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Mrs. Dudley Crafts et al v. Intermountain Power Project et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MRS. DUDLEY CRAFTS, et al,

Plaintiffs and
Appellants,

vs.

INTERMOUNTAIN POWER PROJECT,
a Utah Corporation, et al,

Defendants and
Respondents.

Supreme Court No. 18053 -

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT
OF THE FIFTH JUDICIAL DISTRICT
IN AND FOR MILLARD COUNTY

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IN THE SUPREME COURT OF THE STATE OF UTAH

MRS. DUDLEY CRAFTS, VERA GILES,
BERNARD JACKSON, NELLA JACKSON,
RAY BROWN, BETH BROWN, GERALD
MOODY, ELAINE MOODY, FRED TURNER,
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OWENS, MAXINE OWENS, ETHEL M.
STANWORTH, DOUG TURNER, and
CONNIE TURNER, et al,

Plaintiffs and
Appellants,

vs.

DEE C. HANSEN, State Engineer of
the State of Utah; BOARD OF WATER
RESOURCES; DELTA CANAL COMPANY, a
Utah Corporation; MELVILLE IRRIGA-
TION COMPANY, a Utah Corporation;
ABRAHAM IRRIGATION COMPANY, a
Utah Corporation; DESERET IRRIGA-
TION COMPANY, a Utah Corporation;
and INTERMOUNTAIN POWER AGENCY, a
Utah Corporation,

Defendants and
Respondents.

Supreme Court No. 18053

BRIEF OF APPELLANTS

STATEMENT OF KIND OF CASE

This is an action for a plenary review of a decision
of the State Engineer approving an application for a permanent
change of point of diversion, place and nature of use of water.

DISPOSITION IN LOWER COURT

The trial court granted a motion for summary judgment dismissing the complaint, approving the change application, and affirming the decision of the State Engineer.

RELIEF SOUGHT ON APPEAL

The appellants seek the reversal of the summary judgment and remand of the case for an evidentiary trial on the merits.

STATEMENT OF FACTS

An application to the state engineer, Change Application No. a-10864 (68 area), was filed on July 30, 1979, for a permanent change of point of diversion, place and nature of use of an unspecified flow and quantity of water, the rights to the use of which are evidenced by the "Sevier River Decree", sometimes referred to in the record as the "Cox Decree". The applicants are the Board of Water Resources, Delta Canal Company, Melville Irrigation Company, Abraham Irrigation Company, and Deseret Irrigation Company. The canal company and the irrigation companies are referred to in the record and in this brief as "DMAD". The application is on the printed form provided by the state engineer. (R. 017 - 027)

It is stated in the application, under the heading "Explanatory", that:

"This change application is filed at the instance and request of numerous stockholders of the DMAD companies, which stockholders have committed themselves to the sale of stock owned by them in the DMAD companies to Intermountain Power Agency for industrial use at the proposed Intermountain Power Project, to be constructed and owned by Intermountain Power Agency, a political sub-division of the State of Utah created pursuant to the Interlocal co-operation Act (Chapter 13, Title 11, UCA 1953, as Amended)." (R. 024, br.)

The entire explanatory portion of the application is included in the appendix to this brief, pages 20 to 28 . Briefly stated, the applicants propose to change the points of rediversion, place and nature of use of an unspecified flow and quantity of water of the surface flow of the Sevier River diverted by means of numerous wells, described in paragraph 9 of the application, from irrigation and stockwatering to industrial use. The irrigation use has been seasonal and largely non-consumptive, and the industrial use will totally consume the water. (R. 017 - 026). It is proposed that the water covered by this application will be commingled with other waters at the DMAD Reservoir and will be rediverted at a pumping station located on the west bank of the reservoir into two 48-inch pipelines which will carry it a distance of 11.2 miles to the Intermountain Power Project, where it will be commingled with underground water to be diverted by a combination of five deep wells (R. 024, 025) (Br.27)

Notice of the application was duly published as provided by law and some 67 protests were filed by individuals, irrigation companies, reservoir companies, corporations, and Delta City (R. 027, 028). A hearing was held by the state engineer and the application was approved. We quote from the State Engineer's memorandum decision:

"The State Engineer recognizes that the decreed rights below Gunnison Bend Reservoir are supplied from irrigation return flow and under certain circumstances those rights could be diminished because of the change in use. Approximately 20% of the water of the D.M.A.D. Companies will be diverted to the Project and totally consumed; however, during periods of good water supply the return flow from the irrigation may not suffer appreciable because of the industrial water. It is the opinion of the State Engineer that when there is a reduction in the return flow to the users below Gunnison Bend Reservoir, releases must be made to the lower users to compensate them for those losses. (Emphasis added.) (R. 029 - 030)

This action was filed to review the engineer's decision.

The defendants answered the complaint. The complaint and answers framed many factual issues which will be discussed in some detail in the argument.

The defendants filed a motion for a summary judgment dismissing the case and supported it by affidavits of experts to the effect that the change would not constitute an enlargement and would not result in interference with the rights of others, but would benefit the DMAD companies and their stockholders. The plaintiffs filed an affidavit of an expert stating that the proposed change will, if approved, have a detrimental effect on the water supplies of the plaintiffs. The affidavits will be discussed in detail in

The trial court made and entered an order and summary judgment granting the defendants' motion to dismiss, without formal findings of fact and conclusions of law, but stating generally in a recitation that the change application is in all respects complete and in proper form, that the changes proposed are authorized by law and that they do not conflict with the Sevier River decree dated November 30, 1936, and that the change application can be approved without impairing the existing water rights of the plaintiffs and that there is no genuine issue as to any material fact. This appeal was taken from the summary judgment so made and entered. (R. 308 - 311, 317, 318)

ARGUMENT

THERE ARE GENUINE ISSUES OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT

The appellants rely upon Rule 56(c) of the Utah Rules of Civil Procedure which provides:

"The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law...."

The question as to whether there was a genuine issue of material fact before the trial court when it granted the motion for summary judgment can best be considered and determined after reviewing the nature of the case.

This suit was filed pursuant to Section 73-3-14, UCA 1953, which provides for the review by the district court of decisions of the state engineer. Change Application No. a-10864 was filed in accordance with Section 73-3-3, UCA 1953, which, in pertinent part, provides:

"Any person entitled to the use of water may change the place of diversion or use and may use the water for other purposes than those for which it was originally appropriated, but no such change shall be made if it impairs any vested right without just compensation. Such changes may be permanent or temporary. Changes for an indefinite length of time with an intention to relinquish the original point of diversion, place or purpose of use are defined as permanent changes. Temporary changes include and are limited to all changes for definitely fixed periods of not exceeding one year. Both permanent and temporary changes of point of diversion, place or purpose of use of water including water involved in general adjudication or other suits, shall be made in the manner provided herein and not otherwise.

"No permanent change shall be made except on the approval of an application therefor by the state engineer. Such applications shall be made upon blanks to be furnished by the state engineer and shall set forth the name of the applicant, the quantity of water involved, the stream or source from where the water is diverted, the point to which it is proposed to change the diversion of the water, the place, purpose, and extent of the present use, and the place, purpose and extent of the proposed use and such other information as the state engineer may require...."

The appellants take the position that the statute requires the state engineer to consider, in acting upon each change application, the basic question of fact as to whether the change of place of diversion or use as proposed in the application, can be made without impairing any vested right without just compensation.

In the case of United States v. District Court, 121 Utah 18, 238 P 2d 1132, this Court had before it questions involving an application for change of point of diversion, place and nature of use of water acquired by the United States as appurtenances to land in Deer Creek Reservoir. The Court in its opinion discussed at some length factual questions to be considered, the duties of the state engineer and the nature of actions to review his decisions. We quote:

"The administration of the waters of the western arid states present many vital and complicated problems. The right to the use of water, although a property right, is very different from the ownership of specific property which is subject to possession, control and use as the owner sees fit. Such right does not involve the ownership of a specific body of water but is only a right to use a given amount of the transitory waters of a stream or water source for a specified time, place and purpose, and a change in any of these might materially affect the rights of other users of the same stream or source. Streams and other water sources are usually divided and subdivided between many users and the various divisions are used in turns of a designated number of hours per day or other period of time. A stream of water or other source may be supplied from many sources, some apparent and others unknown, and often where it goes to is difficult or impossible to trace. The amount of water in a stream usually varies from year to year, season to season, and sometimes from day to day and hour to hour. Most farms of this state are vitally dependent on irrigation waters and particularly during the later part of the irrigation season the demand is usually much greater than the supply, and much more land could be brought under cultivation if there was sufficient water. So the keeping of proper records, the equitable and orderly distribution and the taking of effective measures to conserve the waters are of vital importance to the well being of this state."

"The State Engineer's decisions, often have the effect of determining valuable rights. Neither an appropriation or change in diversion place or purpose or place of use can be initiated or accomplished under our law without his approval or the approval of the district court on review. His decisions require notice to all interested persons who may protest, whereupon the Engineer must investigate and hear evidence of all interested parties and he should approve or reject applications to appropriate, and applications for a change and issue or deny certificates that such applications have been accomplished in accordance with the law and the facts as he finds them...."

"The legislature provided that any person aggrieved by the engineer's decision may bring an action in the district court for a plenary review thereof" and that the hearing therein "shall proceed as a trial de novo". The use of the terms 'review' and 'trial de novo' indicate that the court shall review only the issues of law and fact which were involved in the engineer's decision. That is, whether the application shall be approved or rejected, and as a corollary thereto whether on all the evidence adduced at such trial de novo the engineer's approval or rejection should be sustained, rejected, or modified...."

The courts of this state and other Western States have, in many opinions, discussed and ruled upon changes of points of diversion, places and nature of use which constitute an impairment of vested rights within the meaning of the statute, quoted above, and similar statutes.

It has been held that the state engineer must determine whether there is reason to believe that the proposed change can be made without impairing vested rights.

Salt Lake City v. Boundary Springs Water Users
Ass'n, 2 U 2d 141, 270 P 2d 453.

Piute Res. & Irr. Co. v. West Panguitch Res. & Irr.
Co., 13 U 2d 6, 367 P 2d 855.

United States v. District Court, supra.

In the case of East Bench Irr. Co. v. Deseret Irr. Co.,
2 Utah 2d 170, 271 P 2d 449, the Court said:

"Under the circumstances of this case defendants have a vested right to the use of all of the water which would be available for their use without the proposed changes. If these changes decrease the quantity of water available for their use in the future, their vested rights will be impaired."

In the opinion of this Court on rehearing in the case of Piute Res. & Irr. Co. v. West Panguitch Irr. & Res. Co., 13 Utah 2d 6, 367 P 2d 855, which involved a change application, the question as to impairment of vested rights was posed as follows:

"Does the evidence show reason to believe that the winter waters now used for culinary, stock watering and land flooding can be stored in a reservoir to be built until the dry summer season, then used to supplement watering of the presently irrigated land without depriving lower water users of the Sevier River of the use of some quantity of water during the same period of time as would have been available to them without the change? Without such a showing this application should be denied. For if the operation of such a change will deprive the lower users of the same quantity of water during the same period of time as they would have had without this change, their vested rights will thereby be impaired. So this is the determinative question to be considered on this appeal."

The answer of the Court to the question, so posed, is quoted:

"This court has never adopted the so-called 'de minimus' theory, which we understand to be that an application either to appropriate or change the diversion or use of water should be approved if the effect on prior vested rights is so small that

courts will not be concerned therewith. This would seem to require the approval of an application if it were shown that the adverse effect on vested rights is very small, even though there is a definite showing of some such adverse effect. Of course, all of the estimates of the loss to the lower users by Mr. Lambert were many times more than the amount he estimated as being a 'de minimus' amount of loss to the lower water users. However, the correct rule on this question is that the applicant must show reason to believe that the proposed application for change can be made without impairing vested rights. This means that if vested rights will be impaired by such change or application to appropriate, such application should not be approved.

"The foregoing conclusion is especially applicable under the situation here disclosed; that a long river drains the water from many canyons covering a large territory over which there is an inadequate water supply to fully irrigate the land presently under cultivation and where the tributary water of many such canyons could be stored and used to supplement the irrigation of presently irrigated lands during the dry season to great advantage to the landowners who would receive advantages of the supplemental irrigation water. If a 'de minimus' reduction of the waters available to the lower water users were allowed under such conditions over and over again, the damage to the lower users would be unbearable."

It is stated in Corpus Juris Secundum, Vol. 93, page

975:

"While there is no fixed rule for determining whether a change in point of diversion will injure others, and each case depends largely on its own surrounding circumstances and conditions, there can generally be no change in point of diversion which will result in an enlarged use either as to amount or time."

In the case of East Bench Irr. Co. v. State, 5 Utah

2d 235, 300 P 2d 603, 607, the Court said:

"However, there are issues in every appeal from the engineer's decision which must be adjudicated. The court must adjudicate whether there is reason to believe that some rights may be acquired under such application without impairing vested rights of others. In some other cases the court must adjudicate the priority of conflicting rights, and in other cases, as we did in our previous decision in this case, it must adjudicate whether a foreseeable possible effect will constitute an impairment of vested rights...."

Having considered the nature of the issues in actions to review decisions of the State Engineer on applications to change the place and nature of use of water, we now will consider the intent, purpose and application of the summary judgment procedure.

This Court, and Courts in other states, have, in many cases, explained the purpose and application of Rule 56(c) of the Utah Rules of Civil Procedure. We quote from a few:

In the case of Durham v. Margetts, 571 P 2d 1332, 1334, it is stated"

"The summary judgment procedure has the desirable and salutary purpose of eliminating the time, trouble and expense of a trial when there are no issues of fact in dispute and the controversy can be resolved as a matter of law. Nevertheless, that should not be done on conjecture, but only when the matter is clear; and in case of doubt, the doubt should be resolved in allowing the challenged party the opportunity of at least attempting to prove his right to recover...."

The following is quoted from Kidman v. White, 14 Utah 2d 898, 378 P 2d 898, 900:

"In confronting the problem presented on this appeal we have been obliged to remain aware that a summary judgment, which turns a party out of court without an opportunity to present his evidence, is a harsh measure that should be granted only when, taking the view most favorable to a party's claims and any proof that might properly be adduced thereunder, he could in no event prevail...."

See also, Sorenson v. Beers, (Utah) 585 P 2d 458, 460, where it is stated:

"Rule 56(c), Utah Rules of Civil Procedure, provides a summary judgment may be rendered where there is no genuine issue as to any material fact, and that moving party is entitled a judgment as a matter of law. This Court in a number of decisions has laid down the rule that in ruling on a motion for a summary judgment the court may consider only facts which are not in dispute and that motion should be granted only when all the facts entitling the moving party to a judgment are clearly established or admitted."

This Court has held that it takes only one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact.

Holbrook Company v. Adams, 542 P 2d 191.

A number of cases hold that it was not the purpose of Rule 56(c) to provide for a trial by affidavit:

Boyd v. Broyles, 163 Colo. 451, 431 P 2d 484.
Primock v. Hamilton, 168 Colo. 524, 452 P 2d 375.
Knowles v. Klase, 204 Kan. 156, 460 P 2d 444.
Harter v. Kuntz, 207 Kan. 338, 485 P 2d 190.

In the case of Boyd v. Broyles, supra, the Court said:

"In our view of the matter the trial court acted precipitously in granting Broyles' motion for summary judgment. It has been said so frequently that it is now almost trite, but summary judgment is still a very drastic remedy which is never warranted except on a clear showing that

there is no genuine issue as to any material fact, and summary judgment should never be so used as to compel a party to try his case on affidavits with no opportunity to cross-examine the affiants...."

We shall now apply the law discussed above to this case. The statute, Section 73-3-3, directs that an issue of fact be determined by the state engineer and on review by the court as to whether the proposed change "...impairs any vested right without just compensation." The pleadings present issues of fact, among others, as to whether the approval of the proposed change will interfere with and damage vested water rights, whether it will result in an enlargement of the right sought to be changed, and whether 27,000 acre feet of water has ever been pumped from the DMAD wells.

The affidavits of expert witnesses are in direct conflict as to the genuine issue of material fact regarding impairment of vested rights required by the statute to be ruled on by the state engineer and required by case law to be ruled on by decisions of this Court cited above.

The complaint alleges 22 causes of action (R. 001 - 032). Three separate answers were filed, one by the Intermountain Power Project and Intermountain Power Agency (R. 052 - 064), one for the Utah State defendants (R. 065 - 077), and one for DMAD (R. 078 - 090). All answers specifically deny allegations of impairment of vested rights and enlargement of applicants' water rights, (R. 004, 053, 054, 067, 080) which, as pointed out above, are genuine issues

of material fact. There are scores of denials of allegations of other facts, many of which are supportive of the allegations of impairment and enlargement.

The affidavit of defendants' expert Reed W. Mower, states that the proposed changes under Application No. a-10864, will not reduce the natural recharge into the artesian aquifers of the Sevier Desert ground-water basin (R. 115). The affidavit of Roger Walker does not treat application a-10864 separately, but states that after applications a-10863 and a-10864 are in effect, it will result in "...benefits to the public generally and/or Central Utah Water Company, Delta Canal Company, Melville Irrigation Company, Abraham Irrigation Company and Deseret Irrigation Company". (R. 126 - 129). He states that the benefits "...are more than adequate to compensate any and all other water users for any damages, if any there be, which might result from the affirming of such Memorandum Decisions by the District Court...." (R. 129, 130)

The affidavit of the plaintiffs' expert, Parley R. Neeley, states that year-around pumping will create a greater loss of water than pumping allowed under current conditions and that "...pumping of IPP wells and DMAD wells will drastically affect the water level, adversely in the Sugarville area much more than pumping the wells at the original locations and for the original purposes". He further states that "...By transferring water from agricultural purposes to the purposes and at the locations allowed by the decisions of the State Engineer, all other wells in the basin will be adversely affected". (R. 215, 216).

The rule stated in the case of Holbrook Company v. Adams, supra, that it takes only one sworn statement under oath to dispute the averments on the other side of a controversy and create an issue of fact is determinative of this case. An attempt is made, here, to try the many complicated factual issues regarding ground water, by affidavit, which of course denies to the losing party the right to cross-examine expert witnesses on matters of fact involving the movement of ground water in aquifers which cannot be seen and can only be theorized about by experts as to location, extent, thickness, porosity, slope, connections with other aquifers and numerous other characteristics which may enlighten the state engineer and the court in considering whether there is reason to believe that a change in an existing diversion may adversely affect the water rights of others.

THE DEFENDANTS ARE NOT ENTITLED
TO A JUDGMENT AS A MATTER OF LAW.

It will be noted that there are two conditions stated in Rule 56(c) of the Utah Rules of Civil Procedure to the granting of a motion for summary judgment: (1) that there is no genuine issue as to any material fact, and (2) that the moving party is entitled to judgment as a matter of law. Condition (2) will be addressed under the above heading.

This Court held in the case of FMA Acceptance Co. v. Leatherby Ins. Co., (Utah) 594 P2d 1332, that:

"A summary judgment is appropriate only where the favored party makes a showing which precludes, as a matter of law, the awarding of any relief to the losing party."

Other cases hold that summary judgment can be granted only where the moving party is entitled to judgment as a matter of law on clear, complete, and undisputed facts.

Giovanelli v. First Federal Savings, 120 Ariz. 577, 587 P 2d 763.

First National Bank of Albuquerque v. Noram Agr. Prod. Inc., 88 N.M. 74, 537 P 2d 682.

Green v. Garn, 11 Utah 2d 375, 359 P 2d 1050

Harvey v. Sanders, (Utah) 534 P 2d 905

It is necessary that the right to a summary judgment must be free from doubt as to essential facts.

Durham v. Margetts, supra.

Geiler v. Arizona Bank (Arizona) 537 P 2d 994.

In the case of Whaley v. State (Alaska) 438 P 2d 718, the court said:

"In order to justify summary judgment not only must it be shown that there is no genuine issue of fact to be litigated, but also that the moving party is entitled to judgment as a matter of law."

This is a very complicated case as indicated in the "explanatory" portion of Application No. a-10864 in the appendix. It involves both extensive surface water rights on a large river system and underground water rights (Spaulding - Livingston wells). The state engineer's solution is based on a determination of total water supplies available to the DMAD companies each year. The total quantity of water proposed to be changed to industrial use is not specified, contrary to the requirements of Section 73-3-3

UCA. (R. 030). The state engineer made no order as to how the total supply available is to be determined.

The matter is so involved, and the facts are so indefinite that the state engineer approved the application only conditionally to await the installation of measuring devices "...to attempt to determine the historical return flow to the lower users in order to establish more definitively the quantities of water required as compensation". (emphasis added). To make his decision even more indefinite and conditional, the state engineer added:

"The State Engineer is conducting additional studies in the area, and if subsequent studies of a Court - either in a review of this decision or in a subsequent action - adjudicate that a different measure of compensation must be used, the State Engineer will adjust the quantity accordingly."

It is very apparent that in view of the complexity of the water rights set out in the Sevier River decree, the problems of available supply and return flow and the written admission of the State Engineer that he cannot make a determination without the installation and operation of measuring devices over, what he calls, an interlocutory period, that the applicants are not entitled to judgment as a matter of law. This case falls far short of meeting the requirements that the facts must be clear, undisputed, and complete. The defendants did not bear the burden of showing that as a matter of law no relief can be awarded to the losing parties.

This case falls in a category to which the following observation of the Supreme Court of Hawaii is appropriate:

"Some cases are, by their nature, simply not susceptible of disposition by summary judgment." Munds v. First Ins. Co. (Hawaii) 614 P 2d 408, 411.

In view of the admitted lack of facts as to return flow, it was obviously error to award a summary judgment. The application should have been held, unacted upon, until the State Engineer had obtained the facts, and in view of the complexities and the very nature of this large, involved, and important water case, it should have been tried on its merits in the regular way with an opportunity being given to both parties to adduce evidence and to cross-examine experts on the important factual issues presented.

CONCLUSION

The statutory question as to whether the changes proposed by Application No. a-10864 would, if approved, impair any vested water rights without just compensation is a genuine issue as to a material fact within the meaning of Rule 56(c), Utah Rules of Civil Procedure. The affidavits of experts dispute the averments on the other side of the controversy and create an issue of fact and the issues are framed by the pleadings. The State Engineer admitted in his memorandum decision that he could not make a determination of the crucial issue of historical return flow without further measurements and studies. The incomplete records and


disputed facts fall far short of meeting the requirement of the rule that the moving party must show entitlement to a judgment as a matter of law.

The summary judgment should be reversed and the case remanded for a full trial on the merits.

Respectfully submitted,

SKEEN AND SKEEN

By:



E. J. SKEEN
Attorneys for Plaintiffs and
Appellants.

APPENDIX

CHANGE APPLICATION NO.

A-10864

GB-ARCA

Application for Permanent Change of Point of Diversion

Place and Nature of Use of Water

STATE OF UTAH

Please clearly and correctly complete the information requested below which defines the right or rights being changed. (Type or clearly print.)

For the purpose of obtaining permission to permanently change: the point of diversion ☐, place ☒, or nature of use ☒, of water rights acquired by Sevier River Decree, pps. 190-198 incl. 202 (cont. und.) (Give Number of Application, certificate of appropriation, title and date of Decree or other identification of right.) Expl.)

If the right described has been amended by a previous approved change application, give the number of such change application. No. a-3609, Cert. No. a-951

- The name of the applicant is Board of Water Resources, Delta Canal Company (cont. under Expl
- The post-office address of the applicant is c/o N. S. Bassett, Delta, Utah 84624
- The flow of water which has been or was to have been used in second-feet is See Expl. - par. 3 (cont
- The quantity of water which has been or was to have been used in acre-feet is See Expl. - par. 4 (cont
- The water has been or was to have been used for and during periods as follows:
Irrigation from see Expl. (cont) to see Expl. (cont) incl.
 (purpose) (month) (day) (month) (day)
Stockwatering from January 1 to December 31 incl.
 (purpose) (month) (day) (month) (day)
 and stored each year (if stored) from January 1 to December 31 incl.
 (month) (day) (month) (day)
Sevier River - Juab
 6. The direct source of supply is and wells in Millard and Sanpete Counties.
 (well, spring, stream, drain, river; if other explain)
 7. The point or points of diversion See Explanatory - paragraph 7 (continued)

(Must be the same as that of right being changed unless a previous change has been filed and approved. Then use the point or points approved in the previous change.)

- Diversion works:
 If a well give diameter and depth See Explanatory - paragraph 8 (continued)
 If a dam and reservoir give height, capacity, and area inundated See Explanatory - paragraph 8 (continued)
 If other give type of diversion facility See Explanatory - paragraph 8 (continued)
- The water involved has been or was to have been used for the following purposes in the following described legal subdivisions: (If used for irrigation, state sole or supplemental supply, and describe other supplemental rights.)
Irrigation and stockwatering - the Sevier River Decree does not specify the number of acres irrigated nor the number of livestock watered (See Explanatory - par. 9 (cont.))
 Total acres to be irrigated _____
 Stockwatering (number and kind) _____
 Domestic (number of families and/or persons, etc.) None
 Other None
- The point at which water has been or was to have been returned to the stream channel is situated as follows: (Please describe method of return.) None returned

Note: Paragraph 10 is to be completed only when all or part of the water is returned to the natural stream or channel.

The Following Changes Are Proposed

- The flow of water to be changed in cubic feet per second is Same as paragraph 3
- The quantity of water to be changed in acre-feet is Same as paragraph 4

13. The water will be used each year for:
- Irrigation from March 1 to November 15 incl.
(purpose) (month) (day) (month) (day)
- Industrial and stockwatering from January 1 to December 31 incl.
(purpose) (month) (day) (month) (day)
- and stored each year (if stored) from January 1 to December 31 incl.
(month) (day) (month) (day)
14. It is now proposed to divert the water from Same as paragraph 6
(i.e., spring, spring area, stream, river, drain, well, etc.)
- at a point(s) as follows: Same as paragraph 7 - additional point of redirection
from DMAD Reservoir - (6) South 1,880 feet and East 30 feet from the Northwest
corner of Section 25, Township 16 South, Range 6 West, S.L.B. & M.
- NOTE: The "point of diversion," or "point of return," must be located by course and distance or by rectangular distances with reference to some regularly established United States land corner or United States mineral monument if within a distance of six miles of either, or if a greater distance to some prominent and permanent natural object. A spring area must also be described by metes and bounds.
15. The proposed diverting and conveying works will consist of: (if a well, state diameter and depth thereof)
Same as paragraph 8 and pump station, two 48-inch diameter (see Explanatory cont.)
16. If water is to be stored, give capacity of reservoir in acre-feet height of dam
area inundated in acres legal subdivisions of area inundated
Same as paragraph 8
17. The water is to be used for the following purposes in the following described legal subdivisions: (if used for irrigation, state sole or supplemental supply, and describe other supplemental rights.)
Irrigation of 59,492.69 acres as described under Explanatory - paragraph 17 (continued)
- Total acres to be irrigated 59,492.69
but limited to the sole irrigation supply of 59,492.69 acres.
- Stockwatering (number and kind) 2025 head of cattle and 50 head of horses
Domestic (number of families and/or persons, etc.) None
Other Industrial purposes as described under Explanatory - paragraph 17 (continued)
18. If paragraphs 11 and 12 designate that only part of the right described in paragraphs 1 to 10 inclusive is to be changed, designate the status of the water so affected by this change as to its being abandoned or used as heretofore.
All water rights in their entirety are included herein.

EXPLANATORY

The following additional facts are set forth in order to define more clearly and completely the full purpose of the proposed change: (see attached Explanatory)

BOARD OF WATER RESOURCES

By David F. Lawrence
Its Director

DELTA CANAL COMPANY, a corporation

ABRAHAM IRRIGATION COMPANY, a corporation

By Phillip S. Smith
Its President

By W. L. Keast
Its President

MELVILLE IRRIGATION COMPANY, a corporation

DESERT IRRIGATION COMPANY, a corporation

By Carroll T. Hargrave
Its President

By Don Stewart
Its President

The undersigned hereby acknowledges that even though he may have been assisted in the preparation of the above-numbered application through the courtesy of the employees of the State Engineer's Office, all responsibility for the accuracy of the information contained therein, at the time of filing, rests with the applicant.

Signature of Applicant

APPENDIX

EXPLANATORY

The water rights covered by this change application are set forth in that certain Decree entered in the Fifth Judicial District Court of the State of Utah in and for Millard County in Case No. 843 entitled Richlands Irrigation Company v. West View Irrigation Company, et al, commonly known and referred to as the "Sevier River Decree" with page references to the printed copy thereof as follows, to-wit:

DELTA CANAL COMPANY

- 50% of new storage water up to 104,000 acre feet - page 192
- 17% of storage water above 104,000 acre feet - page 193
- 30.7% of exchange water when total storage for Sevier Bridge Reservoir and Piute Reservoir is above 129,280 acre feet - page 202
- All of Application No. 1367A-1 (Delta's 30.7% of App. No. 1367A)
- 30.7% of Application No. 4562 - pages 191, 192

MELVILLE IRRIGATION COMPANY

- 28-1/3% of new storage water up to 104,000 acre feet - page 192
- 11.9% of exchange water when total storage for Sevier Bridge Reservoir and Piute Reservoir is greater than 129,280 acre feet - page 202
- 17% of Application No. 1367A - pages 191, 192
- 11.8% of Application No. 4562 - pages 191, 192

ABRAHAM IRRIGATION COMPANY

- (1) 59.0 cfs of Class "A" primary . . . March 1 to October 1 - page 196
- (2) 6 cfs "well water" (Spaulding-Livingston wells) . . April 1 to October 1 - page 198
- (1) 5 cfs of Class "B" water . . . March 1 to October 1 - page 196
- (3) 5.45% of storage water above 104,000 acre feet - page 193
- 3,986 acre feet of water made below Sevier Bridge Reservoir during non-irrigation season - page 190
- 4,286 acre feet of Class "D" water made April 1-July 1 and used any time - page-196
- (1) 9 cfs of Class "F" water - page 197
- 3.2% of exchange water when total storage for Sevier Bridge Reservoir and Piute Reservoir is above 129,280 acre feet - page 202
- 4.6% of Application No. 1367A - pages 191, 192
- 3.2% of Application No. 4562 - pages 191, 192
- Application No. 1176 - Certificate No. 78B - page 193

DESERET IRRIGATION COMPANY

- (1) 74.0 cfs of Class "A" water March 1 to October 1 - page 196
- (1) 10.7 cfs of Class "B" water March 1 to October 1 - page 196
- 16-2/3% of new stored water up to 104,000 acre feet - page 192
- (3) 20.55% of stored water above 104,000 acre feet - page 193
- 5,314 acre feet of water made below Sevier Bridge Reservoir during non-irrigation season - page 190
- 5,714 acre feet of Class "D" water made April 1 - July 1 and used any time - page 197
- 18.9% of exchange water when total storage for Sevier Bridge Reservoir and Piute Reservoir is above 129,280 acre feet - page 202
- 27.3% of Application No. 1367A - pages 191, 192
- 18.9% of Application No. 4562 - pages 191, 192

(1) The provisions set forth on page 195 of the Sevier River Decree relating to the forfeiture of stored primary waters of the Deseret Irrigation Company, Abraham Irrigation Company and Central Utah Water Company remaining on November 1, have been modified under the terms of the agreement dated October 18, 1938, among Delta Canal Company, Melville Irrigation Company, Deseret Irrigation Company, Central Utah Water Company, Abraham Irrigation Company and Piute Reservoir and Irrigation Company to provide that the Sevier Bridge Reservoir owners only shall have the right to holdover in Sevier Bridge Reservoir, for use the following year, any waters, storage or primary, belonging to them, or any of them, respectively, which are held or stored in said reservoir on October 1 of any year subject to reallocation in the event said reservoir shall be filled to its safe capacity.

(2) The rights of Abraham Irrigation Company specified under paragraph C on page 198 of the Sevier River Decree for a maximum of 15 c.f.s. of water was reduced to a maximum of 6.0 c.f.s. of water by agreement embodied in a stipulation among the various interested parties filed in the office of the State Engineer on February 13, 1962, as the basis for the Memorandum Decision of the State Engineer dated April 4, 1962, in the matter of Underground Water Claims Nos. 14589 to 14657.

(3) The rights of Deseret Irrigation Company and Abraham Irrigation Company to store and impound water in Gunnison-Bend Reservoir and/or use, during the non-irrigation season, up to a maximum of 10,000 acre feet have been modified by an agreement dated October 12, 1959, among Delta Canal Company, Melville Irrigation Company, Abraham Irrigation Company, Deseret Irrigation Company and Central Utah Water Company to fix the maximum quantity so stored and/or used during the non-irrigation season at 9,300 acre feet and are covered by Change Application No. a-3609 and Certificate of Change No. a-951. Abraham Irrigation Company is entitled to 3/7 of said 9,300 acre feet or 3,986 acre feet and Deseret Irrigation Company is entitled to 4/7 of said 9,300 acre feet or 5,314 acre feet.

Paragraph 1 (continued)

Melville Irrigation Company, Abraham Irrigation Company and Deseret Irrigation Company.

Paragraph 3 (continued)

The primary rights as quantified in c.f.s. in the Sevier River Decree are 133.0 c.f.s. of Class "A", 15.70 c.f.s. of Class "B", 9.0 c.f.s. of Class "F", and 6.0 c.f.s. of "well water" (Spaulding-Livingston wells as amended by agreement) for a total of 163.70 c.f.s. The waters accruing to all of the foregoing water rights are stored in Sevier Bridge Reservoir and/or DMAD Reservoir and/or Gunnison-Bend Reservoir.

Paragraph 4 (continued)

The only primary rights quantified in acre feet in the Sevier River Decree are 10,000 acre feet of Class "D". However, the Sevier River Decree does not quantify the total storage rights in acre feet and it is impossible to do so since some of the water rights are stated in percentages of new storage water up to 104,000 acre feet, percentages of storage water above 104,000 acre feet and percentages of exchange waters when the total storage for Sevier Bridge Reservoir and Piute Reservoir is above 129,280 acre feet.

Paragraph 5 (continued)

set forth in the Sevier River Decree. However, since the waters under all of the rights can be and are stored in Sevier Bridge Reservoir and/or DMAD Reservoir and/or Gunnison-Bend Reservoir, the water so stored can be withdrawn in such quantities as the necessities may require under the provisions of §73-3-20, U.C.A., 1953.

Paragraph 7 (continued)

The intersection of the longitudinal axis of the impounding dams and center line of the stream channel are as follows:

- (1) Sevier Bridge Reservoir - South 25° - 35' East 972 feet from Southwest corner, Section 1, Township 17 South, Range 2 West, S.L.B. & M.
- (2) DMAD Reservoir - South 9,396.4 feet and West 6,234 feet from Northwest corner, Section 19, Township 16 South, Range 5 West, S.L.B. & M.
- (3) Gunnison-Bend Reservoir - North 4,093 feet and West 2,221 feet from Southwest corner, Section 15, Township 17 South, Range 7 West, S.L.B. & M.

Spaulding-Livingston Wells

The Sevier River Decree at page 198 describes the Spaulding-Livingston wells as being located in Sections 25 and 30, Township 19 South, Range 1 West, and Sections 30, Township 19 South, Range 1 East (S.L.B. & M.) and 69 of which are covered by Underground Water Claim Nos. 14589 to 14657, inclusive, and/or the replacement wells thereunder approved by the Memorandum Decision thereon of the State Engineer dated April 4, 1962.

Points of Rediversion

The points of rediversion are as follows:

D.M.A.D. Reservoir -

- (1) Canal "A" - North 55° 45' 40" East, 2,188.1 feet from South Quarter Corner of Section 26, Township 16 South, Range 6 West, S.L.B. & M.

Gunnison-Bend Reservoir -

- (2) Warnick Ditch - North 3,710 feet and West 197 feet from Southeast Corner of Section 15, Township 17 South, Range 7 West, S.L.B. & M.
- (3) High Line Canal - North 4,114 feet and East 2,167 feet from Southwest Corner of Section 15, Township 17 South, Range 7 West, S.L.B. & M.
- (4) Low Line Canal - North 3,710 feet and East 2,538 feet from Southwest corner of Section 15, Township 17 South, Range 7 West, S.L.B. & M.
- (5) Abraham Canal - North 2,308 feet and East 520 feet from Southwest corner of Section 10, Township 17 South, Range 7 West, S.L.B. & M.

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Paragraph 8 (continued)

The diversion works, storage reservoirs and equalization facilities are described as follows:

Sevier Bridge Reservoir

Height of impounding dam: 90 feet

Inundated area when full: 10,120 acres of land in Sections 1, 2, 3, 10, 11, 12, 13, 14, 15, 22, 23, 24, 25 and 26 of Township 18 South, Range 1 West; Sections 5, 6, 8, 9, 17, 16, 21, 28, 27, 34 and 35 in Township 17 South, Range 1 West; Sections 19, 30 and 31 in Township 16 South, Range 1 West; Sections 24, 25 and 36 in Township 16 South, Range 2 West, Section 1 in Township 17 South, Range 2 West, S.L.B. & M.

Maximum safe capacity: 235,962 acre feet

DMAD Reservoir

Height of impounding dam: 35 feet

Inundated area when full: 1284.5 acres of land in Sections 23, 24, 25, 26, 35 and 36, Township 16 South, Range 6 West, S.L.B. & M., Sections 3, 4, 8, 9, 10, 17, 18 and 19, Township 16 South, Range 5 West, S.L.B. & M., and Sections 33 and 34, Township 15 South, Range 5 West, S.L.B. & M.

Maximum safe capacity: 11,000 acre feet

Gunnison-Bend Reservoir

Height of impounding dam: 18 feet

Inundated area when full: 674 acres in Sections 2, 10, 11, 14 and 15 of Township 17 South, Range 7 West, S.L.B. & M. and Sections 35 and 36 in Township 16 South, Range 7 West, S.L.B. & M.

Maximum safe capacity: 4,044 acre feet

Paragraph 9 (continued)

The water rights which are supplemental to the water rights sought to be changed herein are covered by Applications Nos. 28727, 28728, 28729, 28730, 28731, 28732, 28733 and 28734 and Segregation Applications Nos. 28727aa, 28727b, 28728b, 28729b and 28733a, all owned by applicants herein and on which proof of appropriation was filed December 31, 1976, covering the DMAD wells collectively evidencing rights to divert 71.333 c.f.s. or 36,722.2 acre feet annually from eight large diameter wells for storage from January 1 to December 31 and use for irrigation purposes from March 1 to November 15 for supplemental

irrigation on 58,145.9 acres of the 59,492.69 acres of land under the DMAD Companies' irrigation systems and for stockwatering of 2,025 head of cattle and 50 head of horses and quality control of the Sevier River waters from January 1 to December 31, inclusive. Concurrently herewith, a similar change application is being filed on the foregoing supplementary rights.

Paragraph 15 (continued)

parallel pipelines 11.2 miles each from pumping station to Intermountain Power Project.

Paragraph 17 (continued)

IRRIGATION:

Township 15 South, Range 7 West, S.L.B. & M.

All or parts of Sections 29, 30, 31, 32 and 33.

Township 15 South, Range 8 West, S.L.B. & M.

All or parts of Sections 25, 26, 34, 35 and 36.

Township 16 South, Range 6 West, S.L.B. & M.

All or parts of Sections 26 and 31.

Township 16 South, Range 7 West, S.L.B. & M.

All or parts of Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36.

Township 16 South, Range 8 West, S.L.B. & M.

All or parts of Sections 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 34, 35 and 36.

Township 17 South, Range 6 West, S.L.B. & M.

All or parts of Sections 6, 7, 8, 9, 16, 17, 18, 19, 20, 21, 22, 27, 28, 29, 30, 31, 32, 33 and 34.

Township 17 South, Range 7 West, S.L.B. & M.

All or parts of Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36.

Township 17 South, Range 8 West, S.L.B. & M.

All or parts of Sections 1, 2, 3, 4, 5, 9, 10, 11, 12, 13, 14, 15, 22, 23, 24, 25, 26, 27 and 36.

Township 18 South, Range 6 West, S.L.B. & M.

All or parts of Sections 4, 5, 6, 7 and 8.

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Township 18 South, Range 7 West, S.L.B. & M.

All or parts of Sections 1, 2, 3, 4, 5, 6,
7, 8, 9, 10, 11, 12, 16, 17, 18, 19, 20, 29
and 30.

Township 18 South, Range 8 West, S.L.B. & M.

All or parts of Sections 9, 10, 11, 12, 13,
14, 15, 16, 24 and 25.

INDUSTRIAL:

Operation of a nominal 3,000 megawatt net electrical energy generating plant, commonly referred to as the Intermountain Power Project, primarily for cooling purposes but including all plant uses embraced in all or parts of Sections 10, 11, 12, 13, 14, 15, 22, 23 and 24, Township 15 South, Range 7 West, S.L.B. & M., and parts of Sections 18 and 19, Township 15 South, Range 6 West, S.L.B. & M.

* * *

Legal title to the water rights covered by this change application stands in the name of Board of Water Resources and the equitable titles, respectively, are vested in the Delta Canal Company, Melville Irrigation Company, Abraham Irrigation Company and Deseret Irrigation Company, collectively referred to herein as "DMAD Companies." This change application is filed at the instance and request of numerous stockholders of the DMAD Companies which stockholders have committed themselves to the sale of shares of stock owned by them in the DMAD Companies to the Intermountain Power Agency for industrial use at the proposed Intermountain Power Project to be constructed and owned by Intermountain Power Agency, a political subdivision of the State of Utah created pursuant to the "Interlocal Co-operation Act." (Chapter 13, Title 11, U.C.A., 1953, as amended)

The waters under the rights of Delta Canal Company and Melville Irrigation Company, as hereinabove set forth, are initially stored in the Sevier Bridge Reservoir. A portion of the waters under the rights of Abraham Irrigation Company and Deseret Irrigation Company, as hereinabove set forth, are initially stored in the Sevier Bridge Reservoir and/or Gunnison-Bend Reservoir.

The waters under the rights of the DMAD Companies stored in Sevier Bridge Reservoir are released on call into the natural channel of the Sevier River and are conveyed thereby a distance of approximately 49 miles to the DMAD Reservoir. Enroute, such waters comingle with the waters diverted by means of the wells under the supplemental rights described in paragraph 9 herein, ie. the waters diverted from Well No. 3 (28729), Well No. 4 (28730), Well No. 5 (28731), Well No. 6 (28732) and Well No. 7 (28733) which are discharged directly into the natural channel of the Sevier River and the waters diverted from Well No. 8 (28734) and Well No. 9 (28728) which are discharged directly into the DMAD Reservoir.

The waters under the rights of Abraham Irrigation Company and Deseret Irrigation Company are released on call from the DMAD Reservoir into the natural channel of the Sevier River and are conveyed thereby a distance of approximately

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11 miles to the Gunnison-Bend Reservoir. Enroute, such waters are comingled with the waters diverted from Well No. 2 (28727) which are discharged into the natural channel of the Sevier River below DMAD Reservoir under a supplemental right as described in paragraph 9 herein. The waters under the rights of Abraham Irrigation Company and Deseret Irrigation Company are rediverted from the Gunnison-Bend Reservoir at the points of rediversion described in paragraph 7 herein.

The shares of Delta Canal Company and Melville Irrigation Company in the waters diverted from Well No. 2 (28727) are made available to said companies at the DMAD Reservoir by an exchange of an equivalent amount of water to which Abraham Irrigation Company, and Deseret Irrigation Company are entitled at DMAD Reservoir. The waters under the rights of the Delta Canal Company and Melville Irrigation Company are rediverted from the DMAD Reservoir at the points of rediversion described in paragraph 7 herein.

The primary purpose of this change application is to amend the collective water rights of the DMAD Companies evidenced by the Sevier River Decree, as amended, to include the use of the waters of each company for year-around industrial purposes by the Intermountain Power Agency at the proposed Intermountain Power Project as described in paragraph 17 herein. A further purpose of this change application is to confirm the existing practice of using the waters under the rights of any of the DMAD Companies for irrigation and stockwatering purposes within the irrigation systems of any other DMAD Company or Companies under the arrangements mutually worked out among them.

Under the proposed change, the waters under the rights of the DMAD Companies will be diverted and stored the same as heretofore. The releases from storage, rediversions and uses for irrigation and stockwatering purposes will be the same as heretofore except that the quantities of water so used for irrigation and stockwatering purposes will be reduced by the quantities of water to be used for industrial purposes by the Intermountain Power Agency at the Intermountain Power Project. The waters to which the Intermountain Power Agency will be entitled as a stockholder in each of the DMAD Companies which are stored in Sevier Bridge Reservoir will be released at its call or may be held over in storage for release in subsequent years at its direction to provide for the continued operation of the Intermountain Power Project.

The waters covered by this change application to which the Intermountain Power Agency will be entitled will be comingled at the DMAD Reservoir with other waters of the Sevier River to which Intermountain Power Agency will be entitled as a stockholder in the Central Utah Water Company and under a portion of a separate-decreed right (Cropper) covered by similar change applications to be filed. The waters so comingled will be rediverted year-around at the direction of the Intermountain Power Agency from the DMAD Reservoir at point of rediversion No. 6 as described in paragraph 14 herein. The rediversion works will consist of a concrete-lined approach channel to be constructed within the reservoir area and a pumping station having a maximum capacity of 74 c.f.s. to be located on the west bank of the reservoir consisting of a pumphouse, pumps, valves, controls and electrical substation.

The water so rediverted will be pumped into two 48-inch diameter parallel pipelines and will be conveyed thereby a distance of 11.2 miles to the Intermountain Power Project. where such waters will be comingled with underground waters to be diverted by means of any combination of five deep wells

under separate underground water rights acquired by Intermountain Power Agency and to be covered by similar change applications to be filed. All of the waters so comingled will be used year-around for industrial purposes by the Intermountain Power Agency at the Intermountain Power Project as described in paragraph 17 herein.

It is not intended under this change application to enlarge upon any of the water rights covered herein.

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CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing BRIEF
OF APPELLANTS was mailed to Defendants and Respondents attorneys,
postage prepaid, addressed as follows:

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Thorpe A. Waddingham
Attorney at Law
P. O. Box 177
Delta, Utah 84624

on this 6th day of January, 1982.


Secretary