

1982

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

E. J. Skeen; Skeen and Skeen; Attorneys for Plaintiffs and Appellants;

Dallin W. Jensen; Michael M. Quealy; Attorneys for Utah State defendants;

Joseph Novak; Snow, Christensen & Martineau; Attorneys for defendants IPP and IPA;

Recommended Citation

Brief of Appellant, *Crafts v. Intermountain Power Project*, No. 18054 (Utah Supreme Court, 1982).

https://digitalcommons.law.byu.edu/uofu_sc2/2659

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

MRS. DUDLEY CRAFTS, et al,

Plaintiffs and
Appellants,

. vs.

DEE C. HANSEN, State Engineer,
et al.

Defendants and
Respondents.

Supreme Court No. 18054

BRIEF OF APPELLANTS

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

E. J. SKEEN
SKEEN AND SKEEN
536 East Fourth South
Salt Lake City, Utah 84102

Attorneys for Plaintiffs and Appellants

Dallin W. Jensen
Michael M. Quealy
Assistants Attorney General
1636 West North Temple
Salt Lake City, Utah 84116

Attorneys for Utah State Defendants.

Joseph Novak
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Post Office Box 3000
Salt Lake City, Utah 84110

Attorneys for Defendants IPP and IPA

FILED

JAN - 8 1982

Clerk, Supreme Court, Utah

Wayne L. Black
Robert D. Moore
BLACK & MOORE
Suite 500, Ten Broadway Building
Ten West Third South Street
Salt Lake City, Utah 84101

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

Attorneys for defendant Companies.

IN THE SUPREME COURT OF THE STATE OF UTAH

MRS. DUDLEY CRAFTS, et al,

Plaintiffs and
Appellants,

vs.

DEE C. HANSEN, State Engineer,
et al,

Defendants and
Respondents.

Supreme Court No. 18054

BRIEF OF APPELLANTS

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

E. J. SKEEN
SKEEN AND SKEEN
536 East Fourth South
Salt Lake City, Utah 84102

Attorneys for Plaintiffs and Appellant

Dallin W. Jensen
Michael M. Quealy
Assistants Attorney General
1636 West North Temple
Salt Lake City, Utah 84116

Attorneys for Utah State Defendants.

Joseph Novak
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Post Office Box 3000
Salt Lake City, Utah 84110

Attorneys for Defendants IPP and IPA

Wayne L. Black
Robert D. Moore
BLACK & MOORE
Suite 500, Ten Broadway Building
Ten West Third South Street
Salt Lake City, Utah 84101
and
Thorpe A. Waddingham
Attorney at Law
P. O. Box 177
Delta, Utah 84624

Attorneys for defendant Companies.

TABLE OF CONTENTS

Cases Cited	ii
Statutes and Rules Cited	iii
Text Cited	iii
Statement of Kind of Case	1
Disposition in Lower Court	2
Relief Sought on Appeal	2
Statement of Facts	2
Argument	8
There are Genuine Issues of Material Fact	8
Precluding Summary Judgment	
The Defendants are not Entitled to a Judgment	21
As a Matter of Law	
Conclusion	24
Appendix (Change Application a-10863).	25

CASES CITED

	Page(s)
<u>American Fork Irr. Co. v. Linke</u> , 121 Utah 90, 239 P 2d. 188	23
<u>Boyd v. Broyles</u> , 163 Colo., 451, 431 P 2d 484	15
<u>City of Roswell v Reynolds</u> , 86 N.M, 796, 522 P 2d 796 .	16, 21
<u>Durham v. Margetts</u> , 571 P 2d 1332, 1334	14, 22
<u>East Bench Irr. Co. v. Deseret Irr. Co.</u> , 2 Utah 2d . . . 170, 271 P 2d 449	12
<u>East Bench Irr. Co. v. State</u> , 5 Utah 2d 235, 300 P . . . 2d 603, 607	13
<u>FMA Acceptance Co. v. Leatherby Ins. Co.</u> , (Utah) 594 P 2d 1332	22
<u>First National Bank of Albuquerque v. Noram Agr. Prod. Inc.</u> , 88 N.M. 74, 537 P 2d 682	22
<u>Geiler v. Arizona Bank</u> , (Arizona) 537 P 2d 994.	22
<u>Giovanelli v. First Federal Savings</u> , 120 Ariz. 577, 587. P 2d 763	22
<u>Green v. Garn</u> , 11 Utah 2d 375, 359 P 2d 1050	22
<u>Harter v. Kuntz</u> , 207 Kan. 338, 485 P 2d 190.	15
<u>Harvey v. Sanders</u> , (Utah) 534 P 2d 905	22
<u>Holbrook Company v. Adams</u> , 542 P 2d 191	15, 21
<u>Kidman v. White</u> , 14 Utah 2d 898, 378 P 2d 898, 900 . . .	14
<u>Knowles v. Klase</u> , 204 Kan. 156, 460 P 2d 444	15
<u>Piute Res. & Irr. Co. v. West Panguitch Res. & Irr. Co.</u> , 13 U 2d 6, 367 P 2d 855	11, 12
<u>Primock v. Hamilton</u> , 168 Colo. 524, 452 P 2d 375	15
<u>Salt Lake City v. Boundary Springs Water Users Assn.</u> , . . 2 U 2d 141, 270 P 2d 453	11
<u>Sorenson v. Beers</u> , (Utah) 585 P 2d 458, 460.	15
<u>United States v. District Court</u> , 121 Utah 18, 238 P 2d . 1132	10, 11

STATUTES AND RULES CITED

Section 73-3-3, Utah Code Annotated, 1953	9
Section 73-3-14, Utah Code Annotated, 1953	6, 9
Rule 56(c), Utah Rules of Civil Procedure	7, 8, 14, 15 21, 22, & 24

TEXT CITED

Corpus Juris Secundum, Vol. 93, page 975	13
--	----

IN THE SUPREME COURT OF THE STATE OF UTAH

MRS. DUDLEY CRAFTS, VERA)
GILES, BERNARD JACKSON,)
NELLA JACKSON, RAY BROWN,)
BETH BROWN, GERALD MOODY,)
ELAINE MOODY, FRED TURNER,)
ELAINE TURNER, CONARD STAN-)
WORTH, NEREE STANWORTH,)
LONNIE HALES, ALVA A. YOUNG,)
EMILY P. YOUNG, RAY WESTERN,)
EMILY Y. McCOLLAUM, PAUL T.)
McCOLLAUM, JR., JAMES H.)
OWENS, MAXINE OWENS, ETHEL)
M. STANWORTH, DOUG TURNER,)
and CONNIE TURNER, et al,)

Plaintiffs and)
Appellants,)

vs.)

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

Defendants and)
Respondents.)

Supreme Court No. 18054

BRIEF OF APPELLANTS

STATEMENT OF KIND OF CASE

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

DISPOSITION IN LOWER COURT

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

RELIEF SOUGHT ON APPEAL

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

STATEMENT OF FACTS

Change Application No. a-10863 (68-475) was filed to permanently change the point of redirection, place and nature of use of a portion of 71.333 second feet or 25,556.2 acre feet of water evidenced by applications numbered 28727 (68-475), 28728 (68-476), 28729 (68-477), 28730 (68-478), 28731 (68-479), 28732 (68-480), 28733 (68-481), 28734 (68-482), 28727-b (68-1810), 28727-a (68-1926), 28728-b (68-1811), 28729-b (68-1812) and 28733-a (68-1809), as amended by Change Application No. a-10862 (68-475). (R. 017 - 029) Each application covers a separate irrigation well.

The applicants are the Utah Board of Water Resources, Delta Canal Company, Melville Irrigation Company, Abraham Irrigation Company, and Deseret Irrigation Company. The canal company

and the irrigation companies are referred to in the record and in this brief as "DMAD". The application is on the printed form furnished by the State Engineer. (R. 017) (See Appendix.)

It is stated in the application that the wells therein described are located along the Sevier River and the water therefrom has been diverted into the river and rediverted from the river into the irrigation canals of the applicant canal and irrigation company and used from April 1 to October 31 for supplemental irrigation of 55,952.62 acres of land and for stockwatering purposes. (R. 026, 027)

It is proposed to redivert a portion of the water into two 48-inch pipelines which will carry it to the proposed Inter-mountain Power Project, a distance of 11.2 miles, where it will be used from January 1 to December 31 for cooling and industrial purposes where it will be totally consumed. (R. 028 - 032)

Notice of the application was published as provided by law and it was protested by some 78 individuals, irrigation, canal and reservoir companies. (R. 031) A hearing on the application was held and the protestants contended that the applicants had never pumped or used the quantity of water to be changed; that the proposed change would result in an enlargement of the water right and would cause interference with existing rights and increase the impact on the underground water basin. (R. 031 - 032)

The State Engineer approved application No. a-10863 by a memorandum decision. (R. 030 - 034)

It will be noted that, in approving the application, the State Engineer considered and ruled upon (1) the effect of the removal and total consumption of the water sought to be changed upon return flow, which historically has been used downstream; (2) the relationship of the well rights to other water rights; (3) the quantity of water involved in the proposed change; (4) the annual water supply in the underground basin; (5) the annual consumptive use requirements; and (6) the impact of the change on the underground basin. (R. 032, 033)

The opinion and approval of the change is stated in the memorandum decision as follows:

"It is the opinion of the State Engineer that the rights of the applicants have been established and defined with limitations on the quantity of water that may be diverted from the underground. The points of diversion are not being changed; therefore, the relationship of the wells to other rights is substantially the same as they have been in the past. The change of place and nature of use from agricultural to industrial purposes, however, could change the amount of water consumed, and thus the State Engineer believes that there must be some compensation for the quantity of water diverted from the underground water source for industrial use, which would result in total consumption of the water diverted.

"The quantity of water proposed to be changed to industrial uses under this change application has not been specified. This application is a companion to Change Application No. a-10864 (68 Area) which seeks to allow the decreed surface rights of the D.M.A.D. Companies to be used for industrial purposes. The well rights are supplemental to the decreed rights and are commingled in the Sevier River prior to storage and use, and the quantity of water proposed to be changed to industrial use will be

supplied from both intermingled sources. The quantity of surface water delivered annually to the D.M.A.D. Companies changes from year to year; therefore, the proportion of surface and underground water to the total water supply will vary.

"The State Engineer believes that whenever industrial water is diverted from the Sevier River under this change application and Change Application Number a-10964, the diversion must be credited to each change in proportion to the respective annual water supplies available. Since the water used for industrial purposes will be totally consumed, only that portion of the underground water that is consumed by present irrigated acreage may be changed; the balance remaining in the underground to protect the resource from additional depletion. The studies of the State Engineer indicate that the annual consumptive use requirement for irrigated acreage in this area is 2.5 acre-feet per acre with a corresponding diversion requirement of 4.0 acre-feet per acre.

"It is the opinion of the State Engineer that the change can be made provided that precautions are taken to avoid enlargement upon the rights, unnecessary localized interference and potential impact upon the groundwater basin.

"It is, therefore, ORDERED and Change Application Number a-10863 (68-475) is hereby APPROVED subject to prior rights and the following condition:

- '1. That the quantity of water diverted to industrial uses under this application shall be in proportion to the amount of groundwater in the total water supply of the D.M.A.D. Companies. The total quantity of water diverted from the D.M.A.D. wells shall be reduced by 1.50 acre-feet for each 2.5 acre-feet diverted for industrial uses.'

"It is not the intention of the State Engineer in establishing a diversion requirement of 4.0 acre feet per acre and a consumptive use requirement of 2.50 acre-feet per acre to adjudicate the extent of the rights of the D.M.A.D. Companies, but rather to provide sufficient definition of the rights to assure

that the other vested rights are not impaired by the change. The State Engineer is conducting additional studies concerning the consumptive use requirements of land in the area. Therefore, the duty of 2.5 acre-feet per acre in determining the diversion reduction is interlocutory, and if subsequent studies or a Court - either in a review of this 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 quantity of water accordingly.

"In order to provide for proper distribution, the water under this change shall be regulated, measured and distributed by the Sevier River Commissioner and the quantity of water diverted for irrigation and industrial purposes shall be included in his annual report to the State Engineer." (R. 032, 033)

This action for review of the decision of the State Engineer was filed pursuant to Section 73-3-14, Utah Code Annotated, 1953. The pleadings are voluminous. They frame the following issues of fact, among others:

1. The quantity of water sought to be changed from irrigation to industrial use,
2. Whether the approval of the change will impose on the non-industrial users the whole shrink or water loss in the several irrigation systems involved.
3. The change would encroach upon the supply of irrigation water.
4. The change will deprive downstream water users of return flow water.
5. The change will result in an enlargement of the rights of the applicants,

6. The decision of the State Engineer is based upon a non-existent quantity of water.

7. The change will impair vested rights of the plaintiffs. (R. 001 - 034, 050 - 061, 069 - 081, 116 - 127)

The defendant irrigation and canal companies filed a motion for a summary judgment pursuant to Rule 56(c) of the Utah Rules of Civil Procedure for dismissal upon the grounds, that there was no genuine issue of material fact and that the defendants are entitled to dismissal as a matter of law. (R. 239) The defendant Intermountain Power Agency joined in the motion. The motion was supported by affidavits of experts Reed W. Mower and Roger Walker.

The affidavits filed in support of the motion for summary judgment relate not only to Application No. a-10863 involved in this action, but also to Applications Nos. a-10862, a-10864, and a-10927. Both Mr. Mower and Mr. Walker, in some detail, state the benefits of the proposed changes proposed by all four applications to other water users and to the public and state and imply that there will be no impairment of other vested rights and that the rights sought to be changed will not be enlarged. (R. 241 - 270)

The affidavits of Parley W. Neeley filed in behalf of the plaintiffs dispute the statements of fact as to the benefits (R. 361 - 369, 435 - 440), and states specifically that the effect of withdrawing water, as proposed, for industrial use

will cause "...irretrievable damages to the aquifer, the present irrigation, municipal and industrial users." (R. 438)

The affidavits will be further discussed in some detail in the argument.

The trial court granted the motion for summary judgment without formal findings of fact and conclusions of law, but stating, generally, in a recitation, that the change application is in all respects complete and in proper form, that the changes proposed are authorized by law and that the change application can be approved without impairing existing water rights of the plaintiffs, that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law (R. 473 - 481) This appeal is from the summary judgment. (R. 490, 491)

ARGUMENT

THERE ARE GENUINE ISSUES OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

Salt Lake City v. Boundary Springs Water Users
Ass'n, 2 U 2d 141, 270 P 2d 453.
Plute Res. & Irr. Co. v. West Panguitch Res. & Irr.
Co., 13 U 2d 6, 367 P 2d 855.
United States v. District Court, supra.

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

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

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

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

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

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

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

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

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

975:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We cite a case to show, in some detail, the many issues of fact before the court on changes affecting underground water. City of Roswell v Reynolds, 86 N.M. 796, 522 P 2d 796, involved an application of the City of Roswell to the state engineer to change the points of diversion, place and purpose of use of underground water in an effort to improve the water quality. The New Mexico water laws and procedures are essentially the same as Utah's. The State Engineer approved the application with reductions of both quantity and rate of pumpage and the City appealed to the district court. A trial de novo was held, technical evidence was introduced, and the district court affirmed the order of the State Engineer. The district court made thirteen findings of fact which are set out in detail in the opinion of the Supreme Court. They include findings on such matters as correlation of lowering of artesian head and water salinity, the effect of increasing pumpage in one area and decreasing pumpage in another, the lateral movement of underground water, crop yields as affected by salinity and the amount of water which can be diverted by "move-to-wells" without increasing the rate of decline of the water levels in wells owned by someone other than the city.

The same type of genuine issues of material facts which must be determined in this case were involved in the New Mexico case. Although no summary judgment was involved in the New Mexico

case, it is in point because it indicates in detail the factual issues involved in a similar underground water case.

We shall now apply the law as above stated to the facts in this case. As before indicated, the pleadings frame several substantial issues of material fact, including the statutory question as to whether there is reason to believe that the changes proposed by Application No. a-10863 will impair vested rights of others.

The affidavits of experts, supporting and opposing the defendants' motion for summary judgment, will be analyzed in some detail to identify the issues of fact.

Reed W. Mower's affidavit (R. 241 - 255) states in paragraph 12 that he is familiar, generally, with fifteen change applications, specifically numbered, which include No. a-10623 involved in this case. In paragraph 13 he says that the "long-term net effect" on the Sevier Desert ground water basin will be the same whether the same quantity of water is diverted annually from the DMAD wells during the period from March 1 to November 15 or at a lesser rate during the entire year, and "...that the short-term effect on the water levels in existing wells in the Sevier Desert ground water basin will be lessened by diverting the same quantity of water annually from the DMAD wells at a lesser rate during the entire year rather than at a greater rate during the period March 1 to November 15, inclusive." (R. 244, 245)

In paragraphs 14 through 23 Mr. Mower discusses the combined effect on the basis of pumping water in accordance with

the State Engineer's decision on the various change applications, including Application No. a-10863, area by area, and concludes in paragraph 24, (R. 255):

"24. That based upon his education, training, studies and experience as set forth above, and his knowledge of the geology and hydrology of the Sevier Desert ground-water basin, 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 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. The bases for the foregoing opinion are set forth under paragraphs 15 through 23 hereinabove."

The affidavit of Roger Walker (R. 256 - 270) in support of the motion for summary judgment discusses Applications Numbers a-10863 and a-10864 together and concludes that after the changes are put into effect it will "...result in the following benefits to the public generally and/or Central Utah Water Company, Delta Canal Company, Melville Irrigation Company, Abraham Irrigation Company, and Deseret Irrigation Company": (R. 264 - 268)

There follows thirteen numbered paragraphs discussing items of benefits. Paragraph 14 states:

"(14) That it is my considered opinion that the benefits, as set forth in this affidavit, which will accrue to approximately eighty percent (80%) of the shares of stock of the DMAD companies, which were not sold to IPA, if the three attached Memorandum Decisions of the Utah State Engineer are affirmed by the District Court, are more than adequate to fully compensate any and all other water users for any damages, if any there be, which might result from the affirming of such Memorandum Decisions by the District Court; and, further, it is my considered opinion that the benefits resulting to the public generally from so doing as heretofore stated in this Affidavit are substantial with no offsetting negative impact to the public." (R. 268, 269)

Mr. Neeley, the plaintiffs' expert, signed two affidavits, (R. 390 - 399, 435 - 441) in which he states with respect to the effect on the basin of year around pumping as compared with seasonal irrigation pumping:

"21. That specifically, and with respect to paragraph 13 of the affidavit of Reed Mower, his conclusions are questionable and likely inaccurate for the reasons that year-around pumping will create a greater loss than pumping allowed under current conditions because there will be an increased evapotranspiration, increased evaporation loss, increased seepage together with channel losses from freezing, all of which results in a net loss greater than would be the case if pumped only as is seasonally required." (R. 393)

In paragraph 22, it is stated that at the new location "...will drastically affect the water level, adversely in the Sugarville area, much more than pumping the wells at the original locations and for the original purposes." (R. 393) Mr. Neeley disputes statements by Mr. Mower that in some areas the water level in wells will rise as a result of the proposed change and a reduction of the use by phreatophytes. (Water loving plants)

He concludes that water levels will not appreciably increase when pumping occurs, but generally decrease if water is pumped from the same basin. (R. 394, 395). He said that the .40 acre foot of retention will not be a saving of water for other users because the water "...never has been drawn from the basin, based on pumping records of the defendant companies which have been examined by your affiant since pumping began in 1959 to the present." (R. 395)

In an affidavit, dated one month later than the one previously referred to, Mr. Neeley points out that the records show that 139,187 acre feet of water were diverted from the DMAD wells and that if 25,000 acre feet per year had been so diverted the withdrawal from the basin would have amounted to 525,000 acre feet. The annual pumping of 25,000 acre feet per year "...will do irretrievable damage to the aquifer, the present irrigation, municipal and industrial users." (R. 438) He goes on to state:

"21. The massive pumping as proposed from an aquifer by the eight DMAD wells in the Sevier River bed may conceivably cause a lowering of the water table to such a point as to cause an accelerated recharge to the aquifer from the primary flows of the Sevier River, thus depriving the irrigators of water awarded under the Cox Decree.

"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." (R. 438)

It should be kept in mind that we are not trying the case by affidavit, but are merely determining whether there is a substantial issue of a material fact. It appears to be obvious

that there are many such issues as pointed out in the case of City of Roswell v. Reynolds, supra.

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

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

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

This Court held in the case of FMA Acceptance Co. v. Leatherby Ins. Co., (Utah) 594 P 2d 1332, that:

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

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

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

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

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

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

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

Durham v. Margetts, supra.

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

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

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

The disputed statements in the affidavits referred to above and the uncertainty of the State Engineer's decision fall far short of meeting the requirements of Rule 56(c) as construed by the cases cited above. The statement of the State Engineer that it is not his intention "...in establishing a diversion

requirement of 4.0 acre feet per acre and a consumptive use requirement of 2.50 acre feet per acre to adjudicate the extent of the rights of the DMAD companies....", (pages 5 and 6 this brief), was obviously a recognition that he has no authority to adjudicate anything for any purpose. American Fork Irr. Co. v. Linke, 121 Utah 90, 239 P 2d 188.

The State Engineer goes on to say that he is conducting additional studies concerning consumptive use and that the figure of 2.5 acre feet per acre is interlocutory and if subsequent studies or a court in review of his decision or in a subsequent action should adjudicate either more or less water he will adjust accordingly.

This is a very important and complex case involving several wells of the applicants and many wells of the protestants and should not be decided on general statements in affidavits. The defendants did not successfully bear the burden of proof of showing that they were entitled to judgment as a matter of law and that the losing parties are not entitled to any relief. The application should have been held by the State Engineer, unacted upon, until the studies of consumptive use requirements and return flow were completed. The case should have been tried in the regular way, with an opportunity being given to both parties to adduce evidence of experts and to cross examine the State Engineer and opposing experts on the important issues here involved.

CONCLUSION

The statutory questions as to whether the changes proposed by Application No. a-10863 would, if approved, result in the impairment of vested water rights is a genuine issue as to material facts within the meaning of Rule 56(c), Utah Rules of Civil Procedure. The pleadings and affidavits of the experts dispute the averments on the other side of the controversy precluding a summary judgment.

The State Engineer, in his decision, states that further studies of the important issue of consumptive use are in progress and it is clear that his decision is preliminary. The incomplete records and disputed facts fall far short of meeting the requirement of the rule that the moving party must show entitlement to a judgment as a matter of law.

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

Respectfully submitted,

SKEEN AND SKEEN

By:



E. J. SKEEN
Attorneys for Plaintiffs and
Appellants

Appendix

CHANGE APPLICATION NO.

A-10863

68-~~XXXX~~-475

Application for Permanent Change of Point of Diversion

Place and Nature of Use of Water

STATE OF UTAH

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

For the purpose of obtaining permission to permanently change: the point of diversion ☐, place ☒, or nature of use ☒, of water rights acquired by Application Nos. 28727, 28728 (cont. under Ex: (Give Number of Application, certificate of appropriation, title and date of Decree or other identification of right.)

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

- The name of the applicant is Board of Water Resources, Delta Canal Company (cont. under Exp
- The post-office address of the applicant is C/O N. S. Bassett, Delta, Utah 84624
- The flow of water which has been or was to have been used in second-feet is 71,333
- The quantity of water which has been or was to have been used in acre-feet is 36,722.2
- The water has been or was to have been used for and during periods as follows:

<u>Irrigation</u>	from <u>March 1</u>	to <u>November 15</u>	incl.
(purpose)	(month) (day)	(month) (day)	
<u>Stockwatering and quality control</u>	from <u>January 1</u>	to <u>December 31</u>	incl.
(purpose)	(month) (day)	(month) (day)	
and stored each year (if stored)	from <u>January 1</u>	to <u>December 31</u>	incl.
	(month) (day)	(month) (day)	
- The direct source of supply is wells in Millard County.
(well, spring, stream, drain, river; if other explain)
- The point or points of diversion Eight wells located as described under Explanatory - paragraph 7 (continued)

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

8. Diversion works:

If a well give diameter and depth. Eight wells as described under Explanatory - par. 8 cont.)

If a dam and reservoir give height, capacity, and area inundated. DMAD Reservoir and Gunnison-Bend Reservoir as described under Explanatory - paragraph 8 (continued)

If other give type of diversion facility.

9. The water involved has been or was to have been used for the following purposes in the following described legal subdivisions: (If used for irrigation, state sole or supplemental supply, and describe other supplemental rights.)

Irrigation of 58,145.9 acres of land as a supplemental supply embraced within the area described under Explanatory - paragraph 9 (continued)

Total acres to be irrigated 58,145.9 supplemental

Stockwatering (number and kind) 2,025 head of cattle and 50 head of horses.

Domestic (number of families and/or persons, etc.) None

Other Quality control of Sevier River waters

10. The point at which water has been or was to have been returned to the stream channel is situated as follows: (Please describe method of return.)

None returned.

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

The Following Changes Are Proposed

11. The flow of water to be changed in cubic feet per second is 71,333

12. The quantity of water to be changed in acre-feet is 36,722.2

13. The water will be used each year for:
Irrigation from March 1 to November 15 incl.
(purpose) (month) (day) (month) (day)
Industrial, stockwatering and from January 1 to December 31 incl.
quality control (purpose) (month) (day) (month) (day)
and stored each year (if stored) from January 1 to December 31 incl.
(month) (day) (month) (day)
14. It is now proposed to divert the water from Same as paragraph 6
(i.e., spring, spring area, stream, river, drain, well, etc.)
at a point(s) as follows: Same as paragraph 7 - additional point of redirection
from DMAD Reservoir - (6) South 1,880 feet and East 30 feet from the Northwest
corner of Section 25, Township 16 South, Range 6 West, S.L.B. & M.
NOTE: The "point of diversion," or "point of return," must be located by course and distance or by rectangular distances
with reference to some regularly established United States land corner or United States mineral monument if within a
distance of six miles of either, or if a greater distance to some prominent and permanent natural object. A spring area
must also be described by metes and bounds.
15. The proposed diverting and conveying works will consist of: (if a well, state diameter and depth thereof)
Same as paragraph 8 and pump station, two 48-inch diameter (see Explanatory cont.)
16. If water is to be stored, give capacity of reservoir in acre-feet height of dam
area inundated in acres legal subdivisions of area inundated
Same as paragraph 8.
17. The water is to be used for the following purposes in the following described legal subdivisions: (if used
for irrigation, state sole or supplemental supply, and describe other supplemental rights.)
Irrigation of 58,145.9 acres as described under paragraph 9 as a supplemental
supply.
Total acres to be irrigated 58,145.9
but limited to the sole irrigation supply of undefined acres.
Stockwatering (number and kind) 2,025 head of cattle and 50 head of horses
Domestic (number of families and/or persons, etc.) None
Other Industrial purposes as described under Explanatory.
18. If paragraphs 11 and 12 designate that only part of the right described in paragraphs 1 to 10 inclusive
is to be changed, designate the status of the water so affected by this change as to its being abandoned
or used as heretofore.
All water rights in their entirety are included herein

EXPLANATORY

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

BOARD OF WATER RESOURCES

By Daniel F. Lawrence
Its Director

DELTA CANAL COMPANY, a corporation

ABRAHAM IRRIGATION COMPANY, a corporation

By Thomas R. Small
Its President

By W. L. Reid
Its President

MELVILLE IRRIGATION COMPANY, a corporation

DESERET IRRIGATION COMPANY, a corporation

By [Signature]
Its President

By [Signature]
Its President

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

Signature of Applicant

EXPLANATORY

28729, 28730, 28731, 28732, 28733 and 28734; and Segregation Application Nos. 28727aa, 28727b, 28728b, 28729b and 28733a. Proof of Appropriation on the foregoing applications was filed December 31, 1976, covering the DMAD wells collectively evidencing rights to divert 71.333 c.f.s. or 36,722.2 acre feet of water annually from eight large diameter wells for storage from January 1 to December 31 and use for irrigation purposes from March 1 to November 15 for supplemental irrigation on 58,145.9 acres of land under the DMAD Companies' irrigation systems and for stockwatering of 2,025 head of cattle and 50 head of horses and quality control of Sevier River waters from January 1 to December 31, inclusive.

Paragraph 1 (continued)

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

Paragraph 7 (continued)

Well No. 2 (28727) - North 5° 46' West, 4,566.1 feet (ced)
from the Southeast corner of Section 27, Township 16 South,
Range 6 West, S.L.B. & M.

Well No. 3 (28729) - North 423.2 feet and East 152.2 c c c
feet from Southwest corner of Section 19, Township 15 South,
Range 4 West, S.L.B. & M.

Well No. 4 (28730) - North 87° 51.5' East, 2,472.1 feet c b b
from Southwest corner of Section 23, Township 15 South, Range
5 West, S.L.B. & M.

Well No. 5 (28731) - North 79° 43' East, 3,056.2 feet b c c
from Southwest corner of Section 27, Township 15 South, Range
5 West, S.L.B. & M.

Well No. 6 (28732) - North 72° 24' East, 2,883.6 feet b c d
from Southwest corner of Section 33, Township 15 South, Range 5
West, S.L.B. & M.

Well No. 7 (28733) - South 38° 40' East, 7,514.6 feet from Southwest corner of Section 33, Township 15 South, Range 5 West, S.L.B. & M.

Well No. 8 (28734) - North 1,677.4 feet and East 2,376.9 feet from Southwest corner of Section 18, Township 16 South, Range 5 West, S.L.B. & M.

Well No. 9 (28728) - South 3,527.3 feet and East 925.2 feet from Northwest corner of Section 19, Township 16 South, Range 5 West, S.L.B. & M.

Storage Reservoirs

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

(1) DMAD Reservoir - South 9,396.4 feet and West 6,234 feet from Northwest corner, Section 19, Township 16 South, Range 5 West, S.L.B. & M.

(2) Gunnison-Bend Reservoir - North 4,093 feet and West 2,221 feet from Southwest corner, Section 15, Township 17 South, Range 7 West, S.L.B. & M.

Points of Rediversion

Points of rediversion from DMAD Reservoir and Gunnison-Bend Reservoir are as follows:

D.M.A.D. Reservoir

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

Gunnison-Bend Reservoir -

(2) Warnick Ditch - North 3,710 feet and West 197 feet from Southeast Corner of Section 15, Township 17 South, Range 7 West, S.L.B. & M.

(3) High Line Canal - North 4,114 feet and East 2,167 feet from Southwest Corner of Section 15, Township 17 South, Range 7 West, S.L.B. & M.

(4) Low Line Canal - North 3,710 feet and East 2,538 feet from Southwest corner of Section 15, Township 17 South, Range 7 West, S.L.B. & M.

(5) Abraham Canal - North 2,308 feet and East 520 feet from Southwest Corner of Section 10, Township 17 South, Range 7 West, S.L.B. & M.

Paragraph 8 (continued)

Well No. 2 - total depth of 1,200 feet consisting of 180 feet of 24-inch diameter pipe with an inner column of 20-inch diameter pipe from ground surface to the 1,200 feet total depth and 40 feet of 20-inch diameter pipe from well to natural channel of Sevier River.

Well No. 3 - total depth of 875 feet consisting of 323 feet of 24-inch diameter pipe with an inner column of 20-inch diameter pipe from ground surface to the 875 feet total depth and 30 feet of 16-inch diameter pipe from well to natural channel of Sevier River.

Well No. 4 - total depth of 1,120 feet consisting of 825 feet of 16-inch diameter pipe with an inner column of 12-inch diameter pipe from 800 feet to the 1,120 feet total depth, 30 feet of 16-inch diameter pipe, concrete equalizer box and 125 feet of 30-inch diameter concrete pipe from box to natural channel of Sevier River.

Well No. 5 - total depth of 1,197 feet consisting of 321 feet of 24-inch diameter pipe with an inner column of 20-inch diameter pipe from ground surface to the 1,197 feet total depth and 40 feet of 20-inch diameter pipe from well to natural channel of Sevier River.

Well No. 6 - total depth of 1,270 feet consisting of 202 feet of 24-inch diameter pipe and two inner columns - the first being a 20-inch diameter pipe from ground surface to a depth of 792 feet and the second being a 16-inch diameter pipe from 775 feet to the 1,270 feet total depth and 40 feet of 20-inch diameter pipe from well to natural channel of Sevier River.

Well No. 7 - total depth of 1,265 feet consisting of 200 feet of 24-inch diameter pipe and two inner columns - the

first being a 20-inch diameter pipe from the ground surface to a depth of 877 feet and the second being a 16-inch diameter pipe from the 850 feet level to the 1,265 feet total depth and 45 feet of 20-inch diameter pipe from well to natural channel of Sevier River.

Well No. 8 - total depth of 1,135 feet consisting of 445 feet of 20-inch diameter pipe and two inner columns - the first being a 16-inch diameter pipe from the 410 feet level to a depth of 935 feet and the second being a 12-inch diameter pipe from the 830 feet level to the 1,135 feet total depth and 40 feet of 16-inch diameter pipe from one well to DMAD Reservoir.

Well No. 9 - total depth of 823 feet consisting of 540 feet of 16-inch diameter pipe with an inner column of 12-inch diameter pipe from the 510 feet level to the 823 feet total depth and 16-inch diameter pipe extending from the well to a concrete equalizer box on bank of DMAD Reservoir.

DMAD Reservoir

Height of impounding dam:	35 feet
Inundated area when full:	1284.5 acres of land in Sections 23, 24, 25, 26, 35 and 36, Township 16 South, Range 6 West, S.L.B. & M., Sections 3, 4, 8, 9, 10, 17, 18 and 19, Township 16 South, Range 5 West, S.L.B. & M., and Sections 33 and 34, Township 15 South, Range 5 West, S.L.B. & M.
Maximum safe capacity:	11,000 acre feet

Gunnison-Bend Reservoir

Height of impounding dam:	18 feet
Inundated area when full:	674 acres in Sections 2, 10, 11, 14 and 15 of Township 17 South, Range 7 West, S.L.B. & M. and Sections 35 and 36 in Township 16 South, Range 7 West, S.L.B. & M.
Maximum safe capacity:	4,044 acre feet

Paragraph 9 (continued)

IRRIGATION:

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

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

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

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

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

All or parts of Sections 26 and 31.

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

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

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

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

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

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

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

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

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

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

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

All or parts of Sections 4, 5, 6, ¹/₇

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

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

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

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

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

DELTA CANAL COMPANY

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

MELVILLE IRRIGATION COMPANY

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

ABRAHAM IRRIGATION COMPANY

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

DESERET IRRIGATION COMPANY

- (1) 74.0 cfs of Class "A" water . . . March 1 to October 1 - page 196
- (1) 10.7 cfs of Class "B" water . . . March 1 to October 1 - page 196
- 16-2/3% of new stored water up to 104,000 acre feet - page 192
- 20.55% of stored water above 104,000 acre feet - page 193

- (3) 5,314 acre feet of water made below Sevier Bridge Reservoir during non-irrigation season - page 190
- 5,714 acre feet of Class "D" water made April 1 - July 1 and used any time - page 197
- 18.9% of exchange water when total storage for Sevier Bridge Reservoir and Piute Reservoir is above 129,280 acre feet - page 202
- 27.3% of Application No. 1367A - pages 191, 192
- 18.9% of Application No. 4562 - pages 191, 192

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

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

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

The water rights covered by this change application are supplemental to 58,145.9 acres of the 59,492.69 acres of land irrigated under the foregoing water rights. Concurrently herewith, a similar change application is being filed on the foregoing rights.

Paragraph 15 (continued)

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

Paragraph 17 (continued)

Supplemental irrigation, stockwatering and quality

in paragraph 9 herein. The industrial uses will be for the operation of a nominal 3,000 megawatt net electrical energy generating plant, commonly referred to as the Intermountain Power Project, primarily for cooling purposes but including all plant uses embraced in all or parts of Sections 10, 11, 12, 13, 14, 15, 22, 23 and 24, Township 15 South, Range 7 West, S.L.B. & M., and parts of Sections 18 and 19, Township 15 South, Range 6 West, S.L.B. & M.

* * *

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

The supplemental waters diverted by means of the DMAD wells are comingled in the natural channel of the Sevier River and DMAD Reservoir with waters of the DMAD Companies under the rights described in paragraph 9 herein. The waters diverted from Well No. 3 (28729), Well No. 4 (28730), Well No. 5 (28731), Well No. 6 (28732) and Well No. 7 (28733) are discharged directly into the natural channel of the Sevier River above the DMAD Reservoir and the waters diverted from Well No. 8 (28734) and Well No. 9 (28728) are discharged directly into the DMAD Reservoir. The waters from Well No. 2 (28727) are discharged into the natural channel of the Sevier River below DMAD Reservoir.

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

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

Under the proposed change, the waters under the supplemental water rights of the DMAD Companies from the DMAD wells will be diverted and stored the same as heretofore. The releases from storage, rediversions and uses for irrigation and stockwatering purposes and for quality control of the Sevier River waters will be the same as heretofore except that the quantities of water so used for irrigation and stockwatering purposes will be reduced by the quantities of water to be used for industrial purposes by the Intermountain Power Agency at the Intermountain Power Project.

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

The water so rediverted will be pumped into two 48-inch diameter parallel pipelines and will be conveyed thereby a distance of 11.2 miles to the Intermountain Power Project where such waters will be comingled with underground waters to be diverted by means of any combination of five deep wells under separate underground water rights acquired by Intermountain Power Agency and to be covered by similar change applications to be filed. All of the waters so comingled will be used year-around for industrial purposes by the Intermountain Power Agency at the Intermountain Power Project as described in paragraph 17 herein.

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

(This page not to be filled in by applicant)

STATE ENGINEER'S ENDORSEMENTS

1. 7/30/79 Change Application received over counter in State Engineer's office by WB
by mail
2. Priority of right to make change brought down to, on account of _____
3. Fee for filing Application \$ 55.00, received by WB, Receipt No. 6-1-30
4. 8/8/79 Application microfilmed by _____ Roll No 871-2 and indexed by WB
5. Application platted by _____
6. 7/30/79 Application examined by WB
7. Application returned, with letter, to _____ for correction
8. Corrected application resubmitted over counter to State Engineer's office
by mail
9. 7-11-79 Application approved for advertisement by WB
10. SEP 20 1979 Notice to water users prepared by WB
11. SEP 27 1979 Publication began, was completed OCT 11 1979
12. 9/27/79 Proof slips checked by WB
13. 10/17/79 Change Application protested by Monte C. Thibault, Paul M. Giff
14. 10/17/79 Publisher paid MEV No. 131177, 131175
15. Field Examined by _____
16. 3/24/80 Application designated for approval by SG
~~rejection~~
17. 3/17/80 Change Application copied pmh proofread by _____
18. 3/17/80 Change Application approved and returned to applicant
~~rejection~~

This application is approved on the following conditions:

1. Actual construction work necessitated by proposed change shall be diligently prosecuted to completion.
2. Proof of change shall be submitted to the State Engineer's office by December 31, 1982
3. This change is subject to all conditions imposed on the approval of the original application or right
by Memo Decision 3/17/80

Dee C. Hansen
Dee C. Hansen, State Engineer

19. Time for making proof of change extended to _____
20. Proof of change submitted.
21. Certificate of change No. _____, issued.

I hereby certify that the foregoing is a true copy of the Application by _____
to change the point of diversion, place and nature of use of water as shown, with endorsements thereon, on
the records of my office on the date given below.

Salt Lake City, Utah _____, 19____
State Engineer

Change Application No. 4-10863

CERTIFICATE OF MAILING

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

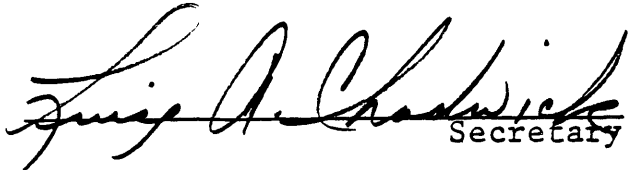
Dallin W. Jensen
Michael M. Quealy
Assistants Attorney General
1636 West North Temple
Salt Lake City, Utah

Joseph Novak
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Post Office Box 3000
Salt Lake City, Utah 84110

Wayne L. Black
Robert D. Moore
BLACK & MOORE
Suite 500, Ten Broadway Building
Ten West Third South Street
Salt Lake City, Utah 84101

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

on this 8th day of January, 1982.


Secretary