Fiduciary's administration. Memorandum, at 6, para. 6.

⁶Approximately 15% of those beneficiaries are not affiliated with the FLDS Church. *Id.*, at 11, note 5.

⁷As a condition of occupancy, beneficiaries seeking to occupy Trust homes will be required to (a) sign an occupancy agreement, (b) pay a modest monthly occupancy fee, and (c) pay the delinquent property taxes and thereafter remain current with the assessment payments. For further detail on the Fiduciary's proposal, see Memorandum at 11-13.

sufficient incentive that non-paying occupants of Trust property will bring themselves into compliance with the requirements for continued occupancy of Trust property. If the threat of eviction is not sufficient in and of itself to encourage occupants to resume *promptly* their current and delinquent tax payments, the Fiduciary will “concentrate [his initial eviction efforts] on delinquent parcels where Trust beneficiaries have approached him and expressed a willingness” to comply with the occupancy requirements. *Id.*, at note 6. The goal is to, as soon as possible, replace non-paying occupants with those who are willing to meet the financial obligations that accompany use of Trust property. The Fiduciary will also be authorized to initiate eviction actions against other non-paying occupants—even if no immediate substitutes are available—in order to secure broader compliance with the requirements the Court has outlined.

One issue that will need to be resolved by the Fiduciary before bringing eviction actions has to do with determining which families or individuals are residing in each UEP-owned home. The Fiduciary reports that early on in his tenure administering the Trust, a substantial majority of residents on UEP land signed occupancy agreements with the Fiduciary. However, since then, many “occupants of FLDS-controlled homes governed by occupancy agreements have moved without updating the occupancy agreement or notifying the Trust.” Memorandum, at 11, note 5. The Fiduciary may want to consider, as an initial step to implementing his proposal, that notice be given to all occupants to produce valid occupancy agreements tied to the specific residences they are occupying. Failure to do so within some specified period of time (say, 30 days) would provide a factual basis for finding that occupants are trespassing onto UEP property and, therefore, in unlawful detainer.

With one notable exception, the Fiduciary proposes that eviction proceedings be made in accordance with Utah and Arizona law. The exception is that the Fiduciary proposes that this Court assume jurisdiction over the eviction actions instead of proceeding under normal venue rules.⁸ The Fiduciary argues that having the eviction actions brought in this Court is consistent with a prior ruling of this Court⁹ and the doctrine of *in custodia legis*.¹⁰ The Court agrees that the logic of its prior Ruling would suggest such an outcome. However, the Court concludes that there is a more reasonable and appropriate alternative available that is also consistent with this Court’s continuing jurisdiction, custody, and control over UEP assets.

⁸Unlawful detainer (*i.e.*, eviction) proceedings are actions “for the recovery of real property” and therefore must normally be filed in the county where the property is located. Utah Code Ann. §78B-3-301.

⁹Ruling and Order on the UEP Trust’s Renewed Motion for Order to Show Cause Re: Unauthorized Filings And the Special Fiduciary’s Recommendations For Procedures To Address and Resolve Competing Claims, dated February 10, 2011.

¹⁰Property under Court administration and assigned to management by a Court-appointed fiduciary is considered *in custodia legis*, meaning it is in the possession of the Court.

Under long-established precedent, once a court assumes possession of the *res*, "the property is thereby withdrawn from the jurisdiction of all other courts, *except to the extent to which that court may determine.*" *Cont'l Bank & Trust Co. v. Apodaca*, 239 F.2d 295, 297-98 (10th Cir. 1956)(emphasis added), citing *Lion Bonding & Surety Co. v. Karatz*, 262 U.S. 77, 90 (1923)("Where a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts). *See also Palmer v. Texas*, 212 U.S. 118, 126, 129 (The court which first acquired jurisdiction through possession of the property is vested, while it holds possession, with the power to hear and determine all controversies relating thereto. *It has the right, while continuing to exercise its prior jurisdiction, to determine for itself how far it will permit any other court to interfere with such possession and jurisdiction*) (emphasis added).¹¹

The clear implication of the italicized language is that this Court has the ability and discretion to permit other courts with concurrent jurisdiction to exercise their authority to the extent that doing so does not undermine this Court's ongoing oversight of the property. Also

¹¹In *Princess Lida of Thurn and Taxis et al., v. Thompson*, 305 U.S. 456 (1939), the United States Supreme Court examined whether the exercise of jurisdiction by a state court over the administration of a trust deprived a federal court of jurisdiction of a later suit involving the same subject matter. In analyzing the issue presented the Court distinguished between those actions brought "in personam" and those that are "in rem" or "quasi in rem." The Court concluded that when actions are "strictly in personam," both state and federal courts may exercise concurrent jurisdiction until judgment is obtained in one of the courts, which judgment could then constitute *res judicata* in the other. *Id.*, at 466. However, where the action is "in rem" or "quasi in rem," "the court first assuming jurisdiction over property *may maintain and exercise that jurisdiction to the exclusion*" of other courts, and this authority "is not restricted to cases where property has been actually seized under judicial process . . . but applies as well where suits are brought to marshal assets, *administer trusts*, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction the court must control the property." *Id.* (emphasis added). There is no question that this Court has exercised "in rem" and/or "quasi in rem" jurisdiction since it removed the UEP Trustees and assumed control of the Trust in mid-2005 pursuant to the authority granted it by the Utah Probate Code.

Although Utah appellate courts have not expressly addressed how unlawful detainer actions should be categorized, the weight of authority appears to be that such actions are either "in rem" or "quasi in rem." *See, e.g., Krasner v. Gurley*, 248 Ala. 686, 29 So.2d 224 (1947)(unlawful detainer actions lie *in rem*); *Scherbenske v. Wachovia Mortg., FSB*, 626 F. Supp.2d 1052 (E.D. Cal. 2009)(unlawful detainer action is quasi *in rem*); *Kaleka v. Durand Shell, Inc.*, 316 Wis.2d 357, 763 N.W.2d 248 (Wis.App. 2008)(*in rem* action for eviction); *In re Dame*, 2008 WL 906847 (Bkrtcy, D.Dist.Co, April 1, 2008 (*in rem* right of lessor to proceed with eviction not affected by a discharge injunction); *Emmerson v. Weilep*, 126 Wash.App.1010, 2005 WL 469288 (Wash. App. Div. 3, March 1, 2005)(unlawful detainer action was an *in rem* claim).

implicit in the above language is the notion that this Court can limit the grant of authority which those coordinate courts can exercise over UEP property. In other words, this Court has the discretion to allow the Fifth Judicial District Court of Utah (and the appropriate Superior Court over Mohave County, Arizona) to exercise their coordinate authority over UEP lands within their respective counties for the limited purpose of hearing eviction actions brought by the Fiduciary. As noted previously, this is in accord with otherwise applicable venue statutes. It also makes it more convenient for defendants to appear and present any legal arguments they may have for retaining Trust property.

Moreover, proceeding in this fashion would minimize or eliminate problems that would otherwise arise. For example, if the eviction actions were brought in this Court, it is not entirely clear whether the *in custodia legis* doctrine grants this Court extra-territorial authority to hear eviction actions concerning land located in Arizona. Neither the Fiduciary nor the AZ AG have addressed this issue. While it would be less problematic for this Court to hear eviction actions involving UEP property in Washington County, Utah, filing those cases in the Third District Court would force defendants to defend these actions in a less convenient forum.

Before bringing this motion the Fiduciary also considered other alternatives to pay the outstanding taxes, such as proceeding with the sale of the Berry Knoll property or the Harker farm. However, the Fiduciary ultimately concluded that those options were less desirable for various reasons; accordingly he *does not* recommend either of those alternatives. The Court agrees. Implementing either of those alternatives at this point would likely trigger greater resistance from the FLDS community and possibly spawn additional litigation. More importantly, as long as there are viable alternatives for generating the funds necessary to pay the taxes and other obligations of the Trust, the sale of assets is not consistent with this Court's commitment to only take action that "preserves and protects" those assets pending resolution of the federal litigation. The Court agrees with the Fiduciary that the more appropriate and logical choice is to require those who benefit from use and occupancy of Trust lands to cover the financial obligations that arise from such use. Accordingly, the Court concludes that implementation of the Fiduciary's proposal, as modified by this Court, is the most appropriate course for resolving this property tax crisis.

The Court recognizes that its approval of the Fiduciary's proposal is a difficult and potentially controversial step. However, for the reasons stated herein, the Court is convinced that absent prompt and definitive action most of the Trust *res* will be lost. The Court is also convinced that the less-extreme measures the Fiduciary has taken to date to collect property taxes and occupancy fees have proven ineffective.

SUBDIVISION OF PARCELS ENCOMPASSING HILDALE, UTAH

In his motion the Fiduciary notes that implementation of the proposal would be significantly aided if the UEP parcels are subdivided. As he notes, "[b]eneficiaries would then

likely feel more secure in paying taxes, knowing that they were only responsible for one home" on a particular lot. Memorandum, at 13.


Some time ago the Trust obtained a default judgment against Hildale City and related entities regarding the Fiduciary's efforts to subdivide the Trust property in Utah. That decision is currently on appeal, but the Utah Supreme Court stayed the appeal at the Trust's request. According to the Fiduciary, the Supreme Court "will look to the Fiduciary as to when the appeal should proceed." *Id.* Because appellate resolution of that case could be instrumental in facilitating efforts to raise funds and pay the property taxes owing, the Fiduciary suggests that asking the Utah Supreme Court to lift the stay and resolve the appeal is therefore "action necessary to preserve and protect the assets of the Trust." He asks for guidance as to what action he should take, if any, with respect to that appeal.

Pursuing the appeal before the Utah Supreme Court would not commit the Trust to any action that could undermine a subsequent decision by the Tenth Circuit. Even if the Tenth Circuit were to affirm the decision of the federal district court in the case before it, the mere fact that the subdivision plats are recorded will not reduce the Trust assets that would return to Warren Jeffs, the "Corporate Sole" of the Corporation of the President ("COP") of the FLDS Church. To be sure, the COP would receive individual *lots* rather than what presently exists as larger parcels of land in Washington County. Nevertheless, with minimal effort, adjoining lots could be re-joined into larger parcels under provisions of the Utah Municipal Land Use, Development, and Management Act ("LUDMA"), Utah Code Ann. §§10-99a-101 *et seq.*, and applicable municipal ordinances. The Court concludes that reactivating the appeal before the Utah Supreme Court *will not* interfere with or limit any remedy that the Tenth Circuit may grant. It could, however, facilitate resolution of the property tax crisis if the Utah Supreme Court were to affirm the order of the Fifth Judicial District Court directing Hildale City to record the plats submitted by the Fiduciary. The Court therefore directs the Fiduciary to request that the Utah Supreme Court lift the stay and proceed to consider Hildale's appeal of the Fifth District judgment.

ORDER

The Court approves the Fiduciary's proposal except as noted herein, and directs the Fiduciary to take all necessary actions to implement this Ruling and Order at the earliest practicable date. The Fiduciary is also directed to take the necessary steps to re-activate the appeal presently pending before the Utah Supreme Court.

SO ORDERED this 14th day of December, 2011.


Judge Denise P. Lindberg
District Court Judge

