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Ray Brown et al v. Dee C. Hansen : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

RAY BROWN, FRED TURNER,
BERNARD JACKSON, CONRAD
STANSWORTH, GERALD MOODY,
LONNIE HALES, ALVA YOUNG,
MELBA CRAFTS, and VERA
GILES, et al,

Plaintiffs and
Appellants,

vs.

DEE C. HANSEN, the State
Engineer of the State of
Utah; UTAH BOARD OF WATER
RESOURCES FOR DMAD COMPANIES;
DELTA CANAL CO., a Utah Corp-
oration; MELVILLE IRRIGATION
COMPANY, a Utah Corporation;
ABRAHAM IRRIGATION COMPANY,
a Utah Corporation; and
DESERET IRRIGATION COMPANY,
a Utah Corporation,

Defendants and
Respondents,

Supreme Court No. 18056

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-10862 (68-475) was filed for a permanent change of point of diversion, place and nature of use of 71.333 second feet of water from eight wells evidenced by 13 applications to appropriate underground water, to correct the points of diversion, place and nature of use of water to conform to the proof of appropriation of water. 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 provided by the State Engineer. (R. 016)

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

"The water is diverted from wells into the Sevier River and thence into either DMAD Reservoir or Gunnison-Bend Reservoir and re-diverted into the companies canals or ditches at the following points." (The points are described under "Explanatory") (R. 017, 020)

The entire application is in the Appendix.

The application seeks to change the rights from direct flow for seasonal use for irrigation from March 1 to November 15 of each year to a storage right from January 1 to December 31 of each year. (R. 010)

Notice of the application was duly published and it was protested by some 32 individuals, an investment company, and Delta City. It is stated in the State Engineer's memorandum decision:

"The protestants asserted that the applicants have never pumped or used the full quantity of water approved and that the Companies intend to enlarge upon their past uses of the water rights. The protestants also contended that if the applicants are allowed to pump 71.333 cfs from any or all wells, it would result in increased localized interference with the wells of the protestants. In addition, the protestants believe that the original applications do not permit the storage of water in DMAD and Gunnison Bend Reservoirs or the use of such water for water quality control purposes." (R. 011)

The State Engineer approved the application, subject to the following conditions:

"1. That the total quantity of water to be diverted under the rights included on this change shall be 25,556.2 acre-feet between the period from April 1 to October 31, inclusive, except as noted in item #2 below.

"2. The applicant may divert water from the wells prior to April 1 for water quality control purposes but such quantity diverted shall be a part of the 25,556.2 acre-feet.

"3. The maximum diversion rate from all eight wells shall not exceed the 71.33 cfs, provided further that the maximum diversion rates from wells numbers 2, 3, 4, 5, and 6, as denoted herein, shall be as follows:

"Well 2	8.00 cfs
"Well 3	10.00 cfs
"Well 4	10.00 cfs
"Well 5	10.00 cfs
"Well 6	9.00 cfs

"4. The total acreage to which the water under this change application is a supplemental supply is 55,952.62 acres and the supplemental stock-watering of 2,025 cattle and 50 horses." (R. 012, 013).

The protestants named as plaintiffs filed an action to review pursuant to Section 73-3-14, Utah Code Annotated, 1953, as amended, (R. 001 - 022) The complaint, which includes eleven causes of action, and the answers (R. 038 - 042, 045 - 050) present issues of fact as follows:

(1) The approval of the change application "...will irreparably damage the plaintiffs and will interfere with their prior appropriations and pending applications." (R. 003)

(2) That by allowing pumping and storage there is "...an unlawful expansion of the rights..." sought to be changed and an enlargement thereof. (R. 003)

(3) That in no year have the DMAD companies pumped or beneficially used 27,000 acre feet of water from the wells. (R. 004, 005)

(4) The approval of the application will permit localized interference with wells of certain plaintiffs. (R. 004)

The defendants filed a motion for a summary judgment pursuant to Rule 56(c) of the Utah Rules of Civil Procedure for dismissal of the case on the ground that there was no genuine

issue of material fact and that the defendants are entitled to a dismissal as a matter of law. (R. 63, 64)

The motion was supported by the affidavit of Reed W. Mower (R. 65 - 79), an engineer, who stated generally that based on his education, training, studies and experience that it was his opinion that the long-term net effects 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, inclusive, 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. 068, 069)

Mr. Mower's affidavit consists largely of the average net effect on the Sevier Desert ground-water basin of pumping water by means of the DMAD wells under both Change Applications Nos. a-10862 (65-475) and a-10863 (65-475) rather than the continued pumping of water by means of the same wells solely for Agricultural purposes. No separate opinions are given for each of the two applications. (R. 069) He generally concludes in paragraph 24 of his affidavit that the result of pumping the wells under both applications "...will be an increase in the water levels in the Sevier Desert ground-water basin as a whole except for that part

of said ground-water basin in the vicinity of the proposed IPP wells...." (R. 079)

Parley R. Neeley, an engineer, signed two affidavits in opposition to the motion for summary judgment (R. 163 - 170 and 188 - 191), which are referred to by the trial court in the order and summary judgment. (R. 230) Mr. Neeley stated that, after reviewing all available data, he is of the opinion that "...year-around pumping will create a greater loss than pumping allowed under current conditions because there will be an increased evapo-transpiration, 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."

Mr. Neeley further stated that the proofs filed in the State Engineer's office, in connection with Application No. a-10862, do not support the figures in such application as to acreage, quantities of water beneficially applied, and the time period during which the water has been used. He said that the quantities which the "...State Engineer purports to allow in this case will likely conflict with the permissive sustained yield and permissive mining yield of the source and will likely ultimately result in the destruction of the supply or seriously damage the supply." He disputes, in detail, the facts stated in the Reed Mower Affidavit.

The trial court made and entered an order and summary judgment, granting the defendants' 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 and that there is no genuine issue as to any material fact. (R. 229 - 232) This appeal was taken from the summary judgment. (R. 238, 239)

ARGUMENT

THERE ARE GENUINE ISSUES OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT

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

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

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

This suit was filed pursuant to Section 73-3-14, UCA 1953, which provides for the review by the district court of decisions of the state engineer. Change Application No. 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 now apply the law to the facts in this case, bearing in mind that it is the duty of the state engineer to determine, pursuant to Sec. 73-3-3, UCA, whether there is reason to believe that the proposed change can be made without impairing vested rights. As indicated above the pleadings frame issues (1) as to whether the proposed change will irreparably damage the plaintiffs and interfere with prior rights; (2) as to whether the change from seasonal irrigation use to year around diversion to storage will constitute an enlargement of the right; (3) as to whether there has ever been 27,000 acre feet pumped from the wells involved in the proposed change and beneficially used and (4) as to whether the changes will result in localized interference with the wells of certain plaintiffs.

The Affidavit of Reed W. Mower filed in support of the motion for summary judgment is reviewed on pages 5 and 6 of this brief. His statements of fact relating generally to Application a-10862 are disputed by the affidavit of Parley R. Neeley, reviewed and quoted on pages 6 and 7 of this brief. The conflicting affidavits are addressed to issues of material fact mentioned above, namely, whether the change, as proposed, will impair vested rights and constitute an enlargement.

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.

In view of the issues of fact discussed above and the applicable law, the summary judgment should be reversed and the case remanded for a trial.

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."

This is a very complicated case as indicated in the "explanatory" portion of Application No. a-10862 in the appendix. It involves eight wells along a large river system and a proposed change of direct flow water from seasonal irrigation use to year-around storage. The state engineer's solution is based on disputed facts which under the statute are determinative of the change application.

This case falls far short of meeting the requirements that the facts must be clear, undisputed, and complete. The defendants did not bear the burden of showing that as a matter of law no relief can be awarded to the losing parties.

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

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

In view of the disputed facts discussed above, it was obviously error to award a summary judgment.

CONCLUSION

The statutory question as to whether the changes proposed by Application No. a-10862 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 do not cover many issues framed by the pleadings. 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.

AMENDATORY

Q-10862

68-475

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 [X], place [], or nature of use [X], of water rights acquired by... See Explanatory
(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.....

- 1. The name of the applicant is BOARD OF WATER RESOURCES for DMAD COMPANIES
2. The post-office address of the applicant is 400 SOUTH 231 EAST, SALT LAKE CITY, UTAH 84111
3. The flow of water which has been or was to have been used in second-feet is 71.333
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:
Irrigation from March 1 to November 15 incl.
Stockwatering from March 1 to November 15 incl.
6. The direct source of supply is 8 wells in Millard County.
7. The point or points of diversion See Explanatory

(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
If a dam and reservoir give height, capacity, and area inundated
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 See Explanatory

Total acres to be irrigated 82,358.69

Stockwatering (number and kind) 2025 CATTLE AND 50 HORSES

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

Other

- 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.)

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

13. The water will be used each year for:
 Irrigation..... from March 1 to November 15 incl.
 (purpose) (month) (day) (month) (day)
 Stockwatering..... from March 1 to November 15 incl.
 (purpose) (month) (day) (month) (day)
 and stored each year (if stored) from January 1 to December 31 incl.
 (month) (day) (month) (day)
14. It is now proposed to divert the water from..... 8 wells.....
 (i.e., spring, spring area, stream, river, drain, well, etc.)
 at a point(s) as follows:..... See explanatory
- (Wells located Along the Sevier River between Lynodyl and Delta)
- 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)
 See Explanatory
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.)
 See explanatory
 Irrigation
-Total acres to be irrigated..... 58,145.9.....
 but limited to the sole irrigation supply of Supplemental acres.
 Stockwatering (number and kind) 2025 CATTLE AND 50 HORSES.....
 Domestic (number of families and/or persons, etc.)
- Other
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.

EXPLANATORY

The following additional facts are set forth in order to define more clearly and completely the full purpose of the proposed change: This change is being filed to correct the original applications to make them conform to the proof. This change will also incorporate 0.65 cfs. of water that was assigned to Topaz and Brush Beryllium Companies and later re-assigned back to the DMAD companies.

The water is diverted from wells into the Sevier River and thence into either DMAD Reservoir or Gunnison-Bend Reservoir and re-diverted into the companies canals or ditches at the following points. (Continued on Supplemental Page 3)

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.

Paul L. Gillott
 Signature of Applicant

DMAD COMPANILS
AMENDATORY CHANGE APPLICATIONEXPLANATORY

Paragraph # 7:

- Appl. 28727 (68-475) North 774 feet and East 1920 feet from the SE Cor. Sec. 12, T15S, R5W
- Appl. 28729 (68-477) South 2923 feet and East 963 feet from the N $\frac{1}{4}$ Cor. Sec. 13, T15S, R5W
- Appl. 28730 (68-478) North 5429 feet and West 8100 feet from the SE Cor. Sec. 25, T15S, R5
- Appl. 28731 (68-479) North 531 feet and East 3023 feet from the NE Cor. Sec. 33, T15S, R5W
- Appl. 28732 (68-480) South 4532 feet from the N $\frac{1}{4}$ Cor. Sec. 33, T15S, R5W
- Appl. 28733 (68-481) South 10,704 feet and East 2100 feet from the N $\frac{1}{4}$ Cor. Sec. 33, T15S,
- Appl. 28734 (68-482) North 2102.2 feet and East 2405.9 feet from the NW Cor. Sec. 19, T16S,
- Appl. 28728 (68-476) South 3393 feet and East 1077.5 feet from the NW Cor. Sec. 19, T16S,
- Seg. Appl. 28733a (68-1809) South 10704 feet and East 2100 feet from the N $\frac{1}{4}$ Cor. Sec. 33
T15S, R5W
- Seg. Appl. 28727b (68-1810) North 774 feet and East 1920 feet from the SE Cor. Sec. 12, T1
R5W
- Seg. Appl. 28728b (68-1811) South 3393 feet and East 1077.5 feet from the NW Cor. Sec. 19,
T16S, R5W
- Seg. Appl. 28729b (68-1812) South 2923 feet and East 963 feet from the N $\frac{1}{4}$ Cor. Sec. 13,
T15S, R5W
- Seg. Appl. 28727aa (68-192b)⁷ (a) North 880.6 feet and ~~North~~ ^{West} 640 feet
- (b) North 1030.6 feet and West 640 feet. Both from the S $\frac{1}{4}$
Cor. Sec. 32, T15S, R5W, SLB&M.

Paragraph #4

- Parts of Sections 14 to 23 inclusive and 26 to 35 inclusive, T15S, R7W
- Parts of Sections 25, 34, 35 and 36, T15S, R8W
- Parts of all Sections in T16S, R7W
- Parts of all Sections in T16S, R8W
- Part of Section 31, T16S, R6W
- Parts of Sections 4, 8, 9, 16 and E $\frac{1}{2}$ of T17S, R8W, except Sections 34 and 35 -
- Parts of all Sections in T17S, R7W
- Parts of Sections 10, 15, 22, 27, 34 and W $\frac{1}{2}$ of T17S, R6W, except Sections 4 and 5 -
- Parts of Sections 3 to 8 inclusive T18S, R6W
- Parts of Sections 1 to 12 inclusive, 17 to 20 inclusive, T18S, R7W, SLB&M.

EXPLANATORY

DMAD COMPANIES
AMENDATORY CHANGE

Paragraph # 14:

- Well No. 2: North 5^o46' West 4566.1 feet from the SE Cor. Sec. 27, T16S, R6W ✓
Well No. 3: North 423.2 feet and East 152.2 feet from the SW Cor. Sec. 19, T15S, R4W ✓
Well No. 4: North 87^o51.5' East 2472.1 feet from the SW Cor. Sec. 23, T15S, R5W ✓
Well No. 5: North 79^o43' East 3056.2 feet from the SW Cor. Sec. 27, T15S, R5W ✓
Well No. 6: North 72^o24' East 2883.6 feet from the SW Cor. Sec. 33, T15S, R5W ✓
Well No. 7: South 38^o40' East 7514.6 feet from the SW Cor. Sec. 33, T15S, R5W ✓
Well No. 8: North 1677.4' and East 2376.9 feet from the SW Cor. Sec. 18, T16S, R5W ✓
Well No. 9: South 3527.3' and East 925.2 feet from the NW Cor. Sec. 19, T16S, R5W

Paragraph #15:

- Well No. 2: 20" Dia. 1200 feet deep
Well No. 3: 20" Dia. 875 feet deep
Well No. 4: 16" Dia. 1120 feet deep
Well No. 5: 20" Dia. 1197 feet deep
Well No. 6: 20" Dia. 1270 feet deep
Well No. 7: 20" Dia. 1265 feet deep
Well No. 8: 20" Dia. 1135 feet deep
Well No. 9: 16" Dia. 823 feet deep

Paragraph #17:

- Parts of Sections 29 to 33 inclusive, T15S, R7W
Parts of Sections 25, 26, 34, 35 and 36, T15S, R8W
Parts of Sections 26 and 31, T16S, R6W
Parts of Sections 2 to 24 inclusive, 27 to 36 inclusive, T16S, R7W
Parts of Sections 1, 2, 10, 11, 12, 13, 14, 15, 22 to 29 incl., 31, 32, 34, 35, 36, T16S,
Parts of Sections 6, 7, 8, 9, 16 to 22 incl; 27 to 34 incl. T17S, R6W
Parts of all Sections in T17S, R7W
Parts of Sections 1, 2, 3, 5, 9, to 14 incl. 15, 22, 23, 24, 25 26, T17S, R8W
Parts of Sections 4, 5, 6 and 7, T18S, R6W
Parts of Sections 1 to 12 incl., 16 to 20 incl, and 29, T18S, R7W
Parts of Sections 9 to 15 incl. and 24, T18S, R8W
All in SLB&M.

Explanatory Continued

OMAD Reservoir

(1) Canal "A" - North $55^{\circ}45' 40''$ East, 2,188.1 feet from the SW
 Cor. Sec. 26, T16S, R6W, SLB&M.

Gunnison-Bend Reservoir

(2) Warnick Ditch - North 3,710 feet and West 197 feet from the SE Cor.
 Sec. 15, T17S, R7W, SLB&M.

(3) High Line Canal - North 4,114 feet and East 2,167 feet from the SW Cor.
 Sec. 15, T17S, R7W, SLB&M.

(4) Low Line Canal - North 3,710 feet and East 2,538 feet from the SW Cor.
 Sec. 15, T17S, R7W, SLB&M.

(5) Abraham Canal - North 2308 feet and East 520 feet from the SW Cor.
 Sec. 10, T17S, R7W, SLB&M.

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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on this 8th day of January, 1982.


Secretary