

1982

## Mrs. Dudley Crafts et al v. Intermountain Power Project et al : Brief of Utah State Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MRS. DUDLEY CRAFTS; et al., )  
Plaintiffs/Appellants, )  
v. ) Case No. 18053  
INTERMOUNTAIN POWER PROJECT; et al., )  
Defendants/Respondents. )

---

MRS. DUDLEY CRAFTS; et al., )  
Plaintiffs/Appellants, )  
v. ) Case No. 18054  
DEE C. HANSEN, State Engineer; et al., )  
Defendants/Respondents. )

---

BERNARD JACKSON; et al., )  
Plaintiffs/Appellants, )  
v. ) Case No. 18055  
DR. CLARK COX; et al., )  
Defendants/Respondents. )

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RAY BROWN; et al., )  
Plaintiffs/Appellants, )  
v. ) Case No. 18056  
DEE C. HANSEN, State Engineer; et al., )  
Defendants/Respondents. )

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GERALD MOODY; et al., )  
Plaintiffs/Appellants, )  
v. ) Case No. 18057  
CENTRAL UTAH WATER COMPANY; et al., )  
Defendants/Respondents. )

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BRIEF OF UTAH STATE RESPONDENTS

ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT  
FIFTH JUDICIAL DISTRICT, MILLARD COUNTY, UTAH

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## IN THE SUPREME COURT OF THE STATE OF UTAH

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## BRIEF OF UTAH STATE RESPONDENTS

### I. STATEMENT OF THE NATURE OF THE CASE

Each of the above-entitled actions were initiated 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. While these are five separate lawsuits involving separate change applications, each case raised common legal questions regarding (1) the authority of the State Engineer to receive, consider and conditionally approve change applications; (2) the criteria governing the approval and rejection of change applications; and (3) the scope of court review as provided for in Sections 73-3-14 and -15.<sup>1/</sup> The trial court was also being asked to deal with a number of issues which are not related to the State Engineer's decisions and which are not proper in these actions. The extraneous issues raised by Appellants in the trial court had the potential of transforming these lawsuits into something far different than what is contemplated by the Utah Water Code or permitted by the decisions of this Court. Thus, it appeared to be both appropriate and necessary to address the fundamental questions of the scope of review of the State Engineer's decisions and the criteria governing the approval and rejection of change applications at the outset of this litigation. Consequently, the Utah State Respondents (the Utah State Engineer and the Utah Board of Water Resources) filed identical Motions for

1. Case No. 18053 alleged 22 causes of action (R. 1-16); Case No. 18054 alleged 25 causes of action (R. 1-16); Case No. 18055 alleged 25 causes of action (R. 1-16); Case No. 18056 alleged 11 causes of action (R. 1-8); and Case No. 18057 alleged 4 causes of action (R. 1-4).



Partial Summary Judgment in all five cases addressing these questions.<sup>2/</sup> These Motions were granted by the trial court<sup>3/</sup> and the general provisions thereof were subsequently incorporated into full Summary Judgments<sup>4/</sup> which had been requested by the remaining Defendants in these actions. Because the relief which the Utah State Respondents seek relate to broad issues common to all five actions, it would appear both appropriate and in the interests of judicial economy to file a single brief encompassing all five cases—which this Court has, on its own motion, consolidated for purposes of this appeal. Unless otherwise noted, the discussion and arguments which follow relate to all five cases.

## II. DISPOSITION IN THE LOWER COURT

The trial court granted the Utah State Respondents' Motion for Partial Summary Judgment, concluding in each case that (1) the particular change application was complete and in proper

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2. Case No. 18053 (R. 225-26); Case No. 18054 (R. 374-75); Case No. 18055 (R. 427-28); Case No. 18056 (R. 146-47); and Case No. 18057 (R. 151-52).

3. Case No. 18053 (R. 278-80); Case No. 18054 (R. 449-52); Case No. 18055 (R. 474-77); Case No. 18056 (R. 199-202); and Case No. 18057 (R. 197-200). Appellants sought to have this Court review the Order and Partial Summary Judgment in all five of these actions by way of an interlocutory appeal. This request was denied on February 2, 1981, when the following Order was entered in each case: "Appellants' petition for interlocutory appeal and stay of proceedings is denied without prejudice to pursue such remedies as may be available in the district court. File closed." Case No. 18053 (R. 285); Case No. 18054 (R. 455-A); Case No. 18055 (R. 480-A); Case No. 18056 (R. 206); and Case No. 18057 (R. 205).

4. Case No. 18053 (R. 308-11); Case No. 18054 (R. 478-81); Case No. 18055 (R. 505-09); Case No. 18056 (R. 229-32); and Case No. 18057 (R. 227-30).



form, and that the changes proposed therein were authorized by law and that the State Engineer had authority to process and conditionally approve the subject change; (2) the appeal, taken pursuant to the provisions of Section 73-3-14, was strictly limited and confined to those issues which could have been raised before the State Engineer; and (3) the criteria governing the approval or rejection of change applications, as set forth in Section 73-3-3, was limited to a determination of whether there is reason to believe that the change can be approved without substantially impairing any water rights of Appellants. This Order was made interlocutory and was to govern the conduct of further proceedings in the action. These Orders and Partial Summary Judgments are virtually identical in each case. A copy of one such Order is attached hereto as Appendix "A".

The trial court subsequently granted the Motion of the remaining Respondents for full Summary Judgment, approving the subject change applications and affirming the decisions of the Utah State Engineer thereon.

### III. RELIEF SOUGHT ON APPEAL

The Utah State Respondents seek to affirm the Orders of the trial court.

### IV. STATEMENT OF THE FACTS

The various change applications which are the subject matter of these lawsuits (with one exception as noted below) were filed by the owners of the water rights involved to allow

water which had heretofore been used for irrigation purposes to be utilized for industrial and domestic purposes in connection with the proposed Intermountain Power Project to be constructed near Lynndyl, Utah.<sup>5/</sup> The one exception is Change Application No. a-10862, which is an amendatory change to conform the applications to appropriate to the proof of appropriation (Case No. 18056, R. 9-20). All of the change applications were advertised as required by law and were protested by various individuals and organizations. Following administrative hearings, the State Engineer approved each of the changes involved by memorandum decision, subject to certain conditions and limitations which, in his opinion, would protect other vested rights.<sup>6/</sup> These lawsuits resulted from those decisions. The Utah State Respondents defer to the remaining Respondents to set forth the detailed facts surrounding their proposed changes and the facts relating thereto.

## V. ARGUMENT

### A. Summary of Argument

As noted above, Appellants' Complaints in these actions raised a number of fundamental legal questions regarding the authority of the State Engineer; the criteria governing his approval and rejection of change applications; and the scope of the trial court's review. Resolution of these underlying issues is critical to a proper evaluation and disposition of the subject change

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5. The various change applications were attached to Appellants' Complaints. Case No. 18053 (R. 17-27); Case No. 18054 (R. 17-29); Case No. 18055 (R. 17-107); and Case No. 18057 (R. 5-17).

6. Copies of the State Engineer's Memorandum Decisions were also attached to Appellants' Complaints as exhibits. Case No. 18053 (R. 28-32); Case No. 18054 (R. 30-35); Case No. 18055 (R. 106-156); Case No. 18056 (R. 9-15); and Case No. 18057 (R. 18-21).

applications. It was for this reason the Utah State Respondents felt compelled to seek clarification of these matters at the outset of this litigation in their Motions for Partial Summary Judgment. The conclusions reached by the trial court in the Partial Summary Judgments staked out the parameters of this litigation and served as a foundation for the court's subsequent evaluation and approval of the State Engineer's decisions in the full Summary Judgments.

When viewed in proper perspective, these are not complex lawsuits. These actions simply come down to the proposition of whether there is reason to believe that the proposed change applications can be approved without impairing other vested water rights. The State Engineer concluded that they could if the approvals were made subject to certain conditions for the protection of other water rights. The trial court, after evaluating these decisions and the Affidavits of Respondent Water Users, affirmed the decisions.

While the legal principles governing these actions were disputed by Appellants below, it now appears that they either concede or do not seriously dispute the conclusions reached by the trial court in the Partial Summary Judgments since they make no direct reference to these Judgments in their Briefs. Finally, it must be emphasized that the legal positions advanced herein are fully consistent with those advocated by the Respondent Water Users, and fully support the decisions made by the trial court. The arguments which follow relate to those matters that the Utah State Respondents advanced in their Motions for Partial Summary Judgment.

B. Court Review of State Engineer's Decisions is Strictly Limited to those Issues which could have been Raised before the State Engineer

All final decisions of the State Engineer are subject to judicial review as provided for in Sections 73-3-14 and -15, Utah Code Annotated 1953, as amended. Section 73-3-14 specifies in part that:

In any case where a decision of the state engineer is involved any person aggrieved by such decision may within sixty days after notice thereof bring a civil action in the district court for a plenary review thereof.

Section 73-3-15 provides that " . . . the hearing in the district court shall proceed as a trial de novo . . . " Thus, the Legislature carefully structured the appeals provision of the Utah Water Code to give those water users involved in the administrative process before the State Engineer the right to review actions taken by the State Engineer, but limited such review to those matters which could have properly been presented to and decided by the State Engineer. Certainly this gives any water user aggrieved by a decision of the State Engineer ample opportunity to have his day in court, but it likewise protects and preserves the administrative structure by preventing water right and policy issues not relevant to a specific decision from being prematurely litigated. Any other result would effectively undermine the administrative process by allowing water users to raise on appeal a variety of issues which may not be related to the specific decision in ques-

tion. Such a result is neither prejudicial nor unfair to the parties to such appeal, and is essential to the preservation of the administrative structure provided for in the Utah Water Code.

If there were any doubt about the legislative intent in this regard, this Court has laid that matter to rest. A number of decisions have addressed this subject and have consistently and uniformly held that the trial court's review is a limited one and is confined to those issues which the statute delegated to the State Engineer to decide in the first instance:

Such action is strictly limited to the trial of such issues as could have been raised before the engineer, and an appeal to this court is provided from the decision of the district court. The decision of these courts on such an appeal from the State Engineer's decision has the same effect and no more on the rights of the applicants to proceed with their proposed project as the decision of the engineer would have had without an appeal. (East Bench Irrigation Co. v. State, 5 Ut.2d 235, 239, 300 P.2d 603 (1956)).

In an earlier decision, when analyzing the scope of the trial court's review of a decision of the State Engineer, this Court ruled:

[t]he district court's judgment in reviewing the engineer's decision is limited to issues determinable by the engineer and in general has the same effect as though it were made by him. (United States v. Fourth District Court, 121 Utah 1, 238 P.2d 1132 (1951), rehearing denied 121 Utah 18, 242 P.2d 774 (1952)).

See also Eardley v. Terry, 94 Utah 367, 77 P.2d 362 (1968) and



Bullock v. Tracy, 4 Ut.2d 370, 294 P.2d 707 (1956).

Thus, it is submitted that the trial court correctly ruled as a matter of law that these lawsuits are strictly limited and confined to a de novo review of those issues which could have been raised before the State Engineer, and that all other aspects of Appellants' Complaints must be dismissed as a matter of law.

While we are firmly convinced that the scope of this litigation is narrow and is confined to whether the various change applications should be approved, we do not want to be misunderstood as to any other claims or concerns that Appellants may have. It is not difficult to appreciate the fact that various individuals will have differing views and problems in evaluating the desirability of a project so large as the proposed Intermountain Power Project as it relates to their lifestyles and the potential impact it may have on their individual rights. However, other forums and procedures exist to deal with other aspects of this Project. These actions should be strictly limited to those issues which this Court can decide on judicial review. The subject decisions of the State Engineer deal only with a very limited facet of the Intermountain Power Project, and cannot be utilized as a vehicle to air other grievances.

C. Criteria and Standards Governing Approval and Rejection of Change Applications

A water user in Utah has the statutory right to change the point of diversion, or the place or nature of the use of his water, so long as other vested rights are not impaired.

Section 73-3-3 provides, in part, that:

Any person entitled to the use of water may change the place of diversion or use and may use the water for other purposes than those for which it was originally appropriated, but no such change shall be made if it impairs vested rights without just compensation.

\* \* \* \* \*

Applications for either permanent or temporary changes shall not be rejected for the sole reason that such change would impair vested rights of others, but if otherwise proper, they may be approved as to part of the water involved or upon condition that such conflicting rights be acquired.

While an applicant must make a prima facie showing that other rights will not be impaired by his proposed change, a person opposing such change must demonstrate that his rights will be impaired by the proposed change in order to prevail:

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. (Salt Lake City v. Boundary Springs Water Users Assoc., 2 Ut.2d 141, 144, 270 P.2d 453 (1954)).



Also, this Court observed in another action:

. . . 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 indeterminate 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 . . . .  
(American Fork Irr. Co. v. Linke, 121 Utah 90, 239 P.2d 188 (1951)).

See also United States v. Fourth District Court, supra, and Wayman v. Murray City Corp., 23 Ut.2d 97, 548 P.2d 861 (1969).

In this regard it is important to keep in mind what the applicant receives as a result of having his change application approved. The approval of a change application merely allows an applicant to proceed with the proposed change and find out whether he can, as a matter of actual fact, use the water as changed without impairing other rights. Such approval is not a final adjudication of the respective rights of the applicant and other users from the same source. Rather, it is merely an initial determination—taking into account the facts and available information at the time the decision is made—as to whether there is reason to believe that a proposed change can be made without impairing other vested rights. As far as any final adjudication between an applicant and protestants to a change is concerned, that determination must await the applicant's efforts to place the water to use. This point has been made clear in a

number of decisions:

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. (United States v. Fourth District Court, 121 Utah 18, 21, 242 P.2d 774 (1952)).

In a subsequent decision, it was concluded that:

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 adjudication 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. (East Bench Irr. Co. v. State, supra, 5 Ut.2d at 240; Emphasis added).

In light of the very broad sweep of Appellants' Complaints, it was both appropriate and necessary for the trial court to determine in the Partial Summary Judgments the criteria governing the approval and rejection of Respondent water users' change applications and to subsequently adjudicate the respective rights

of the parties based upon these established principles. The trial court was clearly correct in its determination of this matter and in reaching the result that it did.

D. The State Engineer has Authority to Issue Conditional Approvals and to Make Interlocutory Orders

1. Introduction

Appellants are critical of the State Engineer for making his approval of these change applications subject to certain conditions and leaving certain matters interlocutory pending further study.<sup>7/</sup> Appellants further suggest that under the circumstances the State Engineer should have left these change applications unacted upon until conclusive data could be obtained. This criticism is totally unjustified. Applicants are entitled to have their change applications acted upon within a reasonable time, and the State Engineer must make his decisions based upon the data presently available to him:

The Engineer must render orders on the best technical evidence available and often in the absence of conclusive data. (Clark v. Hansen, 631 P.2d 914 (Utah 1981)).

This is not to suggest that the State Engineer cannot make portions of his decisions conditional or interlocutory to gain the benefit of on-going technical studies and to minimize the chance for impairment of other vested rights as was done here.

2. Conditional Approvals

Section 73-3-3, Utah Code Annotated 1953, as

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7. See Footnote 6 on page 5 for the record citations to the various memorandum decisions of the State Engineer.

amended, expressly allows for the approval of only a portion of the water involved if that is all the facts will justify:

Applications for either permanent or temporary changes shall not be rejected for the sole reason that such change would impair vested rights of others, but if otherwise proper, they may be approved as to part of the water involved or upon condition that such conflicting rights be acquired. (Emphasis added).

This Court has squarely held that a change can be approved with conditions if such are necessary to protect other rights:

If the point of diversion may be changed and the exchange made as applied for by plaintiff without affecting any vested right of the power company, or if a decree can be made containing such conditions as will safeguard the rights of the power company and at the same time permit delivery of the water for municipal purposes, plaintiff is entitled to have her application granted. (Tanner v. Humphreys, 87 Utah 164, 48 P.2d 487 (1935)).

Further, if there is reason to believe that only a part of the water can be diverted under a proposed change without impairing the rights of others, then the change should be approved for only that portion of the right which can be transferred without causing injury:

If there is reason to believe that only a part of the waters covered by the application may be diverted at the proposed new diversion place without interfering with the rights of others but there is no reason to believe that all of such waters could be so diverted, the Engineer in the first place and the court on appeal should approve the application to change the diversion place of only such amount of water as there is reason to believe may be changed without impairing the rights of others regardless of the amount specified in the application. (United States v. Fourth District Court, supra, 242 P.2d at 775).



Conditions are frequently required on both change applications and applications to appropriate in order to fully and completely protect other water users. To deny the State Engineer the opportunity to impose reasonable conditions on changes would be to remove a valuable administrative tool which allows for the approval of many changes which are desirable and proper but which would otherwise have to be rejected. Certainly such a result is clearly contrary to the public interest. In many areas of Utah, the transfer of existing rights is the only means of meeting new and evolving needs, since there may be no unappropriated water available.

It is most difficult to see the basis for Appellants' objections since the limitations which the State Engineer placed upon the quantity of water which could be transferred was for the benefit of Appellants and other water users. Appellants have not pointed to any evidence or advanced any arguments which remotely suggest that these conditions were incorrect or that they would be benefited if they were removed.

### 3. Interlocutory Orders are Proper

Interim or interlocutory orders by administrative agencies are permissible where justified by the circumstances (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)).

This Court had no difficulty supporting an interim duty of water which had been adopted by the lower court on an interlocutory basis for the Escalante Valley Drainage area (In re Water Rights of Escalante Valley Drainage Area, 10 Ut.2d 77, 348 P.2d 679 (1960)). Further, such an approach is fully consistent with the principles of law discussed above; i.e., that the approval of a change application is only a preliminary approval based on the data available when the change is acted upon, and is not a final adjudication of the rights between contesting parties.

When evaluating the interlocutory aspects of the State Engineer's memorandum decisions, it is important to realize exactly what those memorandum decisions do and do not do. First of all, the State Engineer's decisions are firm and final with respect to the approval of change applications. The interlocutory aspects of these decisions in no way qualify the approval of these changes. The State Engineer simply made interlocutory those portions of the subject memorandum decisions dealing with the further refinement of duty of water and return flow formula if additional studies and more refined data indicate such an adjustment to be necessary. The Court, of course, may review all aspects of State Engineer's decisions—including any interlocutory aspects thereof—but we submit that there is no legal prohibition against the State Engineer's having made interlocutory those aspects of the subject decisions which he did.

Of course, if at some future time after the applicants make the changes authorized the State Engineer makes final decisions on some matters that are now interlocutory, the present Appellants or any other persons then aggrieved will be entitled to de novo judicial review of those decisions at that time.

Finally, it must be pointed out that the interlocutory provisions are not designed for the benefit of the applicants, but for all water users in the area—including Appellants. It is hard to understand how obtaining more facts and information can be anything but beneficial to all of the parties. Certainly when dealing with the complex problems associated with determining relationships between the various water rights in a particular area, any additional studies should be welcomed by everyone.

E. Decisions of State Engineer Comply with Applicable Law

Even though Appellants' Complaints—with their numerous causes of action—tend to obscure it, the plain and simple fact is that these are not complicated lawsuits. The criteria governing the approval and rejection of change applications in Section 73-3-3 and the decisions of this Court are clear and well defined. The State Engineer, and the court on appeal, is limited to a determination of whether there is reason to believe that a change can be approved without substantially impairing other vested water rights. Likewise, the trial court was correct in concluding that these appeals, taken pursuant to the provisions of Sections 73-3-14, were strictly limited and confined to the issues which could



have been raised before the State Engineer. Appellants have not questioned these basic legal conclusions (which are set forth in the Partial Summary Judgments) in their Briefs.

The approval of these change applications is not the final adjudication of the rights of the Respondent Water Users. Rather, it is only the threshold determination that there is reason to believe the changes can be accomplished without substantially impairing other vested rights.<sup>8/</sup> The applicants must now proceed with due diligence to place the water to use in accordance with the changes (Section 73-3-12), and when this is accomplished must submit proof of change (Section 73-3-16).

Also, it must be remembered that in order to minimize the opportunity for impairment the State Engineer conditioned his approvals of the subject change applications and carefully limited the amount of water which could be transferred to the Inter-mountain Power Project. The limitations on these transfers were specifically fashioned by the State Engineer to prevent the impairment of other vested water rights—including those of Appellants. Further, where it seemed that the data was not completely

8. It should also be pointed out that the period of development which applies to change applications also applies to applications to appropriate in Utah. In other words, once either an application or a change application is approved, the applicant must then move forward with a period of experimentation to see if his development can in fact be accomplished. This is a very practical requirement, since a period of experimentation is usually necessary before the impact of a new or different use can be fully evaluated, and is fundamental to the appropriation doctrine which favors full utilization of our limited water resources. In addition to the authorities cited in Section V.C., *infra*, discussing this concept, see Little Cottonwood Water Company v. Sandy City, 123 Utah 242, 258 P.2d 440 (1953) and Bull Lock v. Tracy, 4 Utah 233, 294 P.2d 707 (1956).

sufficient (as with the duty of water), the State Engineer made that portion of his ruling interlocutory to take advantage of on-going studies. Subsequent decisions by the State Engineer on those matters which were left interlocutory may be made the subject matter of court review by any aggrieved party (Section 73-3-14). The net result of all this is that it is difficult to see how Appellants can demonstrate injury at this time.

The State Engineer undertook an extensive and detailed evaluation of the subject change applications prior to acting upon them. His conditional approvals of these change applications following administrative hearings reflect thorough, balanced decisions which protect the rights of other water users in the area while allowing Respondent Water Users to proceed with their new development. The State Engineer's conclusion that other rights will not be impaired by these changes is substantiated and buttressed by the detailed and comprehensive Affidavits of Respondent Water Users, and his conclusions are not seriously challenged by the Affidavits of Appellants—which fail to demonstrate impairment of Appellants' rights and basically urge delay and more investigation. This is not sufficient.

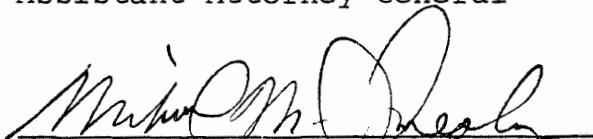
## VI. CONCLUSION

It is respectfully submitted that the decisions of the trial court are proper and correct and are completely consistent with the pronouncements of this Court. These decisions should be affirmed.

DATED this 8th day of March, 1982.



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CERTIFICATE OF SERVICE

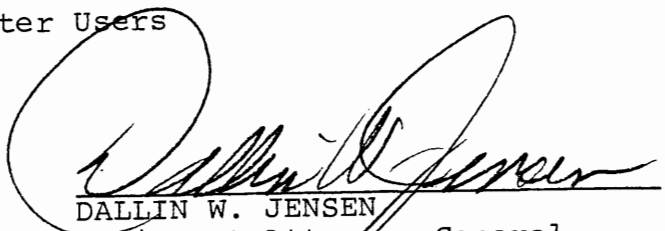
I hereby certify that two copies of the foregoing BRIEF OF UTAH STATE RESPONDENTS were served by mailing the same, first class postage prepaid, this 8th day of March, 1982, to:

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