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Utah State University of Agriculture and Applied Science, A Utah Body Politic and Corporate v. Bear Stearns & Co., A Corporation v. Phillip A. Bullen, Jay R. Bingham, O.C. Hammond, Jay Dee Harris, Beverly D. Kumpfer, Snell Olsen, Rex G. Plowman, W. B. Robins, Alva C. Snow, William R. Stockdale, Jane S. Tibbals, Glen L. Taggart, Dee A. Broadbent, L. Mark Neuberger, Donald A. Catron, John Does, the Industrial Council of Utah State University of



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Agriculture and Applied Science : Reply Brief of Appellant Bosworth, Sullivan and Company

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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UTAH STATE UNIVERSITY OF AGRI-
CULTURE AND APPLIED SCIENCE, a
Utah body politic and corporate,

Plaintiff-Respondent,

vs.

Case No. 16274

BOSWORTH, SULLIVAN AND COMPANY,

Defendant-Appellant,

vs.

PHILLIP A. BULLEN, et al.,

Third-Party
Defendants-Respondents.

- - - - -

REPLY BRIEF OF APPELLANT
BOSWORTH, SULLIVAN AND COMPANY

Appeal from Orders of the
District Court of Cache County
Honorable VeNoy Christofferson, Judge

FILED

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STATEMENT OF FACTS

Respondent Utah State University (hereinafter the "University"), claiming that it does not wish to burden the Court with a separate statement of facts on the issue of liability and further stating that its Motion for Partial Summary Judgment is not dependent upon the acceptance of one or another version of the facts, nevertheless recites in its brief a 13

page version of facts it asserts are contrary to the statement of facts which appears in the main brief of appellant Bosworth, Sullivan & Company (hereinafter "Bosworth").

The statement of facts in the Bosworth brief is supported by the record and on this appeal must be accepted as true for the purposes of ascertaining the propriety of granting the University's Motion for Partial Summary Judgment. Therefore, it must be accepted as true that Bosworth's execution of securities orders was at the request of the University's investment officer, Donald A. Catron, and that Bosworth executed such securities solely as agent and pursuant to a corporate resolution duly passed by the Institutional Counsel authorizing Catron, the University's agent "to purchase, trade and sell long or short, transfer and assign, stocks, bonds and securities of every nature on margin or otherwise." The University now seeks restitution of monies paid to Bosworth for stocks purchased pursuant to such authorization.

It is the University's position that the purchase of securities by the University, through Bosworth as its agent, was ultra vires and, therefore, the University is entitled to return all of the monies paid for such securities.

The University states that it seeks only to have this court determine whether the brokers or the taxpayers should

bear the loss from these transactions. What the University actually seeks is equitable relief from its own acts, and to punish an innocent party because of its reliance upon resolutions of authorized government agencies. Fundamental fairness compels reversal of the judgment of the court below.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN HOLDING THAT
BOSWORTH IS LIABLE TO THE UNIVERSITY.

At page 15 of its brief, the University states that the decision in First Equity Corporation of Florida v. Utah State University, 544 P.2d 887 (Utah 1975), disposes of most arguments contained in Bosworth's brief.

In reality, however, First Equity determined only that the broker could not enforce its contracts with the University, because those agreements were ultra vires. Such a ruling, in accord with settled law as to executory contracts, is not applicable to executed contracts. If anything, First Equity requires this court to leave the parties where it finds them and deny the University rescission of the executed transactions.

The University implicitly acknowledges that it seeks to extend the holding in First Equity by arguing at page 22 of its brief why such an extension should be made. The

University leads its series of cases purporting to establish authority for such an extension with Miller v. McKinnon, 124 P.2d 34 (Cal. 1942), said to be authority that public monies expended pursuant to unlawful contracts may be recovered. In Miller a taxpayer brought suit to recover monies paid to a contractor by a county government, alleging violation of a state competitive bidding statute. The lower court's dismissal was reversed on appeal to the California Supreme Court, which found that the taxpayer's Complaint stated a claim for relief. In Miller, both the county and the contractor were accused of violating a specific statute in effect throughout the course of the parties' dealings. The court held that the contractor should be presumed to know the law with respect to the requirement of competitive bidding, and that such contractor acts at its peril when it fails to follow specific statutory requirements. Moreover, the taxpayer's Complaint alleged that the contractor charged exorbitant amounts for labor and materials.

Miller is inapposite to the case at bar, where no specific statutory prohibition is involved. In this case, not only are there no facts which would allow a presumption that Bosworth knew or should have known that the University's transactions in securities were ultra vires, but the authorization under which Catron acted is dispositive evidence to

the contrary. And in this case. there is no allegation that Bosworth took any advantage of or acted wrongfully in its dealings with the University.

Miller is also contrary to the Utah case of Moe v. Millard County School District 54 Utah 144, 179 Pac. 980 (1919). As discussed in Bosworth's main brief, the contractor in Moe entered into an agreement with the Millard County School District to supply fixtures for a school building. The contract was declared void because it exceeded the constitutional debt limit. While recognizing that the contractor could not recover money owing on an ultra vires contract, (the First Equity case) the court held that the contractor should not be required to refund any of the purchase price previously paid by the school district (this case).

The University also cites State v. Axtell, 393 P.2d 451, 454 (N.M. 1964), calling it a leading case allowing recovery under the rule that public bodies can recover monies paid out under mistake of law. That opinion, however, actually supports the position asserted here by Bosworth.

The Axtell opinion discusses the case of Tobin v. Town Council, 45 Wyo. 219, 17 P.2d 666 (1933), which held that the city of Sundance could not recover monies paid under an illegal contract because the city had retained the benefits it received. That same position is asserted by Bosworth

here. Axtell distinguished Tobin and other cases like Tobin on the ground that Tobin was an action to recover monies paid in good faith after services have been rendered and could not be compared with the situation that existed in Axtell, which involved a gratuitous payment by the state to a seller of feed furnished to farmers in an emergency. The court stated:

In any event, we would observe that the cases relied upon by the appellees mainly involved attempts, under laws found to be unconstitutional, to recover monies paid in good faith after the services had been rendered. The cases mentioned are distinguishable and cannot be compared with a situation in which there is an outright gift. 393 P.2d at 456.

Therefore, Axtell supports Bosworth, not the University.

The University further cites Gerzof v. Sweeney, 264 N.Y.S. 2d 376 (N.Y. App. Div. 1965), in support of its assertion that it can somehow unwind these executed transactions. In Gerzof, as in Miller, a contractor installed a generator for a city in violation of the state competitive bidding law. The court, swayed by the fact that the very purpose of the bidding law was to prohibit contractors from making unfair charges at the expense and to the detriment of local taxpayers, held that the generator was nonreturnable and that the contractor should be required to pay the village the difference between the price of the generator and a competitor's bid for a smaller generator. Gerzof is no more on point than is

Miller, addresses no legal issue relevant to the case at bar, and affords no support for the University's position.

At page 30 of its brief, the University "string cites" without comment 28 cases (none from this jurisdiction) which the University states support its position.

Bosworth could "string cite" as many or more. In an A.L.R. annotation entitled "The Right of a Municipality or Other Public Body, or Taxpayer, to Recover Back Payments Made Under Invalid or Unenforceable Contract," 140 A.L.R. 583. there are over 50 cases supporting Bosworth's position generally. The annotation states:

Lack of any evidence of bad faith in the execution of an invalid or unenforceable public contract under which public funds have been expended, or lack of any evidence of collusion between the contractor and the public authorities in the execution of such contract, are occasionally relied on by the courts in sustaining their refusal to permit recovery back of sums paid under such contracts. See, in this connection, the following cases: Sacramento County v. Southern P. Co. (1899) 127 Cal. 217, 59 P. 568, 825, set out infra, III a 2; Culver ex rel. Longyear v. Brown (1932) 259 Mich. 294, 243 N.W. 10, set out infra, III b 4; Pillager v. Hewett (1906) 98 Minn. 265, 107 N.W. 815, set out infra, III a 3; Witmer v. Nichols (1928) 320 Mo. 665, 8 S.W.2d. 63, set out infra, III b 4; Schell City v. Rumsey Mfg. Co. (189) (1890) 39 Mo. App. 264, set out infra III a 3; Ryszka v. Board of Education (1926) 126 Misc. 622, 214 N.Y.S. 264, set out infra, III b 4; Bartron v. Codrington County (S.D.) (reported herewith) ante, 550; Tobin v. Sundance (1933) 45 Wyo. 219, 17 P.2d 666, 84 A.L.R. 902, set out infra, III a 3. 140 A.L.R. at 588.

In this case Bosworth made every reasonable effort to obtain and did in fact obtain proof that the University had authority to enter into the transactions before it acted as the University's agent. It has been neither alleged nor shown that Bosworth acted in bad faith in discharge of its agency obligation to the University, nor has it been alleged or shown that Bosworth and the University have colluded to the taxpayer's detriment.

POINT II

THE UNIVERSITY IS ESTOPPED FROM SEEKING RECOVERY.

The University asserts that a government cannot be estopped and, therefore, traditional estoppel principles are inapplicable to this action.

It is clear as an initial matter that the traditional elements of estoppel are present in this case. The University officers and its Institutional Council were fully advised of the University's investment program, the kinds of stocks being purchased and sold, and the precise identity, cost and sales price of every stock actually purchased and sold. The University intended that its conduct would be acted upon. The University's corporate resolution had for its purpose to allow the University to open and maintain an account with Bosworth. Bosworth was ignorant of the true facts, and

relied to its detriment on the University's conduct. Therefore, unless estoppel principles do not apply to government entities, the University is estopped from seeking restitution.

That this Court will apply equitable estoppel to governmental entities was recently reaffirmed in Celebrity Club, Inc. v. Utah Liquor Control Commission, 602 P.2d 689 (Utah 1979). In Celebrity, the plaintiff wished to open a private club where liquor would be sold and requested from the Liquor Commission an opinion determining whether the premises at which the club was to be situated would comply with Utah Code Annotated, §16-6-13.5, which provides that such an establishment may not be located within 600 feet of a school. The Utah State Liquor Commission issued a letter to petitioner advising him that the location of the premises was in compliance with the statute. The plaintiff thereupon acted in reliance upon that letter. Sometime later, the Commission advised the plaintiff that the sale of liquor on the premises would be in violation of the statute and accordingly refused to issue plaintiff a liquor license. In a suit to compel issuance of the license, this Court held that all the elements of estoppel had been made out and that the Commission was estopped to deny the plaintiff a liquor license on the grounds that it did not comply with the statute. The Court stated that those elements were: (1) an admission, statement,

or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act. 602 P.2d at 694.

The uncontroverted facts of this case, when applied to the ruling of Celebrity Club, confirm that the University is estopped as a matter of law. The University issued a resolution affirming its authority to enter into purchase of common stocks. Such resolution is the admission, statement or act designated in Celebrity Club. Bosworth, the other party, relied upon the resolution by acting as agent in the securities transactions for the University. Bosworth stands to be injured in the amount of over \$1,000,000 if the University is to be allowed to repudiate its specific representation. Under the holding in Celebrity Club, a more compelling case of estoppel than the uncontroverted facts in this case is not readily imaginable.

The University's own case, Petty v. Borg, 106 Utah 224, 150 P.2d 776 (1944) is inapplicable to this case. In Petty, the court found that the plaintiff's activities which were claimed to have estopped the federal government were not done for the government at all and that the plaintiff never intended that his actions bind the government. In this

case, the Institutional Council did act on behalf of the University and did intend to bind the University.

Finally, the University seems to assert that there is some public policy reason for allowing a government entity unilaterally to repudiate its agreements while retaining the benefits thereof. The holding in Celebrity Club is to the contrary. This court in Celebrity Club stated:

The conduct of government should always be scrupulously just in dealing with its citizens; and where a public official, acting within its authority and with knowledge of the pertinent facts, has made a commitment and the party to whom it was made has acted to its detriment in reliance on that commitment, officials should not be permitted to revoke that commitment. 602 P.2d at 695.

The University has failed to demonstrate any reason why this court should depart from the holding of Celebrity Club. The uncontroverted facts in this case present a clear case for the application of estoppel principles. Estoppel, therefore, bars the University's claim.

POINT III

THE UNIVERSITY'S CLAIM IS BARRED BY THE EQUITABLE DOCTRINE OF UNCLEAN HANDS.

The University states that Bosworth's defense of unclean hands is inapplicable because equitable relief is not sought. Perhaps the University's difficulty in the characterization of its claim stems from the unprecedented nature of the claim.

Its confusion is manifested by reliance upon a lengthy excerpt from Gerzof for the proposition that its cause of action was recognized at common law. However, as the quoted passage clearly indicates, the claim in Gerzof was based, not on the common law, but upon a statute. Moreover, the plaintiff's own complaint, in its prayer for judgment, seeks restitution, an equitable remedy, of the purchase price for securities which have not been sold.

To the extent that the University seeks equitable relief, Bosworth's defense of unclean hands is a bar.

A specific and uncontroverted instance of unclean hands is the failure of the University to notify Bosworth after December 15, 1972, when the University was alerted by the Attorney General's office concerning a problem regarding legality of the University's investments. Most of Bosworth's transactions for the University occurred between December 15, 1972 and March, 1973, when the University for the first time notified Bosworth that the corporate resolution upon which Bosworth relied was no longer in effect.

The University asserts that because of widespread publicity in Salt Lake City and Logan concerning the Attorney General's opinion, Bosworth cannot complain of lack of notice. The fact of the matter is, however, that the University officials who enacted the corporate resolution, knowing that

that resolution was in effect until written notice was given Bosworth to the contrary, failed to give such notice. To this date, the University has given no reason for the delay.

Further, the University, aware that its authority to invest in common stocks was in question in December of 1972, failed to notify Bosworth of such question until March of 1973. The facts show that the University affirmatively and wrongfully induced Bosworth to act to its detriment. The University has not done equity and, therefore, may not turn to equity for relief.

POINT IV

VENUE IS IMPROPER IN CACHE COUNTY.

The University states that the specific venue provision applicable to this action is Utah Code Annotated, §78-13-7, allowing actions not covered by other specific venue statutes to be tried in the county in which the cause of action arose. All parties concur that the cause of action arises where the wrong occurs.

The gist of the University's complaint is that Catron exceeded his authority in purchasing and selling speculative stock on behalf of the University, that the University itself had no authorization to purchase or sell such stock, that Bosworth was allegedly aware of the limitations of

authority and power (although the University never explains why Bosworth should have been better able to anticipate the Attorney General's opinion than the University itself), and that the University suffered damages caused thereby.

Such a cause of action arose, if at all, in Salt Lake County. The University's securities trading account with Bosworth was opened in Bosworth's Salt Lake County office. All orders for the purchase or sale of securities were entered by the University at Bosworth's Salt Lake County office. All new accounts documents and authorizations by the University were submitted to Bosworth's Salt Lake County office. Bosworth did nothing in Cache County.

However, the University states that the wrong occurred in Cache County because the University illegally paid out monies there. This argument is indicative of the difficulties encumbering the claim for relief. The University apparently maintains, and states in its argument on venue, that since the only wrong committed was the wrong committed by the University, that wrong had to have occurred in Cache County. Bosworth agrees with the University that the acts, if any, committed in this case were committed by the University. What the University does not, and cannot, explain is why its own wrongful acts affect venue as to the named defendants. The plaintiff University cannot lay venue

under Utah Code Annotated, §78-13-7, nor any other statute, until it can allege a wrongful act by someone other than itself.

The University further argues that the its banks in Cache County were agents of Bosworth, making venue proper in Cache County. For this proposition, the University relies upon Utah Code Annotated, §70A-4-201(1)(1953), which provides that a collecting bank is an agent or sub-agent of the owner of an item prior to the time of settlement. This statute, part of the Utah Commercial Code, was never intended to determine a venue question. Nor can the banks in Logan be deemed agents of Bosworth in the traditional, common law sense, thus disposing of the venue question.

Finally, the University's claim that venue may be properly laid in each and every county in this state simply ignores the venue statutes and relevant case law.

POINT V

BOSWORTH'S THIRD-PARTY COMPLAINT FOR INDEMNITY AND CONTRIBUTION STATED CLAIMS UPON WHICH RELIEF CAN BE GRANTED.

Bosworth's third-party claims are directed against the University's officers and members of its Institutional Council and are based on theories of implied contract, warranty, implied warranty, misrepresentation, indemnity,

subrogation and conduct outside the scope of authority. The court below granted the third-party defendants' Motion to Dismiss for failure to state a claim upon which relief could be granted. In so doing, the lower court held as a matter of law that under no conceivable state of facts could those persons who actively implemented and supervised the University's investment program be required to indemnify Bosworth against loss.

The third-party defendants assert that the doctrine of sovereign immunity shields the individual defendants because public officials may not be held personally liable for acts performed in good faith and within the scope of their duties. What the third-party defendants overlook is that the University's claim against Bosworth is entirely predicated on the theory that what these individuals did was entirely ultra vires and thus not within the scope of their duties. On the University's theory of liability, as to which Bosworth seeks indemnity, sovereign immunity affords no shelter to the individual third-party defendants.

In Roe v. Lundstrom, 89 Utah 520, 57 P.2d 1128 (1936), this Court, having stated the general rule that "a municipal officer is immune from liability in a private suit for his acts in the discharge of corporate duties in the absence of willful negligence, malice, or corruption constituting mis-

feasance," stated the corollary to that rule, making it clear that a public officer "may not, however, claim immunity for the commission of an act entirely outside the scope of his official duties." 57 P.2d at 1131. Thus, if the transactions were, as the University asserts, ultra vires, the individual defendants did not discharge a corporate duty, but rather acted beyond their authority, power, or jurisdiction. Under Roe, therefore, the individual defendants may not claim sovereign immunity.

Similarly, in Garff v. Smith, 31 Utah 102, 87 Pac. 772 (1906), the court held that since the complaint did not allege that, in performing their duties, the defendants acted beyond the scope of their authority or that they acted without or in excess of their jurisdiction, a state sheep inspector and others were not liable for their negligence in quarantining plaintiff's sheep. The Third-Party Complaint of Bosworth clearly states that, if it is liable to the University, it will be due to the fact that the individual third-party defendants acted without the scope of their authority and jurisdiction and that such acts of the individual defendants were ultra vires.

There are numerous cases in accord with this proposition. See Logan City v. Allen, 86 Utah 375, 44 P.2d 1083 (1935) (officers performing discretionary acts "may become civilly

liable for the acts in excess of authority or where there is a total want of jurisdiction,"); Hjorth v. Whittenberg, 121 Utah 324, 328, 241 P.2d 907 (1952) (Utah State Road Commissioners were entitled to immunity because they were exercising "duties imposed upon them and authorized by law"); Blonquist v. Summit County, 25 Utah 2d 387, 483 P.2d 430 (1971) (if county officials were mistaken with respect to jurisdictional facts upon which they acted, then they could be personally liable to plaintiff).

The cases cited by the individual third-party defendants also establish that sovereign immunity is of no aid to them. For example, in Anderson v. Granite School District, 17 Utah 2d 405, 413 P.2d 597 (1966), the court merely noted the general rule that public officials are immune from damages for acts committed within the scope of their authority. The court was not called upon to determine that the public officials had committed acts totally without their power, as the University claims in this case.

The third-party defendants' reliance upon Lister v. Board of Regents, 72 Wis. 2d 282, 240 N.W.2d 610 (1976) is also misplaced. In Lister, four former University of Wisconsin law students sought to recover the difference between non-resident and resident tuition which they had paid for two school years. The named defendants were the

University's System Board of Regents and the Registrar of the University of Wisconsin. The only "excess of authority" asserted by the plaintiffs against the Registrar was his alleged misinterpretation of the standard set forth in the state statutes which governed the resident/non-resident determination. The court held that the Registrar could properly assert official immunity in response to this claim of a simple error in judgment in exercising his statutory authority, as he was expressly empowered to make the resident /non-resident decision.

Immediately following the text quoted by the third party defendants in their brief, the Wisconsin Supreme Court went on to state that:

. . . there is no substantive liability for damages resulting from mistakes and judgment where the officer is specifically empowered to exercise such judgment.

Since the University's theory of liability against Bosworth is based upon the actions of the third party defendants, actions as to which they were not specifically empowered to exercise any kind of judgment, Lister affords them no support.

Similarly misplaced is the third-party defendants' reliance on McQuillan for the proposition that public officials will not be held liable on contracts which they execute. Again, almost immediately following the passage

quoted by the third-party defendants, McQuillan states that "if public officers in making contracts go beyond or exceed the authority given them, they may become personally liable."⁴ McQuillan, 12.214, at 160.

The third party defendants, without whose resolution Bosworth would never have conducted these transactions at all, should not be allowed to invoke immunity to shield the conduct in these cases.

POINT VI

BOSWORTH'S CLAIM FOR INDEMNITY STATES A CLAIM FOR RELIEF.

The third-party individual defendants also claim that Bosworth is barred from seeking indemnity because of active participation in the events giving rise to liability. However, the only claim in the University's Complaint upon which Bosworth could be liable is that the University had no power to enter into the transactions complained of. Bosworth's liability, if any, is founded upon the legal status of the University and upon Bosworth's alleged constructive knowledge that the University's authority was not what the individual defendants, all of them officers of the University, represented it to be. Bosworth was not an active wrongdoer.

On the other hand, the allegations in Bosworth's Third-Party Complaint, which must be taken as true for purposes of

this appeal, are that the individual third-party defendants passed a resolution authorizing Catron to purchase and sell securities on behalf of the University and warranted in that resolution that Catron had at all times "the authority in every way to bind and obligate the University for the carrying out of any contract or transaction which shall, for and in behalf of this corporation, be entered into or made with or through the brokers." Such resolution was a necessary prerequisite to any transaction complained of herein.

The individual third-party defendants state that as the broker played an essential role in the transactions giving rise to liability and because there is no difference in the culpability of the brokers and respondents sufficient to justify the indemnity action, that action must be dismissed. However, it is not the transactions which give rise to liability, it is the post-determined illegality thereof. Moreover, Bosworth has pleaded that there is in fact a difference between its behavior and the enactment of a resolution, through which Bosworth became involved in the first place, and has stated facts to support its pleading. There is a significant difference between the brokers' and the respondents' culpability. The Third-Party Complaint is sufficient to withstand a Motion to Dismiss.

CONCLUSION

For the foregoing reasons, Bosworth respectfully requests this Court to reverse the ruling of the court below, and to direct the District Court to enter judgment in favor of Bosworth on its Motion to Dismiss.

In the alternative, Bosworth requests this Court to reverse the rulings of the court below granting the University's Motion for Summary Judgment, dismissing Bosworth's Third-Party Complaint against the individual defendants, and in denying Bosworth's Motion for Change of Venue and to remand this case for further proceedings consistent with this court's opinion.

Respectfully submitted,

SNOW, CHRISTENSEN & MARTINEAU

By 

Harold G. Christensen

By 

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STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

NORMA F. CROSSLEY, being duly sworn, says:

That she is employed in the offices of Snow, Christensen and Martineau, Attorneys for Appellant Bosworth, Sullivan and Company herein; that she served the attached Reply Brief of Appellant Bosworth, Sullivan and Company, Case No. 16274, upon the following persons by placing two true and correct copies thereof in an envelope addressed as follows:

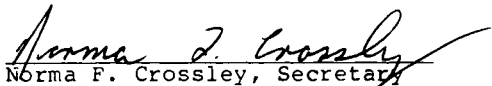
David L. Wilkinson
Office of the Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114

Darwin C. Hansen
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Robert S. Campbell, Jr.
Michael Heyrend
310 South Main Street, 12th Floor
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Keith Taylor
Daniel Allred
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and mailing the same, postage prepaid, on the 11TH day of
April, 1980.


Norma F. Crossley, Secretary

SUBSCRIBED AND SWORN TO before me this 11 day of
April, 1980.


NOTARY PUBLIC
Residing at: S.L.C., Utah

My Commission Expires:
7-10-81