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Bernard Jackson et al v. Dr. Clark Cox et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

BERNARD JACKSON, NELLA JACKSON,)
MRS. DUDLEY CRAFTS, VERA GILES,)
RAY BROWN, BETH BROWN, GERALD)
MOODY, ELAINE MOODY, FRED)
TURNER, ELAINE TURNER, CONRAD)
STANWORTH, 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.)

DOCTOR CLARK COX; S & G, INC.,)
a Utah Corporation; MERVIN G.)
WILLIAMS; MAURLINE B. WILLIAMS;)
L. LYMAN FINLINSON; SARAH C.)
FINLINSON; KENT DEWSNUP;)
SANDRA F. DEWSNUP; HOWARD)
DUTSON; AFTON R. DUTSON; WM D.)
DUTSON; KAE F. DUTSON; GERALD)
NIELSON; BETTY J. NIELSON;)
CAROL ANN NIELSON; JIM NIELSON;)
BECKY NELSON; JACK M. NELSON;)
BILL NELSON; SYLVAN LOVELL;)
GORDON L. NIELSON; BARBARA B.)
NIELSON; RICHARD J. NIELSON;)
KEITH R. NIELSON; CAMILLE R.)
NIELSON; NORMA R. NIELSON;)
MABEL B. HARDER; DEAN A. HARDER;)
INTERMOUNTAIN POWER PROJECT, a)
Utah Corporation; INTERMOUNTAIN)
POWER AGENCY, a Utah Corpora-)
tion; LOS ANGELES, PASADENA,)
RIVERSIDE, BURBANK, ANAHEIM,)
GLENDALE, Cities and Corpora-)
tions of the State of Calif.;)
DEE C. HANSEN, State Engineer)
of the State of Utah; and)
BOARD OF WATER RESOURCES OF THE)
STATE OF UTAH,)

Supreme Court No. 18055

Defendants and)
Respondents,)

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

This action was filed pursuant to Section 73-3-14, UCA, 1953, for a plenary review of the decisions of the defendant Dee C. Hansen, State Engineer, approving Permanent Change Applications Nos. a-10952 (68-531), a-10953 (68-2165), a-10954 (68-2166), a-10955 (68-2161), a-10956 (68-2167), a-10968 (68-2169), a-10969 (68-2170), a-10970 (68-2168), a-10971 (68-2171), a-10972 (68-2180), a-10973 (68-2181), a-10981 (68-2173), a-10997 (68-2179), and a-11009 (68-2182). (R. 001 - 156). A copy of a typical application appears in the appendix.

Separate applications were filed by the owner or owners of fourteen wells located at the points specifically described in each application along the Sevier River. The applicants were the various defendants. The water from the wells, which vary in depth from 203 feet to 988 feet, has heretofore been used for irrigation and incidental stockwatering purposes from April 1 to October 31 of each year. (R. 017 - 107)

It is proposed by each of the change applications to change the points of diversion from the present points to five 20 inch wells 800 to 1200 feet deep to be located at five of nine points described in each application. The distances from the present locations of the 14 wells to the proposed site of the Intermountain Power Project vary from 11 to 14.5 miles. The use at the power project site will be at an electrical generating plant for cooling and other purposes from January 1 to December 31 of each year. The water diverted for industrial use will be fully consumed. (R. 108 - 156)

The fourteen applications were advertised as provided by law. Protests were filed by numerous well owners in the area and a hearing on all fourteen applications was held. The State Engineer approved each change application with a reduction of the number of acre feet to be changed based on the assumption that all of the water would be applied to beneficial use each year and that 2.50 acre feet per acre would be consumptively used. It is stated in the State Engineer's memorandum decision on page 3, Change Application No. a-10952:

"It is not the intention of the State Engineer in establishing a consumptive use duty of 2.5 acre-feet of water per acre of land to adjudicate the extent of the rights of Dr. Clark B. Cox, but rather to provide sufficient definition of the right to assure that other vested rights are not impaired by the change. The State Engineer is conducting additional studies concerning the consumptive use requirements of irrigated land in the area. Therefore, the duty of 2.5 acre-feet per acre in determining acreage reduction and all issues relating thereto shall be interlocutory, and if subsequent studies or a Court - either in a review of this decision or in a subsequent action - adjudicates that this right is entitled to either more or less water, the State Engineer will adjust the duty and acreage accordingly." (R. 114)

The decision on each of the other thirteen applications is the same. (R. 112 - 156)

This action was filed to review the State Engineer's decisions, on the fourteen applications, pursuant to Section 73-3-14 UCA, 1953. (R. 001 - 156) It is alleged in the complaint that the plaintiffs are the owners of water rights in the Sevier Desert Ground Water Basin and that the approval of the change applications will cause or allow impairment of and interference with the water rights of the plaintiffs. These allegations are denied by the defendants.

The defendants filed a motion for a summary judgment, (R. 330, 331) dismissing the case and supported it by an affidavit of an expert to the effect that the changes proposed by the applications here involved and applications Nos. a-10862 and a-10863, also filed for the IPP Project would not impair the rights of others and would not constitute an enlargement. (R. 332 - 346) The plaintiffs

filed an affidavit of an expert which states that the transfers of water as proposed "...cannot reasonably be expected to be accomplished because of the transmissibility of the area over which the transfers are proposed. Therefore, pumping at the IPP site will directly impact wells in the Sugarville-Sutherland area, which impact cannot be alleviated by the cessation of pumping in the areas where the wells are presently located." (R. 418 - 421) These affidavits will be discussed in more detail in the argument.

The trial court made and entered an order and summary judgment stating generally in a recitation that the change applications can be approved without impairing the 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. 505 - 509) This appeal was taken from the summary judgment so made and entered. (R. 515 - 516)

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 a summary judgment should never be so used as to compel a party to try his case on affidavits with no opportunity to cross-examine the affiants...."

We shall now apply the law to the facts in this case. A review of the pleadings establishes issues as to impairment of vested water rights and the enlargement of the rights sought to be changed by increasing the time of diversion from seasonal irrigation use to year around use for industrial purposes from which there will be no return flow.

The affidavit in support of the motion for summary judgment, signed by Reed W. Mower, does not attempt any specific analysis of the effect on the underground basin and other wells in the area of stopping the pumping at each of the wells, which he refers to as the 12 wells with depths from 203 feet to 988 feet and the pumping of water from five new wells at depths of 800 feet to 1200 feet at distances which vary from 11 to 14.5 miles away from the present wells. His affidavit discusses two change applications, Nos. a-10862 and a-10863, as well as 13 of the wells involved in this suit and his conclusions are generally based on the effect on the underground basin of all proposed changes including those not here involved. This evidence would, for those reasons, not be admissible. (R. 335 - 346)

The general conclusion as to the effect of the proposed changes on wells involved in this suit, the wells described in applications Nos. a-10862 and a-10863, all lumped together, is stated as follows:

(1) No adverse effect on ground water levels in the Sevier Desert ground water basin, long term or short term, by enlarging the time of diversion from the irrigation season to year around. (R. 335, 336)

(2) The effect on the basin as a whole will be "less" adverse by pumping water as proposed than solely for irrigation use. (R. 336)

Similar conclusions on the "lump" effect are given area by area.

The plaintiffs' expert, Parley R. Neeley, in addition to the statement quoted on page 5 of this brief, said:

"22. With respect to paragraph 14 of the Mower affidavit, the conclusions are highly suspect in that they do not take into account the movement of water in the underground aquifer; the pumping of IPP wells and DMAD wells will drastically affect the water level, adversely in the Sugarville area, much more than pumping the wells at the original locations and for the original purposes.

"That more water will be pumped than ever pumped for agricultural purposes from the DMAD wells and the 12 individual wells. By transferring water from agricultural purposes to the purposes and at the locations allowed by the decisions of the State Engineer, all other wells in the Basin will be adversely affected." (R. 417, 418)

Mr. Neeley further concludes "...that water levels will not appreciably increase, rather, when pumping occurs, water levels generally decrease if water is pumped from the same basin." (R. 419)

Clearly, no facts involving the changes under the fourteen applications are undisputed. On the contrary, the conclusions of each expert is contrary to those of the other expert.

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

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

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

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

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

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

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

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

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

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

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

Durham v. Margetts, supra.

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

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

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

This is a very complicated case as indicated in the "explanatory" portion of each of the fourteen applications involved in this case of which the one in the appendix is typical. They involve ground water rights in an area traversed by a large river system. The state engineer's decision on each application is based upon a determination of consumptive use "...to provide a sufficient definition of the right, to assure that other vested rights are not impaired by the change." He states that he is con-

ducting additional studies concerning consumptive use requirements of irrigated land in the area and that the duty of 2.5 acre feet per acre is interlocutory and will be adjusted when the duty is determined in court. (R. 110)

The matter is so involved, and the facts are so indefinite, that the state engineer approved the application only conditionally to await a court decision on consumptive use. It is clear that the decision to reduce each water right by 1.5 acre feet per acre to assure that other water rights are not impaired by the change is based on an interlocutory decision on a factual issue, that of consumptive use of water. Admittedly, the engineer was continuing studies to determine the question of fact.

The decision is conjectural and theoretical, consumptive use as tentatively determined and the same figure, 2.5 acre feet per acre, is applied to all land.

It is very apparent that in view of the complexity of the water right and the State Engineer's admissions that he is making further studies, the results of which may be determined in this action for review, the applicants are not entitled to judgment as a matter of law. This case falls far short of meeting the requirements that the facts must be clear, undisputed, and complete. The defendants did not successfully bear the burden of showing that as a matter of law no relief can be awarded to the losing parties.

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

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

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

CONCLUSION

The statutory question as to whether the changes proposed by the fourteen applications for changes of points of diversion, places, and purpose of use would, if approved, impair any vested water rights without just compensation is a genuine issue as to a material fact within the meaning of Rule 56(c), Utah Rules of Civil Procedure. The affidavits of experts dispute the averments on the other side of the controversy and create issues of fact as to impairment of vested rights, consumptive use of water, and enlargement, and the issues are framed by the pleadings. The


State Engineer admitted in his memorandum decision that his decision on each application was interlocutory and he was continuing his studies. The incomplete records and disputed facts fall far short of meeting the requirement of the rule that the moving party must show entitlement to a judgment as a matter of law.

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

Respectfully submitted,

SKEEN AND SKEEN

By:



E. J. SKEEN

Attorneys for Plaintiffs and
Appellants.

APPENDIX

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 No. 31273-Certificate No. 7865
(Give Number of Appropriation, certificate of appropriation, title and date of Decree or other identification of right.) (68-5
If the right described has been amended by a previous approved change application, give the number of such change application. No. a-5129.....

1. The name of the applicant is S. & G. Inc......
2. The post-office address of the applicant is 385 East Center Street, Richfield, UT. 847.....
3. The flow of water which has been or was to have been used in second-feet is 5.0 cfs.....
4. The quantity of water which has been or was to have been used in acre-feet is --.....
5. The water has been or was to have been used for and during periods as follows:

<u>Irrigation</u>	<u>from April 1</u>	<u>to October 31</u>	<u>incl</u>	
<small>(purpose)</small>	<small>(month)</small>	<small>(day)</small>	<small>(month)</small>	<small>(day)</small>
.....				
	<u>from</u>	<u>to</u>	<u>incl</u>	
<small>(purpose)</small>	<small>(month)</small>	<small>(day)</small>	<small>(month)</small>	<small>(day)</small>
and stored each year (if stored).....				
	<u>from</u>	<u>to</u>	<u>incl</u>	
<small>(purpose)</small>	<small>(month)</small>	<small>(day)</small>	<small>(month)</small>	<small>(day)</small>
6. The direct source of supply is well in Millard County.
(well, spring, stream, drain, river; if other explain)
7. The point or points of diversion South 30 feet and West 20 feet from Northeast Corner of Section 17, Township 17 South, Range 6 West, S.L.B. & M.

(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.)

b. Diversion works:

If a well give diameter and depth 16-inch diameter, 834 feet deep

If a dam and reservoir give height, capacity, and area inundated None

If other give type of diversion facility None

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 292.75 acres of land as a supplemental supply embraced within the area described under Explanatory - paragraph 9 (cont.)
 Total acres to be irrigated 292.75 supplemental
 Stockwatering (number and kind) None
 Domestic (number of families and/or persons, etc.) None
 Other None
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

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 --
12. The quantity of water to be changed in acre-feet is 418.0 See Explanatory - par. 12 (cont)

13. The water will be used each year for:

Industrial from *January 1 to December 31 incl.
(purpose) (month) (day) (month) (day)
-- from -- to -- incl.
(purpose) (month) (day) (month) (day)

and stored each year (if stored) from -- to -- incl.
(month) (day) (month) (day)

*See Explanatory-paragraph 13(cont.)

14. It is now proposed to divert the water from 5 new wells
(i.e., spring, spring area, stream, river, drain, well, etc.)

at a point(s) as follows: See proposed well field description under Explanator
The points of diversion will consist of 5 well locations at any combi
ation of the 9 well locations described under Explanatory-par. 14(con
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)

Five 20" diameter wells between 800 feet and to 1,200 feet deep -
distribution pipelines and equalization facilities.

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 --

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 None

Total acres to be irrigated None

but limited to the sole irrigation supply of -- acres.

Stockwatering (number and kind) None

Domestic (number of families and/or persons, etc.)

Other Industrial purposes as described under Explanatory-par. 17(cont.)

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.

The remaining waters will continue to be used as heretofore as descri
in paragraphs 1 to 10 inclusive.

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)

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.

S & G, Inc.
By *Jay T. Gardner* Pres.
Signature of Applicant

EXPLANATORY (Continued)

Paragraph 9 (Continued)

Section 16, T17S, R6W, S.L.B.&M. (91.16 acres)

37.88 acres in NW $\frac{1}{4}$ NW $\frac{1}{4}$
9.10 acres in NE $\frac{1}{4}$ NW $\frac{1}{4}$
36.60 acres in NW $\frac{1}{4}$ SW $\frac{1}{4}$
7.58 acres in NE $\frac{1}{4}$ SW $\frac{1}{4}$

Section 17, T17S, R6W, S.L.B.&M. (201.59 acres)

37.10 acres in NW $\frac{1}{4}$ NE $\frac{1}{4}$
37.00 acres in NE $\frac{1}{4}$ NE $\frac{1}{4}$
37.32 acres in SW $\frac{1}{4}$ NE $\frac{1}{4}$
13.50 acres in NW $\frac{1}{4}$ SE $\frac{1}{4}$
38.17 acres in NE $\frac{1}{4}$ SE $\frac{1}{4}$
38.50 " " " " SE $\frac{1}{4}$ NE $\frac{1}{4}$

The water right covered herein is limited to the sole supply requirements of 240 acres and is supplemental to the waters accruing to 40 shares of stock in the Melville Irrigation Company.

Paragraph 12 (Continued)

Only the first 418.0 acre feet of water annually accruing to the water right evidenced by Certificate No. 7865 (68-531) is proposed to be changed herein.

Paragraph 13 (Continued)

Since the total quantity of water which will be diverted annually under Certificate No. 7865 (68-531) will be limited to the sole supply requirements of 240 acres of land and since the source of supply is from storage in the underground, there will be no enlargement of the right nor impairment of other rights by extending the period of diversion and use of the 418.0 acre feet of water herein year-around to include the period outside of the irrigation season of April 1 to October 31 set forth in Certificate No. 7865 (68-531).

Paragraph 14 (Continued)

Primary well locations:

T15S, R6W, S.L.B.& M.

Well No. 1-S. 2,490 ft. E.150 ft. from NW Corner, Sec. 18; *b c c*
Well No. 3-S. 2,490 ft. E.150 ft. from NW Corner, Sec. 19; *b c c*
Well No. 4-N. 600 ft. E.150 ft. from SW Corner, Sec. 19; *c c c*
Well No. 5-S. 1,470 ft. E.150 ft. from NW Corner, Sec. 18. *b c b*

T15S, R7W, S.L.B.& M.

Well No. 2-N. 500 ft. W. 500 ft. from SE Corner, Sec. 13. *d d d*

Alternate well locations:

T15S, R6W, S.L.B.& M.

Well A1 - N. 150 ft. E. 1,000 ft. from SW Corner, Sec. 7; *c c d*
Well A2 - N. 1,470 ft. E. 150 ft. from SW Corner, Sec. 18; *c b c*
Well A3 - N. 1,470 ft. E. 150 ft. from NW Corner, Sec. 19; *b b c*
Well A4 - N. 1,470 ft. E. 150 ft. from SW Corner, Sec. 19. *c b c*

Paragraph 17 (Continued)

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, T15S, R7W, SLB&M, and parts of Sections 18 and 19, T15S, R6W, S.B&M. In addition the water will be used for all purposes required for the construction of the Intermountain Power Project during the period of its construction.

* * *

Applicant is negotiating the sale to Intermountain Power Agency of the first 418.0 acre feet of water annually accruing to the water right evidenced by Certificate No. 7865 (68-531) for year-around industrial use at the proposed Intermountain Power Project to be constructed and owned by Intermountain Power Agency, a political subdivision of the State of Utah created pursuant to the "Interlocal Co-operation Act" (Chapter 13, Title 11, U.C.A., 1953, as amended). This change application is filed to amend Certificate No. 7865 (68-531) to provide for the year-around diversion and use of the first 418.0 acre feet of water annually accruing thereunder for year-around industrial use at the Intermountain Power Project and thereby accomplish the purposes of the foregoing sale. Upon consummation of the sale, the ~~primary~~ ^{first} right to the first 418.0 acre feet of water as amended by this change application will be conveyed to Intermountain Power Agency. WLB b

The remaining waters accruing to Certificate No. 7865 (68-531) will continue to be used as heretofore as described in paragraphs 1 to 10, inclusive, herein except that the quantities of water so used for irrigation purposes will be reduced by the quantities of water to be used for industrial purposes at the Intermountain Power Project. ~~Provided, however, that the right to said remaining waters shall at all times be subject to the primary right to the first 418.0 acre feet of water annually covered by this change application.~~ WLB by tj

It is proposed to divert the said 418.0 acre feet of water annually by means of any combination of five wells to be drilled at the Intermountain Power Project at any five of the nine locations described in paragraph 14 herein. Under the proposed plan of development, the wells will be first drilled at the primary locations. In the event any of the wells so drilled do not yield an adequate supply of water, additional wells will be drilled as required at the alternate well locations. The proposed five wells are sized and will be equipped to provide an adequate water supply to operate at least one electrical generating unit at the Intermountain Power Project in the event of an outage in the surface water supply.

Similar change applications are being filed on other ground-water rights to divert underground waters by means of the same five wells described above. The underground waters diverted by means of the five wells under this change application and the other similar change applications will be comingled at the Intermountain Power Project with surface waters rediverted from the Sevier River under water rights of the Delta Canal Company, Melville Irrigation Company, Abraham Irrigation Company, Desert Irrigation Company, Central Utah Water Company and Vincent Cropper for use at the Intermountain Power Project as described in paragraph 17 herein.

Provided, however, that the right to said remaining waters shall be subject to the first right to the first 418 acre feet of water annually covered by this change application.

WLB by tj

In the event that other water rights are impaired by substantial interference resulting from the drilling and operation of the proposed five wells at the Intermountain Power Project and replacement of water is required, such replacement shall not be made from the ~~primary~~ right to the first 418.0 acre feet of water annually covered by this change application, but shall be made from the remaining portion of the right under Certificate No. 7865 (68-531) as hereinabove described.

It is not intended under this change application to enlarge upon the water right evidenced by Certificate No. 7865 (68-531).

This change application shall be in accordance with the Water Sale Agreement to be entered into by and between the applicant and Intermountain Power Agency.

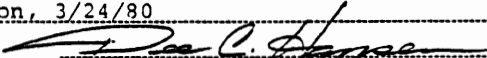
(This page not to be filled in by applicant)

STATE ENGINEER'S ENDORSEMENTS

1. 3/21/77 Change Application received over counter in State Engineer's office by WLB
by mail
2. _____ Priority of right to make change brought down to, on account of _____
3. 4/12/77 Fee for filing Application \$ 60.00, received by WLB, Receipt No. 05007
4. 10/19/79 Application microfilmed by _____ Roll No. 876-2 and indexed by HW 13-5-79
5. 11-26-79 Application platted by PCM
6. 11/7/79 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. 11/7/79 Application approved for advertisement by WB
10. NOV 2 1979 Notice to water users prepared by WLB
11. NOV 8 1979 Publication began, was completed NOV 22 1979 Millard C. Williams
12. 11/9/79 Proof slips checked by WLB
13. 12/27/79 Change Application protested by Don C. Nelson, Bureau of Reclamation, Council Bluffs, IA
14. 12/21/79 Publisher paid MEV No. 031259 Bertwick Jackson, Red Lake, Pa.
Tom & Ray, Piquette, South Ct.
15. _____ Field Examined by Kegidus & Steve G. Kegidus
16. 3/7/80 Application designated for approval by S.G.
rejection
17. 3/10/80 Change Application copied slf proofread by _____
18. 3/10/80 Change Application approved and returned to applicant _____
rejected

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, 3/10/80
Amended Memo Decision, 3/24/80


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. Q-10952

CERTIFICATE OF MAILING

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

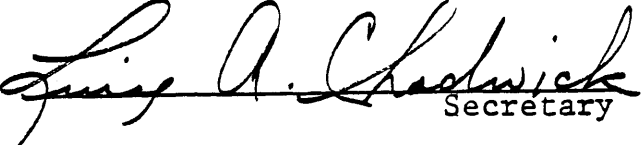
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Ten West Third South Street
Salt Lake City, Utah 84101

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

on this 6th day of January, 1982.


Secretary