

1982

Mrs. Dudley Crafts et al v. Intermountain Power Project et al : Brief of Corporate and Individual Respondents

Utah Supreme Court

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 Plaintiffs/Appellants, :
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 vs. : Case No. 18053
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 INTERMOUNTAIN POWER PROJECT, et al., :
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 Defendants/Respondents. :

MRS. DUDLEY CRAFTS, et al., :
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 CENTRAL UTAH WATER COMPANY, et al., :
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 Defendants/Respondents. :

FILED

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

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Defendants and Respondents

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BRIEF OF CORPORATE AND INDIVIDUAL RESPONDENTS

PRELIMINARY STATEMENT

This honorable court, on its own motion, has consolidated the above cases for disposition on appeal. Consequently, respondents, with the exception of the State of Utah respondents who will file a separate brief, herein submit a consolidated brief applicable to all five cases.

The above cases were filed in the Fifth Judicial District as Civil Nos. 7131, 7140, 7144, 7145 and 7146. They will be referred to from time to time in this brief by those numbers.

I. STATEMENT OF THE NATURE OF THE CASES

The above-entitled actions were initiated by appellants pursuant to the provisions of Section 73-3-14, Utah Code Annotated, 1953, as amended, to review decisions of the Utah State Engineer approving various change applications.

II. DISPOSITION IN THE LOWER COURT

The trial court granted the Utah State Respondents' Motions for Partial Summary Judgment in each case and also granted the remaining respondents' Motions for Summary Judgment in each case. The trial court's orders in each case are essentially identical. We attach hereto one copy of each and mark them as Appendix "A" and Appendix "B".

III. RELIEF SOUGHT ON APPEAL

These answering respondents seek to affirm the orders of the trial court granting summary judgment.

IV. STATEMENT OF THE FACTS

A group of farmers who owned stock in Delta Canal Company, a Utah corporation, Melville Irrigation Company, a Utah corporation,

Abraham Irrigation Company, a Utah corporation, Deseret Irrigation Company, a Utah corporation, Central Utah Water Company, a Utah corporation, and a group of farmers who owned water wells in Millard County, Utah, formed a joint venture for the purpose of selling a composite amount of 45,000 acre feet of water to the Intermountain Power Agency, a political subdivision of the State of Utah, said amount of water being necessary for construction and operation of the Intermountain Power Project near Lynndyl, Millard County, Utah. Intermountain Power Agency will hereafter be referred to as IPA. Intermountain Power Project will hereafter be referred to as IPP.

After a period of negotiation, contracts for sale of the water were consummated and the necessary change applications authorizing use of the water for the industrial power plant purposes envisaged by the sale were filed with the Utah State Engineer. Said change applications were filed during the months of September and October of 1979. After appropriate advertising and public hearings, the State Engineer issued a series of Memorandum Decisions approving the change applications, subject to certain conditions. Thereafter, a number of local citizens filed complaints in the five cases that are now before this court.

The water rights which are involved in said complaints have been historically used in Millard County for irrigation, agricultural and livestock purposes.

The Delta, Melville, Abraham and Deseret companies above referred to are hereafter referred to collectively as the DMAD Companies. The DMAD Companies own decreed rights to waters from

the Sevier River. These include storage rights on the Sevier River and direct flow rights. The DMAD Companies also have the right to utilize water from eight large diameter wells located near the Sevier River. These wells divert water from closed underground aquifers which are not tributary to the Sevier River. The water from these wells is discharged into the Sevier River and distributed for irrigation, stock watering and agricultural uses. The IPA purchased approximately 20% of the stock of the DMAD Companies, which would entitle the purchaser to utilize approximately 20% of the water stored in surface reservoirs, approximately 20% of DMAD's direct flow rights and approximately 20% of the water from the DMAD wells.

Central Utah Water Company is another irrigation company which owns decreed storage rights and direct flow rights to the waters of the Sevier River. This water has historically been used partly in the area near Lynndyl and partly through a long (40 mile) canal which provides water for irrigation in the vicinity of Flowell. IPA purchased 85% of the stock of Central and would be entitled to 85% of the storage and direct flow rights of that company.

The stockholders selling their DMAD and Central stock sought permission through their respective change applications to divert their Sevier River water into two pipelines which would transport the water to the IPP plant site, some 11 miles from the river, and north and east of Lynndyl. This would involve a change in point of diversion from the inlets of the canals to the pipelines. It would involve a change in place of use from the farms to the plant site and a change in purpose of use from agricultural to industrial.

There were also a number of individual well owners who had perfected their rights to utilize underground water from their individual wells. These users sold only portions of their respective water rights. The proposal incorporated in the change applications was to discontinue taking the purchased portions from these independent farm wells and to drill five wells at the IPP plant site where the waters would be pumped for use.

While the appellants claim to have water rights from the Sevier River and water rights from the underground basin, neither the complaints nor the affidavits filed by the appellants furnish any information with regard to those rights; that is, where their wells are located in relationship to the existing wells of the DMAD Companies, the existing wells of the farmers who sold part of their well rights, or in relationship to the five new wells to be drilled at the IPP plant site. Furthermore, neither the complaints nor the affidavits filed by appellants furnish any information with regard to the surface rights from the Sevier River claimed by the appellants; that is, where their points of diversion were, what canal systems they used, where their lands were located, and how they might be affected, if at all, from the changes in points of diversion or the place or nature of use.

After responsive pleadings had been filed and discovery procedures had taken place, defendant companies, the individual defendants, and defendants IPP and IPA presented motions for summary judgment. Defendants Dee C. Hansen, State Engineer of the State of Utah, and Board of Water Resources of the State of Utah filed motions for partial summary judgment. In support of said motions, defendants other than the State of Utah defendants, filed affidavits

of Reed Mower, a civil engineer. Said affidavits were filed on the 4th day of September, 1980. (See Civil No. 7144, R. 332-346. Other Mower affidavits were filed in each of the remaining cases.)

In support of the motions, defendants filed memorandums of authorities on or about the 4th day of September, 1980. (See Civil No. 7144, R. 347-363. Essentially the same memorandums were filed in each of the remaining cases.) Plaintiffs thereafter filed motions for extension of time within which to file answering points and authorities and counter affidavits pursuant to the Rules of Practice in District Courts on September 12, 1980 in each of the cases. (Civil No. 7144, R. 409-411. Same motions and memorandums in each of the remaining cases.) A hearing took place on said motions and plaintiffs were granted thirty days in which to file answering memoranda and counter affidavits.

Although plaintiffs filed supporting affidavits of Parley R. Neeley, a civil engineer, in each of the cases, they did not file supporting memoranda.

On October 16, 1980 at the County Courthouse in Fillmore, Millard County, Utah, the court heard extensive oral arguments in support of and in opposition to the motions before the court. The court granted the motions for partial summary judgment and took the motions for summary judgment under advisement. (See Civil No. 7144, R. 471. Same ruling in each case.)

The formal orders granting partial summary judgment in each of the cases were signed and filed by the court on December 17, 1980. (See Civil No. 7144, R. 474. Same order in each case.) The aforesaid orders clearly define the issues that remained before the court on

the motions for summary judgment. We quote the following language which appears in each of said orders:

"2. This appeal, taken pursuant to the provisions of Section 73-3-14, Utah Code Annotated, 1953, as amended, is strictly limited and confined to those issues which could have been raised by plaintiffs before the State Engineer;

3. The criteria governing the approval or rejection of said Change Applications, as set forth in Section 73-3-3, Utah Code Annotated 1953, as amended, is limited to a determination of whether there is reason to believe that said Change Applications can be approved without substantially impairing any water rights of Plaintiffs;" (emphasis added)

(Civil No. 7144, R. 476)

Appellants do not appeal from the trial court's orders granting partial summary judgment. They only appeal from the orders granting summary judgment. Therefore, the sole issues before this honorable court are the narrowly defined issues set forth as above in the partial summary judgments.

The motions were held under advisement by the court for many months. During said period of time, appellants did not supplement the record, submitted no additional authorities, and filed no additional affidavits.

On June 18, 1981, the court announced its decisions from the bench granting the motions for summary judgment in each case, giving clear and concise reasons for its rulings. Transcripts of the court proceedings and the court's remarks in each case are a part of the record. The court signed and filed its formal order and summary judgment in each case on September 24, 1981. (See Civil No. 7144, R. 505. Same orders in each case.)

After original counsel for appellants had withdrawn from the case, attorney E. J. Skeen entered his appearance as counsel for appellants on July 2, 1981. (Civil No. 7144, R. 489. Same in each case.)

In this Statement of the Facts we have attempted to supply the court with an overview of the issues involved in this litigation. The details concerning the change applications, memorandum decisions of the Utah State Engineer, the five complaints filed by appellants, and the decisions of the trial court are set forth in Appendix "C" of this brief.

V. ARGUMENT

POINT I.

THE TRIAL COURT CORRECTLY HELD THAT THERE IS "REASON TO BELIEVE" THE CHANGE APPLICATIONS CAN BE APPROVED WITHOUT SUBSTANTIALLY IMPAIRING ANY WATER RIGHTS OF PLAINTIFFS AND CORRECTLY GRANTED THE MOTIONS FOR SUMMARY JUDGMENT.

A. The Criteria and Standards Governing Approval and Rejection of Change Applications

These answering respondents adopt and incorporate herein the portion of the Brief of Utah State Respondents which outlines in careful detail the Utah law with regard to criteria and standards governing approval and rejection of change applications.

The "reason to believe" rule discussed in the Brief of Utah State Respondents has been considered a number of times by this honorable court.

In Salt Lake City v. Boundary Springs Water Users Ass'n, 2 Utah 2d 141, 144, 270 P.2d 453, 455 (1954), the court stated:

"If the evidence shows that there is reason to believe that the proposed change can be made without impairing vested rights the application should be approved. The owner of a water right has a vested right to the quality as well as the quantity which he has beneficially used. A

change application cannot be rejected without a showing that vested rights will thereby be substantially impaired. While the applicant has the general burden of showing that no impairment of vested rights will result from the change, the person opposing such application must fail if the evidence does not disclose that his rights will be impaired." (emphasis added)

In United States v. District Court, 121 Utah 18, 242 P.2d 774 at 777 (1952), the court stated:

"Neither the decision of the Engineer nor of the Court on appeal therefrom are based on a determination of the facts or law applicable thereto but the application must be approved in both cases if the tribunal concludes that there is reason to believe that no existing right will be impaired." (emphasis added)

See also Whitmore v. Murray City, 107 Utah 445, 154 P.2d 748 (1944).

Other cases make clear that inherent in the ownership of a water interest is the right of the owner, upon proper application, to change the nature and/or place of use of said water based upon the highest and best use to which said water can be put. See Shurtleff v. Salt Lake City, 96 Utah 21, 82 P.2d 561 (1938); Sigurd City v. State, 105 Utah 278, 142 P.2d 154 (1943). See also Orange County Water District v. City, 173 Cal. App. 2d 137, 343 P.2d 450 (1959); City v. Yust, 126 Colo. 289, 249 P.2d 151 (1952).

B. Burden of Proof

The general burden of proof is on the applicant for a change to make a prima facie showing that there is "reason to believe" the change can be made without impairing the existing water rights of protestants. The burden then shifts to the protestants to prove

specifically and by competent evidence that their rights will be substantially impaired if the change is made.

To this effect, see Salt Lake City v. Boundary Springs Water Users Ass'n, 2 Utah 2d 141, 144, 270 P.2d 453 (1954) at 455, where the court stated:

"While the applicant has the general burden of showing that no impairment of vested rights will result from the change, the person opposing such application must fail if the evidence does not disclose that his rights will be impaired."
(emphasis added)

and Tanner v. Humphreys, 87 Utah 164, 48 P.2d 484 at 489, where the court stated:

"It would be impracticable to require the plaintiff to ferret out all of the ways in which others might perchance be injured and offer proof in negation thereof as a part of its affirmative case. The general negative as against injury to the protestants is sufficient to carry the case over a motion for non-suit in that respect."

See also Eardley v. Terry, 94 Utah 367, 77 P.2d 362 (1938).

Once the applicant has established a prima facie case to the effect that the change can be made without substantially and adversely affecting the water rights of a protestant, the burden of going forward shifts to the protestant to show how he will be injured. It is no sufficient answer to show only that uncertainties and doubts still exist as to whether the change will adversely affect the rights of a protestant or that future studies may reveal additional material information. The law favors water development and permits the applicant to proceed to see if he can perfect his right without injury to the rights of others. The courts have held many times that if all doubts and uncertainties had to be removed before a change of use could be allowed and work could proceed, substantial

and important rights would be improperly denied the owner of a water right and the water would not be put to its highest use, contrary to the public policy of this State.

In American Fork Irr. Co. v. Linke, 121 Utah 90, 239 P.2d 188 at 191 (1951), the court stated:

"We recognize plaintiff's duty to prove that vested rights will not be impaired by approval of their application, but we also recognize that such duty must not be made unreasonably onerous, to the point where every remote but presently indeterminable vested right must be pinpointed. And we cannot turn a deaf ear to every request which reasonably appears designed for a more beneficial use of water not impairing vested rights . . ."

We would add that under the "reason to believe" rule few changes in use of water to the highest and best use could be made if those seeking the change had to wait until technical and conclusive data were available. See Clark v. Hansen, 641 P.2d 914 (Utah 1981).

It is also important to understand that approval of a change application does not constitute a final adjudication of the water rights involved, i.e., that the change can assuredly be made without injury to the rights of others. It merely allows an applicant to proceed to make the proposed change and find out whether he can, as a matter of fact, use the water as changed without impairing other rights. If the change is made and injury then occurs, the protestant still has his day in court.

In United States v. Fourth District Court, 121 Utah 18, 21, 242 P.2d 774 at 777 (1952), the court stated:

"It merely requires an approval or rejection of the application and, if approved, authorizes the applicant to proceed with his proposed work and forbids him to proceed if rejected. It leaves the adjudication of the rights which the applicant may have or may acquire under the application, and the rights of the protestants, to the courts in another kind of a proceeding and not to the engineer who is merely an executive officer. Neither the decision of the Engineer nor of the Court on appeal therefrom are based on a determination of the facts or law applicable thereto but the application must be approved in both cases if the tribunal concludes that there is reason to believe that no existing right will thereby be impaired." (emphasis added)

In East Bench Irr. Co. v. State, 5 Utah 2d 235, 300 P.2d 603 (1956) at 607, the court stated:

"One such issue which cannot be adjudicated on such an appeal is the extent or priority of rights which the applicant hopes to acquire under such application. This for the obvious reason that an adjudication of such rights is premature for no cause of action for the adjudications of such rights can accrue at that time. Before a cause of action can arise to adjudicate that the applicant has established or perfected the rights which he seeks under such application, his application must first be approved and thereafter by compliance with its terms and provisions he must perfect the rights which he seeks under the application, and until this has occurred a suit to adjudicate that he has such rights is premature." (emphasis added)

And in Daniels Irrigation Co. v. Daniel Summit Co., et al., 571 P.2d 1323 (Utah 1977) at 1324, this court stated:

"The law appears to be well-settled that proceedings before the state engineer and appeals therefrom do not constitute adjudications of water rights. His function is a part of the executive branch of government, his duties are limited to administrative matters, and the proceedings before him are not judicial in nature.

Specifically in regard to change applications, the same rules apply. In Whitmore v. Murray City this court stated the following:

The office of state engineer was not created to adjudicate vested rights between parties, but to administer and supervise the appropriation of the waters of the state. In Eardley v. Terry, [citation] this court considered the rights and duties of the state engineer in approving or denying an application . . . and we there held that in fulfilling his duties, he acts in an administrative capacity only and has no authority to determine rights of parties. The same reasoning applies to the extent of the state engineer's authority when he determines to grant or deny an application for change of diversion, use or place. [Emphasis added.]"

See also Whitmore v. Murray City, 107 Utah 445, 154 P.2d 748 (1944); Bullock v. Tracy, 4 Utah 2d 370, 294 P.2d 707 (1956); East Bench Irr. Co. v. State, 5 Utah 2d 235, 300 P.2d 603 (1956); In re Application #7600, 63 Utah 311, 225 P. 605 (1924); Tanner v. Bacon, 103 Utah 494, 136 P.2d 957 (1943); Little Cottonwood Water Co. v. Kimball, 76 Utah 243, 289 P. 116 (1930); Lehi Irrigation Co. v. Jones, 115 Utah 136, 202 P.2d 892 (1949); and Brady v. McGonagle, 57 Utah 424, 195 P. 188 (1921).

The issue that was before the State Engineer and before the trial court in these cases is not unlike a procedure before a committing magistrate in a criminal case. The issue is not the innocence or guilt of the defendant. The State must show that there is reasonable cause to believe that a crime has been committed, and that the defendant committed it. If the required showing is made, the defendant is bound over to the district court for trial. The decision of the committing magistrate has not decided anything except that the defendant should stand trial. The defendant may

elect to put on his defense before the committing magistrate. He may claim an alibi or some other factual or legal defense, which he thinks is so strong that the committing magistrate should not bind him over for trial. If the committing magistrate, nevertheless, determines that he should stand trial, it does not mean that there has been an adjudication that his defenses of alibi, etc., are groundless, nor does it decide anything else about his guilt or innocence. That is not the function of the preliminary hearing.

Thus it is critical for the court here to keep in mind what the function of the state engineer's office is. A protest on the ground that an applicant will interfere with vested rights does not change the function of the state engineer. He goes no farther than is necessary to determine whether the application should be granted or rejected, and the issue remains the same on appeal to the court. The decision to grant the change does not adjudicate the competing rights of the parties any more than a decision to bind a defendant over for trial decides his guilt.

- C. The Mower affidavits constitute a prima facie showing that the changes can be made without substantially and adversely affecting the water rights of appellants. The Neeley affidavits do not raise a material issue of fact.

Mr. Mower's affidavit in Civil No. 7131 appears at R. 065-079. A detailed description of the background and issues raised in Civil No. 7131 appears in Appendix "C" of this brief. Suffice it to say here that this is a technical amendatory change requested in order to make applications to appropriate that had been filed by DMAD conform to proof of appropriation. The affidavit outlines Mr. Mower's extensive training and experience as a civil engineer

and hydrologist, indicates that he conducted a comprehensive study of the groundwater resources of the Sevier Desert groundwater basin to evaluate the groundwater resources thereof, including recharge, discharge, rates and routes of movement of groundwater from recharge to discharge areas, delineation of the extent and appraisal of the potential yield of each aquifer in said groundwater basin, uses of the water and the quality thereof. The affidavit also indicates that during the period of June, 1964 to October, 1979, he closely monitored the groundwater activities in the Sevier Desert groundwater basin, including the combined annual discharges from wells and the changes in groundwater levels and quality of water resulting therefrom, the results of which were published by the U.S.G.S. each year in cooperation with the Utah State Division of Water Resources in annual summaries of groundwater conditions in Utah. Mr. Mower further indicates in his affidavit that he has familiarized himself with each of the change applications, together with the Memorandum Decisions of the State Engineer, and that he is also familiar with the existing wells covered thereby and the lands irrigated thereunder, together with the proposed locations of the proposed IPP wells and the proposed uses of the waters therefrom.

Mr. Mower's affidavit concludes as follows:

" . . . the combined net effect on the Sevier Desert ground-water basin as a whole, which will result from pumping water by means of the DMAD wells under the proposed changes covered by Change Application Nos. a-10862 (65-475) and a-10863 (65-475) and by means of the proposed IPP wells under the proposed changes covered by the 12 individual well

change applications will be an increase in the water levels in the Sevier Desert ground-water basin as a whole, except for that part of said ground-water basin in the vicinity of the proposed IPP wells, as compared with the water levels in the Sevier Desert ground-water basin as a whole, which will result from pumping water by means of the DMAD wells and the said 12 individual wells solely for agricultural purposes . . ."
(emphasis added)

Mr. Neeley's affidavit in Civil No. 7131 appears at R. 163-170. The affidavit outlines his training and experience as a civil engineer. It indicates that he was employed by the Bureau of Reclamation as a professional engineer on July 20, 1927 and retired in 1963. It indicates that he was employed by appellants to undertake a study of the effects of the proposed change in July of 1980. It indicates that he studied and has evaluated certain U.S.G.S. water supply reports relative to and relating to the water supply in the Sevier Desert as used in the State Engineer's hearings, also some reports relating to the Sevier River and Desert area, U.S.G.S. manuals, procedures and State Engineer's reports and other data. He concludes as follows:

"12. The affiant states that at this juncture there can be no intelligent assessment of the effects on the Sevier River Desert Water supply.

13. The affiant further states that there can be no intelligent evaluation of the effects of the proposed proposals by the IPA Company until the present study by the U.S.G.S. under the sponsorship of the Utah State Engineer is completed and as programmed for 1981."

Mr. Neeley then proceeds to comment that the data on which Mr. Mower relies is ". . . incomplete data and out-of-date data . . ." and then concludes as follows:

"34. Your affiant is currently conducting studies of his own and will be able to supplement this affidavit with more factual data and analysis within 30 days from today's date."

Mr. Neeley filed a supplemental affidavit dated October 15, 1980 and filed on November 25, 1980 which appears at R. 188-192. He repeats his qualifications, makes some additional analyses, and makes the following statement:

"12. The affiant further states that there can be no intelligent evaluation of the effects of the proponents until the present study by the U.S.G.S. under the sponsorship of the Utah State Engineer is completed. Said evaluation is programmed for a 1981 completion."

Again in Civil No. 7140, we have a Mower affidavit which appears at R. 241-255 and a Neeley affidavit which appears at R. 361-390. A detailed description of the background and issues raised in Civil No. 7140 also appears in Appendix "C". Here the issues revolved around change applications which request conversion of usage of water from the eight large DMAD wells from agricultural to industrial purposes at the IPP. The Mower affidavit repeated Mr. Mower's qualifications as a civil engineer and hydrologist and his experience and knowledge of the Sevier Desert groundwater basin, his studies of the change applications and the Memorandum Decisions of the Utah State Engineer, and again Mr. Mower makes the following statement:

". . . it is the opinion of affiant that the combined net effect on the Sevier Desert ground-water basin as a whole, which will result from pumping water by

means of the DMAD wells under the proposed changes covered by Change Application Nos. a-10862 (64-475) and a-10863 (65-475) and by means of the proposed IPP wells under the proposed change covered by the 12 individual well change applications identified in paragraph 12 hereinabove, will be an increase in the water levels in the Sevier Desert ground-water basin as a whole, except for that part of said ground-water basin in the vicinity of the proposed IPP wells, as compared with the water levels in the Sevier Desert ground-water basin as a whole, which will result from pumping water by means of the DMAD wells and the said 12 individual wells solely for agricultural purposes." (emphasis added)

The Neeley affidavit dated September 15, 1980 repeated Mr. Neeley's qualifications as a civil engineer, again outlined his studies of the change applications, again indicates his disagreement with Mr. Mower and again contains the following:

"12. The affiant states that at this juncture there can be no intelligent assessment of the effects on the Sevier River Desert Water supply.

13. The affiant further states that there can be no intelligent evaluation of the effects of the proposed proposals by the IPA Company until the present study by the U.S.G.S. under the sponsorship of the Utah State Engineer is completed and as programmed for 1981.

14. That the affiant has been unable determine as to where and how the State Engineer could obtain data of a character sufficient to approve the changing of applications based upon such fragmental data as is available at the present time."

Mr. Neeley concludes as follows:

"34. Your affiant is currently conducting studies of his own and will be able to supplement this affidavit with more factual data and analysis within 30 days from today's date."

Mr. Neeley submitted a supplemental affidavit dated October 15, 1980 and filed on November 25, 1980 which appears at R. 390-399.

The affidavit contains the following:

"22. Until a comprehensive program of investigation is undertaken and the results tabulated and approved, there can be no safe or conclusive answers as to how much water can be safely removed from the Sevier River aquifer bed."

Again in Civil No. 7144, we have a Mower affidavit which appears at R. 332-346 and a Neeley affidavit which appears at R. 414-422. A detailed description of the background and issues raised in Civil No. 7144 also appears in Appendix "C". Here the issues revolved around change applications which request change of usage of portions of water from a number of individually owned wells from agricultural to industrial purposes at the IPP.

The Mower affidavit repeated Mr. Mower's qualifications as a civil engineer and hydrologist, and his experience and knowledge of the Sevier Desert groundwater basin, his studies of the change applications and the Memorandum Decisions of the Utah State Engineer, and again Mr. Mower makes the following statement:

". . . it is the opinion of affiant that the combined net effect on the Sevier Desert ground-water basin as a whole, which will result from pumping water by means of the DMAD wells under the proposed changes covered by Change Application Nos. a-10862 (65-475) and a-10863 (65-475) and by means of the proposed IPP wells under the proposed changes by the 12 individual well change applications identified in paragraph 12 hereinabove, will be an increase in the water levels in the Sevier Desert ground-water basin as a whole, except for that part of said ground-water basin in the vicinity of the proposed IPP wells, as compared with the water levels in

the Sevier Desert ground-water basin as a whole, which will result from pumping water by means of the DMAD wells and the said 12 individual wells solely for agricultural purposes." (emphasis added)

The Neeley affidavit dated September 15, 1980 repeats Mr. Neeley's qualifications as a civil engineer, again outlines his studies of the change applications, again indicates his disagreement with Mr. Mower and again contains the following:

"12. The affiant states that at this juncture there can be no intelligent assessment of the effects on the Sevier River Desert Water supply.

13. The affiant further states that there can be no intelligent evaluation of the effects of the proposed proposals by the IPA Company until the present study by the U.S.G.S. under the sponsorship of the Utah State Engineer is completed and as programmed for 1981.

14. That the affiant has been unable determine as to where and how the State Engineer could obtain data of a character sufficient to approve the changing of applications based upon such fragmental data as is available at the present time."

Mr. Neeley again concludes as follows:

"34. Your affiant is currently conducting studies of his own and will be able to supplement this affidavit with more factual data and analysis within 30 days from today's date."

Mr. Neeley submitted an additional affidavit on September 17, 1980 which appears at R. 444-452. The affidavit is essentially identical to the one submitted on September 15, 1980 and we don't know why it was filed. Nevertheless, the affidavit contains the following:

"12. The affiant states that at this juncture there can be no intelligent assessment of the affects on the Sevier River Desert water supply.

Again in Civil No. 7145 we have a Mower affidavit which appears at R. 112-116, and a Neeley affidavit which appears at R. 212-220. A detailed description of the background and issues raised in Civil No. 7145 also appears in Appendix "C". Here the issues revolved around change applications which request change of usage of DMAD Companies' decreed Sevier River direct flow and storage water rights to permit industrial usage at the IPP.

The Mower affidavit repeats Mr. Mower's qualifications as a civil engineer and hydrologist, and his experience and knowledge of the Sevier Desert ground-water basin, his studies of the change applications and the Memorandum Decisions of the Utah State Engineer, and again Mr. Mower makes the following statement:

"13. That the only section of the natural channel of the Sevier River which contributes to the natural recharge into the artesian aquifers in the Sevier Desert ground-water basin is located in Leamington Canyon for a distance of approximately 3-1/2 miles situated between a point approximately 200 feet upstream from the Central Utah Water Company diversion dam and a point approximately 1/4 mile upstream from the Sevier River crossing with the west line of Section 1, T. 15 S., R. 4 W., SLB&M.

14. That the proposed changes under Change Application No. a-10864 (68 Area) will not reduce the natural recharge into the artesian aquifers of the Sevier Desert ground-water basin from the waters flowing in the Sevier River since the rate at which the said approximately 3-1/2 miles of Sevier River stream channel contributes to such natural recharge is a function of the wetted perimeter of the stream channel and the increase in the wetted perimeter thereof during the non-irrigation season under the proposed change will more than offset any decrease in the wetted perimeter thereof during the irrigation season.

15. That the canal systems of the DMAD Companies and the lands irrigated thereunder are situated more than 15 miles downstream from the only section of the Sevier River which naturally recharges the artesian aquifers in the Sevier Desert ground-water basin referred to in paragraph 13 hereinabove and are situated in an area in which there is no natural recharge into the artesian aquifers in the Sevier Desert ground-water basin.

16. That none of the waters diverted into the canal systems of the DMAD Companies and used to irrigate the lands thereunder recharges the artesian aquifers which are the sole sources of water diverted by means of wells in the Sevier Desert ground-water basin. The basis for the foregoing opinion is that the canal systems of the DMAD Companies and the lands irrigated thereunder are underlain with a thick layer of impervious clay which constitutes a barrier to the movement of water from the ground surface into the underlying artesian aquifers." (emphasis added)

The Neeley affidavit dated September 15, 1980 repeats Mr. Neeley's qualifications as a civil engineer, again outlines his studies of the change applications, again indicates his disagreement with Mr. Mower and again contains the following:

"12. The affiant states that at this juncture there can be no intelligent assessment of the effects on the Sevier River Desert Water supply.

13. The affiant further states that there can be no intelligent evaluation of the effects of the proposed proposals by the IPA Company until the present study by the U.S.G.S. under the sponsorship of the Utah State Engineer is completed and as programmed for 1981.

14. That the affiant has been unable determine as to where and how the State Engineer could obtain data of a character sufficient to approve the changing of applications based upon such fragmental data as is available at the present time."

And again:

"18. That there is currently an on-going study by the United States Geological Survey to determine further characteristics and answer questions which are attempted to be answered by the affiant Mower, which study will be completed within the next year to year and one-half. Without the data obtained by such study, said conclusions cannot be accurately drawn about the Basin."

And again:

"33. That your affiant knows there is an on-going study being conducted by Mr. Walter Holmes of the U.S.G.S. and that such information as is being gathered by the subject basin by the U.S.G.S. is indispensable in answering the questions which Mr. Mower attempts to answer. That further information from the U.S.G.S. study and other independent studies is necessary to determine, with any degree of factual and scientific certainty, the conclusions which Mr. Mower attempts to make. Therefore, said conclusions are highly questionable and likely to be inaccurate.

34. Your affiant is currently conducting studies of his own and will be able to supplement this affidavit with more factual data and analysis within 30 days from today's date." (emphasis added)

Appellants filed a second Neeley affidavit on September 17, 1980 which appears at R. 242-250. The affidavit is essentially identical with the first affidavit and we do not know why it was filed. In any event, the original affidavit was not supplemented with "more factual data and analysis" as was the stated intent as set forth in the original affidavit.

A careful reading of the Neeley affidavit reveals that Mr. Neeley does not respond at all to the Mower affidavit filed in Civil No. 7145. Rather, it responds to the Mower affidavits filed in Civil Nos. 7131, 7140 and 7144 which involve underground

waters and do not involve Sevier River surface waters. Thus, paragraphs 21 through 24 of the Neeley affidavit criticize paragraphs 13 through 16 of the Mower affidavit which have nothing to do with pumping underground waters. Likewise, paragraphs 25 through 31 of the Neeley affidavit criticize paragraphs 17 through 23 of the Mower affidavit which do not even exist since there are only a total of 16 paragraphs therein.

The trial court correctly evaluated the Neeley affidavit in ruling on the Motions for Summary Judgment on June 18, 1981. Thus, on page 4 of the transcript of Court Proceedings in Civil No. 7145, the court states:

"Now, then, the Court again having reviewed the pleadings and making special note that the plaintiffs, respondents, have not filed any memorandum in opposition stating contra law; and they have the affidavit of Parley Neeley, which in substance states that he doesn't know and that no intelligent person can know; the information is not now available and that no intelligent assessment can be made. The affidavit further makes reference to studies underway within a short time frame, and from October until this date, June 18, 1981, no supplemental affidavits have been filed, no new information in opposition has been filed by the plaintiffs, respondents;"

Again in Civil No. 7146 we have a Mower affidavit which appears at R. 56-61 and a Neeley affidavit which appears at R. 138-146. A detailed description of the background and issues raised in Civil No. 7146 also appears in Appendix "C". Here the issues revolved around a change application which requests change of usage of Central surface direct flow and storage water rights to permit industrial usage at the IPP.

The Mower affidavit repeats Mr. Mower's qualifications as a civil engineer and hydrologist, and his experience and knowledge

of the Sevier Desert ground-water basin, his studies of the change applications and the Memorandum Decisions of the Utah State Engineer, and again Mr. Mower makes the following statement:

"15. That the reduction in the quantities of water to be conveyed by means of the Central Utah Canal under Change Application No. a-10927 (68 Area) will not reduce the net recharge into the artesian aquifers in the Sevier Desert ground-water basin. The basis of the foregoing opinion is that any reductions in the quantities of water conveyed by means of the Central Utah Canal will be offset by an increase in like quantities of water being conveyed by means of the natural channel of the Sevier River through the 3-1/2 mile section thereof referred to in paragraph 13 hereinabove and the increased recharge into the artesian aquifers in the Sevier Desert ground-water basin resulting therefrom will more than offset any decrease in recharge which might result from conveying less water through the Central Utah Canal. A further basis of the foregoing opinion is that the large losses of water by seepage from the Central Utah Canal below the Landis Check near Fools Creek Reservoir No. 1 contributes to the shallow, unconfined subsurface waters which naturally move towards the area of Mud Lake and are consumed enroute by phreatophytes and such waters do not contribute to the artesian aquifers within the Sevier Desert ground-water basin.

16. That all of the lands irrigated under the Central Utah Water Company within the Sevier Desert ground-water basin are located in an area in which there is virtually no natural recharge into the artesian aquifers in the Sevier Desert ground-water basin.

17. That none of the waters used to irrigate the lands under the Central Utah Water Company within the Sevier Desert ground-water basin recharges the artesian aquifers which are the sole sources of water diverted by means of wells in the Sevier Desert ground-water basin. The basis for the foregoing opinion is that the said lands are underlain with a thick layer of impervious clay which consti-

tutes a barrier to the movement of water from the ground surface into the underlying artesian aquifers." (emphasis added)

The Neeley affidavit dated September 15, 1980 repeats Mr. Neeley's qualifications as a civil engineer, again outlines his studies of the change applications, again indicates his disagreement with Mr. Mower and again contains the following:

"12. The affiant states that at this juncture there can be no intelligent assessment of the effects on the Sevier River Desert Water supply.

13. The affiant further states that there can be no intelligent evaluation of the effects of the proposed proposals by the IPA Company until the present study by the U.S.G.S. under the sponsorship of the Utah State Engineer is completed and as programmed for 1981."

And again:

"18. That there is currently an on-going study by the United States Geological Survey to determine further characteristics and answer questions which are attempted to be answered by the affiant Mower, which study will be completed within the next year to year and one-half. Without the data obtained by such study, said conclusions cannot be accurately drawn about the Basin."

And again:

"33. That your affiant knows there is an on-going study being conducted by Mr. Walter Holmes of the U.S.G.S. and that such information as is being gathered by the subject basin by the U.S.G.S. is indispensable in answering the questions which Mr. Mower attempts to answer. That further information from the U.S.G.S. study and other independent studies is necessary to determine, with any degree of factual and scientific certainty, the conclusions which Mr. Mower attempts to make. Therefore, said conclusions are highly questionable and likely to be inaccurate.

34. Your affiant is currently conducting studies of his own and will be able to supplement this affidavit with more factual data and analysis within 30 days from today's date." (emphasis added)

Again, appellants filed a second Neeley affidavit on September 17, 1980 which appears at R. 168-180. This affidavit also is essentially identical with the first affidavit, and we do not know why it was filed. In any event, as indicated in the previous case, the original affidavit was not supplemented with "more factual data and analysis" as was the stated intent as set forth in the original affidavit.

A careful reading of the Neeley affidavit again reveals that Mr. Neeley does not respond at all to the Mower affidavit filed in Civil No. 7146. Rather, it responds to the Mower affidavits filed in Civil Nos. 7131, 7140 and 7144, which involve underground waters and do not involve Sevier River surface waters. Thus, paragraphs 21 through 25 of the Neeley affidavit criticize paragraphs 13 through 17 of the Mower affidavit which had nothing to do with pumping underground water. Likewise, paragraphs 26 through 31 of the Neeley affidavit criticize paragraphs 18 through 23 of the Mower affidavit which do not even exist since there are only a total of 16 paragraphs therein.

The trial court correctly evaluated the Neeley affidavit as not specifically addressing the issues in ruling on the Motion for Summary Judgment on June 18, 1981. Thus, on pages 3 and 4 of the transcript of Court Proceedings in Civil No. 7146, it states:

"And the Court with reference to the first cause of action, motion for summary judgment is granted. The Court specifically

refers to Rule 23.1, Utah Rules of Civil Procedure, specific reference to the requirements of Rule 56(e), and no affidavit that specifically addresses the provisions of the first cause of action and in support thereof filed by the plaintiffs, respondents, motion for summary judgment as to that cause of action is granted."

A fundamental proposition of evidence law is that the testimony of a witness is no stronger than its weakest link. Here the weak link of Mr. Neeley's affidavits is that he doesn't know. If he doesn't know, it follows that he is incompetent to give an opinion. See Alvarado v. Tucker, 2 Utah 2d 16, 268 P.2d 986 (1954); State of Utah v. Pratt, 25 Utah 2d 76, 475 P.2d 1013 (1970).

The trial court in rendering its decisions in open court on June 18, 1981 commented a number of times on the legal effect of the Mower and Neeley affidavits. For example, in Civil No. 7140 the court stated:

"The Court makes special note that the Engineer's order permits a period of experimentation to determine if impairment and unreasonable action in kind or nature exists. And the Court has reviewed the nature and content of the determination of the State Engineer's office and the pleadings, including the affidavit filed in support of the motion for summary judgment, the affidavit of Mr. Neeley, which in substance, as the court paraphrases it, he claims he doesn't know; that no one can know; the information is not now available and no intelligent assessment can be made. The Court also has reviewed the affidavit of the same party filed November 25, 1980 in the case, and the Court again applies as the determinable rule the "reason to believe" rule, as it's referred to." See page 1-3 of transcript.

In Civil No. 7144, the court stated:

"The Court has before it the determination of the State Engineer's office and has reviewed those matters, as the pleadings

reflect. The affidavit of one Mower in support, the affidavit of one Walker in support and the affidavit of one Parley Neeley, which, for the main part of this case, 7144, states, 'I don't know. I can't know. The information is not available.' I'm paraphrasing, of course. And that other studies are under way which would lend light to it, to the matter.

Now, the Court, with that in mind, has held this matter from October 18 until this date, June 18, 1981, October 18, 1980 until June 18, 1981, during which time no further affidavits, no depositions and no memorandum has been filed in opposition. The affidavit, the Court has in opposition by Mr. Neeley in effect states, "No intelligent assessment can be made." This Court finds that that does not sufficiently place in issue the factual matters under what the Court would paraphrase a "reason to believe" rule, which is the nexus of the State Engineer's determination." See page 4 of transcript. (emphasis added)

The appellants in their brief seem to be claiming that the remedy of summary judgment was not available to respondents. If such is their claim, we need only point out that Utah Rules of Civil Procedure are applicable in a water law case involving a trial de novo. See Utah Code Annotated, Section 73-3-15, et seq.

See the following cases where courts have specifically upheld summary judgment as a remedy in a trial de novo review. Smith v. School District No. 308, 13 Wash. App. 430, 534 P.2d 1406 (1975); Taylor v. Donaldson, 227 Ga. 496, 181 S.E.2d 340 (1971); Yribar v. Fitzpatrick, 393 P.2d 588 (Idaho 1964).

The motions for summary judgment were made pursuant to Rule 56. Subsection (e) of said rule, insofar as material here, reads as follows:

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." (emphasis added)

This court has held that the minimum requirement of a counter-affidavit filed pursuant to Rule 56(e) is that said affidavit show clearly on its face that the witness is testifying from personal knowledge to facts that would be admissible in evidence and that the witness is competent to testify. See Walker v. Rocky Mountain Recreation Corp., 29 Utah 2d 274, 508 P.2d 538 (1973) and Albrecht v. Uranium Service, Inc., 596 P.2d 1025 (Utah 1979). See also First National Bank of Arizona v. Cities Service Co., (1968) 391 U.S. 253, 20 L. Ed. 2d 569, 88 S.Ct. 1575; Wagoner v. Mountain Savings and Loan Ass'n, (U. S. Dist. Ct. Colo. 1961) 29 FRD 138; Markwell v. General Tire and Rubber Co., (7 CCA 1968) 367 F.2d 748; Securities and Exchange Comm. v. Research Automation Corp., et al., (2 CCA 1978) 585 F.2d 31.

Mr. Neeley has indicated in his affidavits that he is aware of the fact that studies were in progress. He states that it would be "essential" for him to know the results of said studies in order for him to form an opinion as to the nature and extent of any interference with appellants' water rights in the event the

changes are approved. We again point out that over a year elapsed after the filing of the Neeley affidavits before the court signed its written orders granting summary judgment in each case. Yet no new affidavits were filed by appellants and no new evidence was presented to the court.

In summary, Mr. Mower testifies on the basis of extensive experience, personal knowledge of studies made of the Sevier Basin and his own computations that the changes will not adversely affect other water rights. This clearly meets the requirement of a prima facie showing that there is reason to believe that the changes can be made without injury to protestants. Mr. Neeley, on the other hand, testifies that he does not know and cannot know without further studies "with any degree of factual and scientific certainty" whether or not the conclusions of Mr. Mower are accurate. This does not meet the legal requirement that, after applicant has made his prima facie showing, the protestant must come forward and show with particularity how he will be injured. The trial court expressly noted this in ruling on the motion for summary judgment in Civil No. 7145 at page 4 and placed its decision thereon.

- D. The Neeley affidavits are fatally defective for the further reason that they fail to lay a sufficient foundation to support a finding that the individual water rights of the appellants would be adversely affected by approval of the change applications.

The cases cited under Point I., subsection B, of this brief hold that after applicants for a change have made a prima facie general showing that other water owners will not be adversely affected by approval of the change, the burden shifts to the protestants to show with particularity how the change will

adversely affect the individual water rights of the protestants. Injury in the air is simply not enough. This is not a class action. The Neeley affidavits contain no factual basis to indicate that he has the slightest notion as to the nature and location of the water rights belonging to appellants. As far as his affidavits are concerned, there isn't even a basis for a finding that appellants own any water rights, let alone that their rights will be interfered with as a result of the proposed changes. What is the nature of the individual appellants' water rights? Are their rights well water rights? Are they surface water rights? Are they a combination of both? Where are they located? Which of their rights will be affected?

This court has held that an individual cannot assert the rights of third persons in an attempt to compel the State Engineer to take action with regard to said individual's own water rights. See Tanner v. Beers, 49 Utah 536, 165 P. 465 (1917). This court has also held that a stranger who has no interest in the rights which are the subject of litigation lacks the necessary status to attack the claim of another to said rights. See Cortella v. Salt Lake City, 93 Utah 236, 72 P.2d 630 (1937), and Little Cottonwood Water Co. v. Kimball, 76 Utah 243, 289 P. 116 (1930).

The total failure of appellants to indicate in the Neeley affidavits or otherwise how and in what manner their individual water rights would be interfered with in the event the changes are approved puts appellants at odds with the foregoing cases and at total odds with the requirements of Utah Rule of Civil Procedure 56(e).

The one stubborn fact that has become increasingly evident as this litigation wears on is that the real purpose of appellants has never been to protect their individual water rights. Their purpose has always been to defeat the construction of the Intermountain Power Plant at all costs. See affidavit of Robert D. Moore in Civil No. 7145, pages 098-100. See the trial court's remarks in open court when he granted respondents' Motion for Summary Judgment in Civil No. 7145.

E. The State Engineer has authority to issue conditional approvals and to make interlocutory orders.

Appellants contend that the State Engineer lacked the authority to protect other owners of water rights in the Sevier River Basin by inserting interlocutory conditions in his various decisions approving of the change applications. We adopt the response to this contention contained in the State Respondents' Brief.

We emphasize the fact that this court has long ago held that the State Engineer has the authority to modify his approval of a change if a time comes when such a modification is necessary in order to protect other rights. See Tanner v. Humphreys, 87 Utah 164, 48 P.2d 484 (1935); East Bench Irr. Co. v. Deseret Irr. Co., 2 Utah 2d 170, 271 P.2d 449 (1954); and Tanner v. Bacon, 103 Utah 494, 136 P.2d 957 (1943).

See also the following cases cited in the State Respondents' Brief which are repeated herein for convenience of the court: State v. Public Service Comm., 191 S.W. 412 (Mo. 1916); Market Street R. Co. v. Railroad Comm., 324 U.S. 548 (1944); and Federal Power Comm. v. Nat. Gas Pipeline Co., 315 U.S. 575 (1941).

Here the Utah State Engineer, in keeping with Tanner, supra, was meticulous in each of his Memorandum Decisions to carefully protect any and all other water owners against the possibility that at some future time further studies show that their water rights are or may be adversely affected by the change. We cite as an example the Memorandum Decision of the State Engineer in re Change Application No. a-10864 (68 Area), a part of Case No. 7146, which reads in part as follows:

"During the interlocutory period prior to plant operation, measuring devices shall be installed to attempt to determine the historical return flow to the lower users in order to be able to establish more definitively the quantities of water required as compensation. Any compensation determined by the State Engineer and the Sevier River Commissioner shall be an interlocutory means of administering the right. The State Engineer is conducting additional studies in the area, and if subsequent studies or a Court--either in a review of this decision or in a subsequent action--adjudicates that a different measure of compensation must be used, the State Engineer will adjust the quantity accordingly." Civil No. 7146, R.85-86 (emphasis added)

We also cite as a further example the Memorandum Decision of the State Engineer in re Change Application No. a-10953 (68-2165) which is a part of Case No. 7144, of which reads in part as follows:

"It is not the intention of the State Engineer in establishing a consumptive use duty of 2.5 acre feet of water per acre of land to adjudicate the extent of the rights of Dr. Clark B. Cox, but rather to provide sufficient definition of the right to assure that other vested rights are not impaired by the change. The State Engineer is conducting additional studies concerning the consumptive use requirements of irrigated land in the area. Therefore,

the duty of 2.5 acre feet per acre in determining acreage reduction and all issues relating thereto shall be interlocutory, and if subsequent studies or a Court--either in a review of this action decision or in a subsequent action--adjudicates that this right is entitled to either more or less water, the State Engineer will adjust the duty and acreage accordingly."
Civil No. 7144, R. 110. (emphasis added)

The same interlocutory provisions, only slightly modified on a change by change basis, appear in the remaining State Engineer's decisions. Said provisions effectively preserve for appellants adequate legal remedies when, as and if the proposed changes adversely affect their water rights. From this undisputable fact alone it follows that the appellants must fail because of the prematurity of their suits.

VI. CONCLUSION

The public policy of the State of Utah was determined by the legislature when it enacted enabling legislation providing for construction of the Intermountain Power Project. See Interlocal Co-operation Act, Utah Code Annotated, Section 11-13-1, et seq. It is understandable that there would be a difference of opinion among citizens of Millard County as to whether they desired to have the plant built and their lifestyle changed. But whether the building of the plant should be delayed and defeated for policy reasons is not the issue before this court. The issue before this court is whether the State Engineer and the trial court correctly determined that there is "reason to believe" the changes can be made and the plant constructed without substantially impairing the water rights of the appellants. We submit that the trial court correctly determined said issue in favor of the respondents. The

interlocutory provisions set forth by the Utah State Engineer in his memorandum decisions safeguard to appellants, as well as all other owners of water rights in Millard County, adequate legal and administrative remedies should the time ever arise when further studies reveal that the changes will adversely affect their interests.

We respectfully submit that the decisions of the trial court should be affirmed.

DATED this _____ day of March, 1982.

WAYNE L. BLACK

ROBERT D. MOORE

THORPE WADDINGHAM

EDWARD W. CLYDE

JOSEPH NOVAK

Attorneys for Respondents

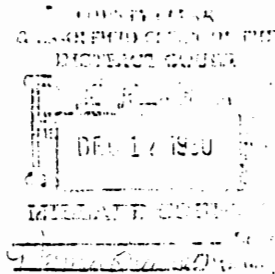
CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing BRIEF OF
CORPORATE AND INDIVIDUAL RESPONDENTS was sent to the following
this _____ day of March, 1982:

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
 IN AND FOR MILLARD COUNTY, STATE OF UTAH

BERNARD JACKSON, <u>et al.</u> , Plaintiffs, v. DR. CLARK COX, <u>et al.</u> , Defendants.	}	ORDER AND PARTIAL SUMMARY JUDGMENT Civil No. 7144
--------------------------------------------------------------------------------------------------------	---	------------------------------------------------------------

This matter came before the above-entitled Court on October 16, 1980, at the hour of 10:00 a.m. for Hearing before the Honorable J. Harlan Burns, District Judge, upon the Motion for Partial Summary Judgment filed by the Utah State Defendants, and the Motion for Summary Judgment filed by the Defendant Companies and joined in by Defendants Intermountain Power Project and Intermountain Power Agency in open court; Plaintiffs were represented by their attorney J. Franklin Allred of Salt Lake City, Utah; Defendants Delta Canal Company, Melville Irrigation Company, Abraham Irrigation Company and Deseret Irrigation Company were represented by their attorneys Thorpe Waddingham of Delta, Utah, Wayne L. Black and Robert D. Moore, both of Salt Lake City, Utah; Defendants Intermountain Power Project and Intermountain Power Agency were represented by their attorney Joseph Novak of Salt Lake City, Utah; and Defendants Doc C. Hanson, State Engineer of the State of Utah, and Board of Water Resources of the State of Utah were represented by their attorney Dallin W. Jensen, Assistant Attorney General, of Salt Lake City, Utah. The Court having considered the pleadings and files herein, the memorandum filed by the Utah State Defendants and the affidavits and memorandum filed by the Defendant Companies, and the arguments of all counsel; and it

appearing that no memorandum in opposition to said motions has been filed by Plaintiffs herein, and it appearing to the Court that Change Applications Nos. a-10952, a-10953, a-10954, a-10955, a-10956, a-10968, a-10969, a-10970, a-10971, a-10972, a-10973, a-10981 and a-11009 are in all respects complete and in proper form and the changes proposed therein are authorized by law and that the State Engineer had authority to accept, process, and conditionally approve said Change Applications, and it further appearing to the Court that this appeal is strictly limited to only those issues which could have been raised before the State Engineer on said Change Applications, and that this Court is limited to a determination of whether there is reason to believe that said Change Applications can be approved without impairing any water rights of Plaintiffs, and the Court now being fully advised in the premises, finds that there is no genuine issue of fact as to those issues raised within said Motion for Partial Summary Judgment and concludes as a matter of law that Defendants are entitled to Partial Summary Judgment as sought therein, and that this Court lacks jurisdiction in this appeal over the subject matter of Plaintiffs' Twenty-Fourth and Twenty-Fifth Causes of Action, and it further appearing that a decision on the Motion for Summary Judgment filed by the individual Defendants, except as to Plaintiffs' Twenty-Fourth and Twenty-Fifth Causes of Action, will require further study and consideration by the Court, now therefore it is

ORDERED that the Motion for Summary Judgment filed by the individual Defendants, except as to Plaintiffs' Twenty-Fourth and Twenty-Fifth Causes of Action, be and the same is hereby taken under advisement for further consideration and determination by the Court, and it is further

ORDERED that the Motion for Partial Summary Judgment filed by the Utah State Defendants be and the same is hereby granted, and based thereon it is

ORDERED, ADJUDGED AND DECREED that:

1. Change Applications Nos. a-10952, a-10953, a-10954, a-10955, a-10956, a-10968, a-10969, a-10970, a-10971, a-10972, a-10973, a-10981 and a-11009 are in all respects complete and in proper form and the changes proposed therein are authorized by law, and the State Engineer had statutory authority to accept and process said Change Applications and to conditionally approve said Change Applications as provided in his respective Memorandum Decisions thereon;

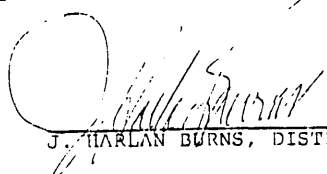
2. This appeal, taken pursuant to the provisions of Section 73-3-14, Utah Code Annotated 1953, as amended, is strictly limited and confined to those issues which could have been raised by Plaintiffs before the State Engineer;

3. The criteria governing the approval or rejection of said Change Applications, as set forth in Section 73-3-3, Utah Code Annotated 1953, as amended, is limited to a determination of whether there is reason to believe that said Change Applications can be approved without substantially impairing any water rights of Plaintiffs;

4. The Twenty-Fourth and Twenty-Fifth Causes of Action of Plaintiffs' Complaint be, and the same are hereby, dismissed without prejudice; and,

5. This Order and Partial Summary Judgment shall be interlocutory in nature and shall govern the conduct of all further proceedings in this action.

DATED this 16 day of December, 1980.


J. HARLAN BURNS, DISTRICT JUDGE

CERTIFICATE OF SERVICE

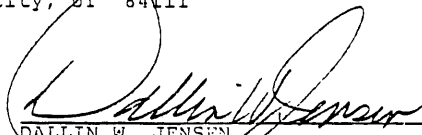
I hereby certify that on this 9th day of December, 1980,
a true and correct copy of the foregoing Order and Partial
Summary Judgment, prior to signature and entry by the Court,
was mailed, first class postage prepaid, to:

John Franklin Allred
Attorney for Plaintiffs
321 South Sixth East
Salt Lake City, UT 84102

Thorpe A. Waddingham
Attorney for Defendant Irri-
gation Companies
615 North 100 West
Delta, UT 84624

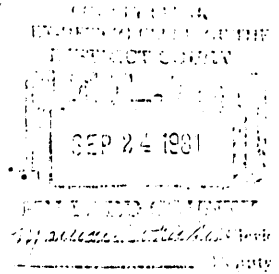
Wayne L. Black
Robert D. Moore
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Joseph Novak
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DALLIN W. JENSEN
Assistant Attorney General

APPENDIX "B"



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IN THE FIFTH JUDICIAL DISTRICT COURT OF MILLARD COUNTY
STATE OF UTAH

BERNARD JACKSON, et al.,

Plaintiffs,

vs.

DOCTOR CLARK COX, et al.,

Defendants.

ORDER

AND

SUMMARY JUDGMENT

Civil No. 7144

This matter came on regularly before the above-entitled Court on October 16, 1980, at the hour of 10:00 a.m. for hearing before the Honorable J. Harlan Burns, District Judge, upon the Motion for Summary Judgment filed by the Defendant Water Rights Owners, i.e., Doctor Clark Cox, S. & G., Inc., a Utah corporation, Mervin G. Williams, Maurline B. Williams, L. Lyman Finlinson, Sarah C. Finlinson, Kent Dewsnap, Sandra F. Dewsnap, Howard Dutson, Afton R. Dutson, William D. Dutson, Kae F. Dutson, Gerald Nielson, Betty J. Nielson, Carol Ann Nielson, Jim Nielson, Becky Nelson, Jack M. Nelson, Bill Nielson, Sylvan Lovell, Gordon L. Nielson, Barbara B. Nielson, Richard J. Nielson, Keith R. Nielson, Camille R. Nielson, Norma R. Nielson, Mabel B. Harder, Dean A. Harder, and joined in by Defendants Intermountain Power Project and Intermountain Power Agency; Plaintiffs were represented by their attorney J. Franklin Allred, Esq., of Salt Lake City, Utah; Defendant Water Rights Owners were represented by their

attorneys Thorpe Waddingham, Esq., of Delta, Utah, Wayne L. Black, Esq., and Robert D. Moore, Esq., both of Salt Lake City, Utah; Defendants Dee C. Hansen as State Engineer of the State of Utah and Board of Water Resources of the State of Utah were represented by their attorney Dallin W. Jensen, Assistant Attorney General, of Salt Lake City, Utah; and Defendants Intermountain Power Project and Intermountain Power Agency were represented by their attorney Joseph Novak, Esq., of Salt Lake City, Utah. The Court having previously considered the pleadings and files herein, the Memorandum filed by the Utah State Defendants, and the Affidavits and Memorandum filed by the Defendant Water Rights Owners, and the arguments of all counsel, and based thereon made and entered its Order and Partial Summary Judgment herein on December 17, 1980 and, at that time held the Motion for Summary Judgment filed by the Defendant Water Rights Owners under advisement for further study and consideration; and the Court having afforded plaintiffs full opportunity to file additional affidavits and Memoranda of Law in Opposition to Defendant Water Rights Owners' Motion for Summary Judgment and having allowed sufficient time to do so, and no supplemental or additional affidavits or Memoranda of Law having been filed by Plaintiffs herein, and the Court again having considered the pleadings and files herein and having considered the Affidavits on file in support of Defendant Water Rights Owners' Motion For Summary Judgment, and the Affidavits of Parley R. Neeley filed in support of Plaintiffs' Motion for Extension of Time, and in opposition to Defendant Water Rights Owners' Motion for Summary Judgment, and the Court having read and considered the Memorandum filed by Defendant Water Rights Owners in support of their Motion for Summary Judgment herein, and the Court having considered Plaintiffs'

Objections to Proposed Order and Partial Summary Judgment filed herein and having considered the arguments of all respective counsel and being fully advised in the premises, the Court made and announced its decision herein in open court on June 18, 1981, and based thereon and in accordance therewith, the Court finds that Change Applications Nos. a-10952 (68-531), a-10953 (68-2165), a-10954 (68-2166), a-10955 (68-2161), a-10956 (68-2167), a-10968 (68-2169), a-10969 (68-2170), a-10970 (68-2168), a-10971 (68-2171), a-10972 (68-2180), a-10973 (68-2181), a-10981 (68-2173), a-11009 (68-2182), are in all respects complete and in proper form and the changes proposed therein are authorized by law; and that defendant Dee C. Hansen, as State Engineer, fully complied with all statutory requirements and that said Change Applications are properly before the Court for judicial review; and the Court further finds that the jurisdiction of this Court is limited to a final decision of approval in whole or in part and with or without conditions or a rejection of said Change Applications; and based on the record herein, the Court finds reason to believe that said Change Applications can be approved on the same terms and conditions as set forth in the respective Memorandum Decisions or Amended Memorandum Decisions of the State Engineer thereon without impairing the existing water rights of plaintiffs, or any of them, and that there is no genuine issue as to any material fact thereon and that defendants are entitled to judgment as a matter of law;

NOW, THEREFORE, it is

ORDERED that the Objections to Proposed Order and Partial Summary Judgment filed by plaintiffs herein be, and the same are, hereby overruled and denied; and it is further

ORDERED that the Order and Partial Summary Judgment made and entered herein on December 17, 1980 be, and the same is hereby reaffirmed, and it is further

ORDERED that the Motion for Summary Judgment filed by the Defendant Water Rights Owners herein be, and the same is hereby granted as to each and every cause of action of Plaintiffs' Complaint, and based thereon, it is

ORDERED, ADJUDGED AND DECREED that:

1. The following Change Applications be, and the same are hereby approved upon the same terms and conditions as set forth in the following respective Memorandum Decisions or Amended Memorandum Decisions of the State Engineer to wit:

a-10952 (68-531) dated March 24, 1980 (Amended)
a-10953 (68-2165) dated March 24, 1980 (Amended)
a-10954 (68-2166) dated March 24, 1980 (Amended)
a-10955 (68-2161) dated March 24, 1980 (Amended)
a-10956 (68-2167) dated May 19, 1980
a-10968 (68-2169) dated March 26, 1980
a-10969 (68-2170) dated March 27, 1980
a-10970 (68-2168) dated April 15, 1980
a-10971 (68-2171) dated April 1, 1980
a-10972 (68-2180) dated March 27, 1980
a-10973 (68-2181) dated April 16, 1980
a-10981 (68-2173) dated March 28, 1980
a-11009 (68-2182) dated March 28, 1980

2. The respective Memorandum Decisions and Amended Memorandum Decisions of defendant Dee C. Hansen as State Engineer as set forth in the preceding paragraph 1 be, and the same are hereby affirmed in all respects; and

3. Each party shall bear his own costs.

DATED this 22 ^{Sept.} day of July, 1981.

BY THE COURT:


DISTRICT JUDGE

CERTIFICATE OF MAILING

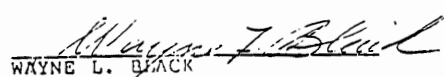
I hereby certify that on this 9 day of July, 1981, a true and correct copy of the foregoing Order and Summary Judgment, prior to signature and entry by the Court, was mailed first class postage prepaid, to:

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E. J. Skeen
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WAYNE L. BLACK
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Water Rights Owners
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Salt Lake City, Utah 84101

APPENDIX "C"

Analysis of the Five Cases

The cases here involved were filed in the District Court of Millard County as Civil Nos. 7131, 7140, 7144, 7145 and 7146 and will be referred to from time to time in this appendix by those numbers. Plaintiffs-Appellants collectively will be referred to herein as appellants. Defendants-Respondents, Delta Canal Company, Melville Irrigation Company, Abraham Irrigation Company and Deseret Irrigation Company, collectively will be referred to herein as respondent DMAD Companies; defendant-respondent Central Utah Water Company will be referred to herein as respondent Central Company; the individual defendants-respondents in Case No. 18055 (Civil No. 7144) collectively will be referred to herein as respondent well owners; defendants-respondents Intermountain Power Project and Intermountain Power Agency will be referred to herein as respondent IPP and respondent IPA, respectively. All of the foregoing defendants-respondents collectively will be referred to herein as respondent water users. Defendant-Respondent Dee C. Hansen, as State Engineer, will be referred to herein as respondent State Engineer; defendant-respondent Board of Water Resources will be referred to herein as respondent Resources Board and jointly will be referred to herein as Utah State respondents.

Respondent DMAD Companies are the owners of direct flow and storage rights to the use of the waters of the lower Sevier River

as confirmed by the Sevier River Decree dated November 30, 1936, (Millard County Civil No. 843) and to the use of the underground waters diverted by means of eight large diameter wells (DMAD wells) situated along the Sevier River between Lynndyl and Delta. (A sketch map showing generally the lower Sevier River system appears in Case No. 18053 at R. 131, Case No. 18054 at R. 270 and Case No. 18057 at R. 76) The storage waters are impounded in the Sevier Bridge Reservoir, DMAD Reservoir and Gunnison Bend Reservoir and are released therefrom on call and, together with surface direct flow waters and as supplemented by the DMAD well waters, are rediverted from the Sevier River into various DMAD canals and are used for irrigation purposes in the Delta area.

Respondent Central Company is the owner of direct flow and storage rights to the use of the waters of the lower Sevier River as confirmed by the Sevier River Decree dated November 30, 1936 (Millard County Civil No. 843). The storage waters are impounded in the Sevier Bridge Reservoir and Fool Creek Reservoirs and are released therefrom on call and, together with surface direct flow waters, are diverted into the Central Utah Canal and are used for irrigation purposes in the Lynndyl area and the Flowell area through a canal some 45 miles from the point of diversion.

The respondent well owners are owners of rights to the use of underground waters from individual wells in the Lynndyl, Fool Creek and Delta areas each evidenced by a certificate of appropriation.

Respondent IPA entered into 687 separate stock purchase contracts and water right purchase contracts with individual stockholders of respondent DMAD Companies and Central Company and with individual

well right owners whereby respondent IPA has acquired rights to the use of approximately 45,000 acre feet of water annually for use at the Intermountain Power Project, comprising a 3,000 megawatt coal fired electrical generation plant being constructed near Lynndyl, Utah. Approximately 25,100 acre feet of water annually will be derived from the stock purchased under 466 contracts from individual stockholders in the respondent DMAD Companies which represents approximately 20% of the outstanding stock in each of those companies. Approximately 14,500 acre feet of water annually will be derived from the stock purchased under 190 contracts from the individual stockholders in respondent Central Company, each of whom sold 85% of his stock and each retained 15% of his stock. Approximately 5400 acre feet of water annually will be derived from the underground water rights purchased under 31 contracts from the individual well owners.

Respondent DMAD Companies filed change application a-10862 (68-475) in the office of respondent State Engineer to correct thirteen applications to appropriate water from the eight DMAD wells and thereby conform those applications to the proofs of appropriation filed thereunder by respondent DMAD Companies on December 31, 1976 (Case No. 18056, R. 016-020, incl.) The foregoing change application is amendatory only to make the applications conform to the proof of appropriation and does not change the nature of use of any of the waters covered thereby to include industrial use at the Intermountain Power Project. This Change Application No. a-10862 (68-475) was conditionally approved by Memorandum Decision of respondent State Engineer dated February 29, 1980 (Case No. 18056, Civil No. 7131, R. 009-015 incl.)

Pursuant to the respective stock purchase contracts and at the instance of its stockholder sellers, respondent DMAD Companies filed Change Application No. a-10863 (68-475) to change the place and nature of use of the DMAD well water rights to include industrial use at the Intermountain Power Project of that portion, i.e., approximately 20%, of the well waters to which respondent IPA will be entitled under its stock ownership (Case No. 18054, R. 017-029 incl. Change Application No. a-10863 (68-475) was conditionally approved by Memorandum Decision of respondent State Engineer dated March 25, 1980 (Case No. 18054, R. 030 035 incl.).

Respondent DMAD Companies likewise filed Change Application No. a-10864 (68 Area) to change the place and nature of use of its decreed Sevier River water rights to include industrial use at the Intermountain Power Project of that portion, i.e., approximately 20%, of such waters to which respondent IPA will be entitled under its stock ownership (Case No. 18053, R. 017-027 incl.). Change Application No. a-10864 (68 Area) was conditionally approved by Memorandum Decision of respondent State Engineer dated March 25, 1980 (Case No. 18053, R. 028-032 incl.).

Respondent IPA's share of respondent DMAD Companies' decreed Sevier River waters will be released from Sevier Bridge Reservoir at IPA's call. This stored water, together with respondent IPA's share of the direct flow water and DMAD well waters, will be rediverted from the Sevier River at the DMAD Reservoir into two large pipelines and conveyed thereby approximately 11 miles for industrial use at the Intermountain Power Project. The industrial use will consume all of such waters. Respondent IPA's total share

thereof will be approximately 25,100 acre feet annually based on its stock ownership in the four respondent DMAD Companies.

Pursuant to the stock purchase contracts and at the instance of its stockholder sellers, respondent Central Company filed Change Application No. a-10927 (68 Area) to change the place and nature of use of its decreed Sevier River storage and direct flow water rights to include industrial use at the Intermountain Power Project of that portion, i.e., 85% of such waters to which respondent IPA will be entitled under its stock ownership (Case No. 18057, R. 5-17 incl.). Change Application a-10927 (68 Area) was conditionally approved by Memorandum Decision of respondent State Engineer dated March 25, 1980 (Case No. 18057, R. 18-21 incl.). Respondent IPA's share of respondent Central Company's decreed Sevier River waters will be released from Sevier Bridge Reservoir and Fool Creek Reservoirs at IPA's call and will be rediverted at the DMAD Reservoir into two large pipelines and conveyed thereby approximately 11 miles for industrial use at the Intermountain Power Project, which will consume all of such waters. Respondent IPA's total share thereof will be approximately 14,500 acre feet annually based on its ownership of 85% of the stock in respondent Central Company.

Pursuant to water right purchase contracts, the individual well owners filed some sixteen change applications in the office of respondent State Engineer to change the points of diversion, place and nature of use, of portions of their well water rights. These applications each contemplated that the purchased water would not be diverted from the existing wells but in lieu thereof water would be diverted by means of five new wells to be drilled by

respondent IPA at the Intermountain Power Project site for industrial use which will consume all of such waters. However, only thirteen change applications are the subject matter of Case No. 18055 (Civil No. 7144). (R. 024-Incl; 083-107 incl.) (Change Application No. a-10997 (68-2179) attached to plaintiffs' Complaint (R. 074-082 incl.) was not approved (R. 082, 507). Respondent IPA by its purchase contracts has now acquired rights to 4,504.94 acre feet of the well waters covered by the said approved change applications. The balance of 895.06 acre feet acquired by the respondent IPA to make up the total of 5,400 acre feet of well water is covered by Change Application Nos. a-11174 (68-2227) and a-11227 (68-264)). Separate Memorandum Decisions were issued by respondent State Engineer conditionally approving each of said change applications (Case No. 18055, R. 108-156 incl.)

The five cases filed by appellants are defined and described as follows:

Case No. 18056 (Civil No. 7131)

Civil No. 7131 was filed for a judicial review of the Memorandum Decision of respondent State Engineer dated February 29, 1980 conditionally approving amendatory Change Application No. a-10862 (68-475) filed in the names of respondent Resources Board for respondent DMAD Companies to conform thirteen applications to appropriate water from the eight DMAD wells to work actually done as reflected by the proof of said work. The conditions of such approval are accurately quoted on pages 3 and 4 of appellants' brief.

The Complaint was filed by individual plaintiffs who claim rights to the use of underground waters in the Sevier Desert

Groundwater Basin. It purports to state eleven separate causes of action, all asserted as being brought pursuant to §73-3-14, U.C.A., 1953, as amended, (R. 001-008 incl.). Respondent DMAD Companies, State Engineer and Resources Board are named as defendants.

Case No. 18054 (Civil No. 7140)

Civil No. 7140 seeks a judicial review of the Memorandum Decision of the respondent State Engineer dated March 25, 1980, conditionally approving Change Application No. a-10863 (68-475) filed in the names of respondent Resources Board and respondent DMAD Companies to change the respondent DMAD Companies' well water rights from the eight DMAD wells to permit industrial use of a portion thereof at the Intermountain Power Project. The portion of such Memorandum Decision and the conditions of approval are accurately quoted on pages 4-6 inclusive of appellants' brief.

The Complaint was filed by individual plaintiffs who claim rights to the use of underground waters in the Sevier Desert Groundwater Basin and as shareholders in the respondent DMAD Companies and purports to state twenty-five separate causes of action, all pursuant to §73-3-14, U.C.A., 1953, as amended (R. 001-016 incl.). Respondent DMAD Companies, State Engineer, Resources Board and IPA are named as defendants.

Case No. 18053 (Civil No. 7145)

Civil No. 7145 seeks a judicial review of the Memorandum Decision of respondent State Engineer dated March 25, 1980, conditionally approving Change Application No. 10864 (68 Area) filed in the names of respondent Resources Board and respondent DMAD Companies to change respondent DMAD Companies' decreed Sevier

River direct flow and storage water rights to permit industrial use of a portion thereof at the Intermountain Power Project. The portion of respondent State Engineer's Memorandum Decision quoted on page 4 of appellants' brief, while taken out of context is accurately stated. However, the Order of respondent State Engineer provides:

"It is therefore, ORDERED, and Change Application Number a-10864 (68 Area) is hereby APPROVED subject to prior rights, particularly those of the protestants, and the following conditions:

1. That the quantity of water diverted for industrial uses from the decreed rights covered by the application shall be in proportion to the amount of surface water in the total water supply of the DMAD Companies.
2. That during periods when the natural return flow to the River does not meet the historical supply below Gunnison Bend Reservoir, water shall be released from the Reservoir to compensate the lower users for those losses.

During the interlocutory period prior to plant operation, measuring devices shall be installed to attempt to determine the historical return flow to the lower users in order to be able to establish more definitively the quantities of water required as compensation. Any compensation determined by the State Engineer and the Sevier River Commissioner shall be an interlocutory means of administering the right. The State Engineer is conducting additional studies in the area, and if subsequent studies or 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." (R. 030, 031)

The Complaint was filed by individual plaintiffs who claim to be owners of certificated water rights and shareholders of the respondent DMAD Companies and purports to state twenty-two separate causes of action all pursuant to §73-3-14, U.C.A., 1953, as amended, (R. 001-016 incl.). Respondents DMAD Companies, State Engineer Resources Board, IPP and IPA are named as defendants.

Case No. 18057 (Civil No. 7146)

Civil No. 7146 seeks a judicial review of the Memorandum Decision of the respondent State Engineer dated March 25, 1980, conditionally approving Change Application No. a-10927 (68 Area) filed in the names of respondents Resources Board and Central Company to change the surface direct flow and storage water rights of respondent Central Company to permit industrial use of a portion thereof at the Intermountain Power Project. The conditions of such approval are accurately stated on pages 3 and 4 of appellants' brief.

The Complaint was filed by individual plaintiffs who claim rights to the use of water both surface and underground in the Sevier River system and purports to state four separate causes of action, all pursuant to §73-3-14, U.C.A., 1953, as amended (R. 1-4 incl.). Respondents Central Company, State Engineer, Resources Board, IPP and IPA are named as defendants.

Case No. 18055 (Civil No. 7144)

Civil No. 7144 seeks judicial review of twelve separate Memorandum Decisions of the respondent State Engineer dated between March 24, 1980 and May 19, 1980 conditionally approving said change applications, filed in the names of respondent well owners, to change the points of diversion, place and nature of

use of portions of their underground water rights from their respective individual wells for diversion by means of five proposed wells at the Intermountain Power Project for industrial use. Respondent IPA will acquire rights to approximately 4,500 acre feet of the waters covered by said change applications based on the aggregate quantities specified in the respective water right purchase contracts.

The State Engineer's Amended Memorandum Decision appearing at page 3 of the Amended Memorandum Decision on Change Application No. a-10953 (68-2165) at R. 110 reads in part as follows:

"It is the opinion of the State Engineer that the change can be made, provided that the water right and use of water from the well presently used by Dr. Clark B. Cox is reduced to reflect the change. The application which this change is based is for 5.90 cfs for the irrigation requirements of 320.0 acres. The studies of the State Engineer indicate that each acre of irrigated land will consumptively use 2.50 acre feet/acre. Therefore, in order to compensate for the diversion of 598.0 acre feet of water as proposed, the irrigated acreage under the application shall be reduced by 239.20 acres.

It is therefore, ORDERED and Change Application Number a-10953 (68-2165) is hereby APPROVED subject to prior rights, particularly those of the protestants and subject to the reduction of 239.20 acres of irrigated lands as indicated and as qualified below." (R. 109, 110)

The Complaint was filed by individual plaintiffs who claim rights to the use of underground water in the Sevier Desert Groundwater Basin and as shareholders in the respondent DMAD Companies and purports to state twenty-five separate causes of action, all pursuant to §73-3-14, U.C.A., 1953, as amended. Respondents, the well owners, State Engineer, Resources Board and the California

cities of Los Angeles, Pasadena, Riverside, Burbank, Anaheim, and Glendale (California Cities who are among the participants in the IPP project) are named as defendants. Plaintiffs seek \$200,000,000.00 in punitive and compensatory damages against respondents IPP, IPA and the California Cities under their twenty-fourth and twenty-fifth causes of action, respectively, (R. 013-016 incl.)

On September 4, 1980, respondent DMAD Companies filed their motions for summary judgment in Civil Nos. 7131, 7140 and 7145, together with a supporting affidavit of Reed W. Mower (Case No. 18056, R. 065-079 incl; Case No. 18054, R. 241-255 incl; Case No. 18053, R. 112-116 incl.) and supporting affidavits of Roger Walker with attached exhibits in Civil Nos. 7140 and 7145 (Case No. 18054, R. 256-285 incl; Case No. 18053, R. 117-146 incl.) and memorandum in support thereof (Case No. 18056, R. 080-097 incl; Case No. 18054, R. 286-314 incl; Case No. 18053, R. 147-165 incl.).

On September 4, 1980, respondent Central Company filed its motion for summary judgment in Civil No. 7146 - Case No. 18057 (R. 54, 55) - together with the supporting affidavit of Reed W. Mower (R. 56-61 incl.) and supporting affidavit of Roger Walker with attached exhibits (R. 62-91 incl.) and memorandum in support thereof (R. 92-99 incl.).

On September 4, 1980, respondent well owners filed their motion for summary judgment in Civil No. 7144 - Case No. 18055 (R. 330, 331) - together with supporting affidavit of Reed W. Mower (R. 332-346 incl.) and Memorandum in support thereof (R. 347-363 incl.).

On September 15, 1980, appellants filed the first affidavit of Parley R. Neeley in all five cases. (Case No. 18056, R. 133-141 incl; Case No. 18054, R. 361-369 incl; Case No. 18053, R. 212-220 incl; Case No. 18057, R. 138-146 incl; Case No. 18055, R. 414-426 incl.)

On September 16, 1980, Utah State respondents filed their Motion for Partial Summary Judgment and Memorandum in support thereof in all five cases. (Case No. 18056, R. 146-161 incl; Case No. 18054, R. 374-389 incl; Case No. 18053, R. 225-240 incl; Case No. 18057, R. 151-166 incl; Case No. 18055, R. 247-442 incl.)

On September 17, 1980, appellants filed the second affidavit of Parley R. Neeley in all five cases, which is identical to his first affidavit except for the one word change under paragraph 17 thereof and the name of the Notary Public. (Case No. 18056, R. 163-170 incl; Case No. 18054, R. 390-398 incl; Case No. 18053, R. 242-249 incl; Case No. 18057, R. 168-176 incl; Case No. 18055, R. 444-456 incl.)

On October 16, 1980, a hearing was held in the lower court on all pending motions in all five cases pursuant to notice. (Case No. 18056, R. 176-178 incl., 187; Case No. 18054, R. 403-405 incl., 427; Case No. 18053, R. 255-257 incl., 270; Case No. 18057 R. 181-183 incl., 190; Case No. 18055, R. 457-459 incl., 471) Respondents IPP and IPA joined in the Motions for Summary Judgment in open court in all of the cases to which each was a party.

At the conclusion of arguments, the lower court granted Utah State respondents' motions for partial summary judgment in all

five cases, and granted summary judgment on the twenty-fourth and twenty-fifth causes of the Complaint in Civil No. 7144 (Case No. 18055, R. 471). The lower court then took under advisement respondent water users' Motions for Summary Judgment, noting that all concur that the motions were ripe for ruling. (Case No. 18056, R. 176-178 incl., 187; Case No. 18054, R. 403-405 incl., 427; Case No. 18053, R. 255-257 incl., 270; Case No. 18057, R. 181-183 incl., 190; Case No. 18055, R. 457-459 incl., 471)

On November 25, 1980, appellants filed the third affidavit of Parley R. Neeley in Civil No. 7131 (Case No. 18056, R. 188-192 incl.) and in Civil No. 7140 (Case No. 18054, R. 435-441 incl.). Appellants did not file additional affidavits in Civil No. 7144, 7145 or 7146.

On December 17, 1980, the lower court made and entered its formal Order and Partial Summary Judgment in each of the five cases (Case No. 18056, R. 199-203 incl; Case No. 18054, R. 449-452 incl; Case No. 18053, R. 278-281 incl; Case No. 18057, R. 197-200 incl; Case No. 18055, R. 474-477 incl; Exhibit "A") adjudging that the respective change applications were in all respects proper; that the respondent State Engineer had authority to accept, process and conditionally approve the same; that each action under §73-3-14 was limited to those issues which the respondent State Engineer could decide; that the criteria governing approval of a change application are limited to whether there is reason to believe that the change applications could be perfected as proposed without substantially impairing any water rights of appellants. The damage claims for \$200,000,000.00 in Civil No. 7144 were

dismissed but without prejudice and respondent water users' motion(s) for full Summary Judgment were taken under advisement.

On June 16, 1981, the lower court in open court granted respondent water users' Motions for full Summary Judgment in each of the five cases and as to all causes of action stating the reasons and bases therefor. (Case No. 18056, R. 212, 213; Case No. 18054, R. 461, 462; Case No. 18053, R. 291, 292; Case No. 18057, R. 210, 211; Case No. 18055, R. 486, 487; also see separate transcripts of court proceedings in Civil Nos. 7131, 7140, 7145, 7146 and 7144)

Appellants filed their Objections to Proposed Order and Summary Judgment in each case (Case No. 18056, R. 216-218 incl; Case No. 18054, R. 465-467 incl; Case No. 18053, R. 295-297 incl; Case No. 18057, R. 214-216 incl; Case No. 18055, R. 491-494 incl.) and after a hearing thereon the lower court made and entered its formal Order and Summary Judgment on September 24, 1981 in each of the five cases (Case No. 18056, R. 229-232 incl; Case No. 18054, R. 478-481 incl; Case No. 18053, R. 308-311 incl; Case No. 18057, R. 227-230 incl; Case No. 18055, R. 505-509 incl.) thereby specifically found that there was reason to believe, on the basis of the record before it in each case, that each of the change applications could be approved without impairing the existing water rights of appellants and that there was no genuine issue of any material fact thereon. The lower court then approved all the respective change applications on the same terms and conditions as set forth in the respective Memorandum Decisions of respondent State Engineer and affirmed those Decisions of respondent State Engineer and affirmed those Decisions in all respects. On

October 20, 1981, the named appellants filed their Notice of Appeal in each case. (Case No. 18056, R. 238, 239; Case No. 18054, R. 490, 491; Case No. 18053, R. 317, 318; Case No. 18057, R. 236, 237; Case No. 18055, R. 515, 516)