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Gerald Moody et al v. Central Utah Water Co. et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GERALD MOODY, et al,

Plaintiffs and
Appellants,

vs.

CENTRAL UTAH WATER COMPANY,
et al,

Defendants and
Respondents.

Supreme Court No. 18057

BRIEF OF APPELLANT

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

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IN THE SUPREME COURT OF THE STATE OF UTAH

GERALD MOODY, ELAINE MOODY,
BERNARD JACKSON, NELLA JACK-
SON, FRED TURNER, ELAINE
TURNER, RAY BROWN, BETH
BROWN, CONRAD STANWORTH,
and NEREE STANWORTH, et al,

Plaintiffs and
Appellants

vs.

CENTRAL UTAH WATER COMPANY;
DEE C. HANSEN, State Engineer
of the State of Utah; THE
BOARD OF WATER RESOURCES OF
THE STATE OF UTAH; INTER-
MOUNTAIN POWER PROJECT, a
Utah Corporation; and INTER-
MOUNTAIN POWER AGENCY, a
governmental agency,

Defendants and
Respondents.

Supreme Court No. 18057

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

Application No. a-10927 (68 Area) was filed with the State Engineer to change the points of diversion, place and nature of use of part or all of the water rights of Central Utah Water Company set out in the Sevier River decree in the Sevier River, Lower Molen Spring, and storage rights in Sevier Bridge Reservoir and Fool Creek Reservoir. The applicants named in the application are Board of Water Resources and Central Utah Water Company.
(R. 5)

It is proposed to change an indefinite flow and quantity of water from irrigation and stockwater use to industrial use at the Intermountain Power Project (IPP). The company proposes to release portions of their water into the DMAD Reservoir and to convey such water by means of two 48-inch pipelines a distance of 11.2 miles to IPP for fully consumptive use year around, for cooling and industrial purposes. The remainder of the decreed water rights will be used for irrigation of 4,681.1 acres of land under the Upper Central Utah Canal or will be used to maintain the return flows of the Sevier River. (R. 14, 15) A copy of Application No. a-10927 is included in the Appendix. (R. 6 - 16)

Notice of the application was published, numerous protests were filed and a hearing was held. The applicant stated at the hearing that the Central Utah Water Company had agreed to sell 85% of its stock to IPP and the remaining stock would be used to compensate for loss of return flow to the river and for irrigation of land when water is available. The protestants contended that the return flow from use of irrigation water would no longer contribute to the flow of the Sevier River and the water rights of downstream users would be impaired. (R. 18, 19)

The defendant State Engineer approved the change application with the following comments and order:

"It is the opinion of the State Engineer that this application may be approved provided that compensation can be made to the lower user's for loss of return flow from the use of the water for irrigation purposes. Historically, it appears that from the studies which had been conducted thus far that approximately 15% of the water diverted for irrigation purposes has returned to the River as return flow which in part satisfy downstream rights. During low water years there will be little or no diversion into the canal under this change, with the major portion of the water being diverted to the Inter-mountain Power Project. During those low flood periods it will be necessary to release water to downstream users to compensate for return flow.

"It is, therefore, ORDERED and Change Application Number a-10927 (68 Area) is hereby APPROVED subject to prior rights and the following condition:

"1. That in order to maintain historical return flow, releases to the river will be made according to the following formula:

$$"REL = .15 (TA) - .35 (ID)$$

"WHERE:

"REL = Amount to be released

"TA = Total amount of water available to
CUWC

"ID = Amount of water diverted into CUWC's
canal for irrigation

"When REL in above formula equals zero or less no releases directly to the river to compensate for return flow need be made.

"It is not the intention of the State Engineer to adjudicate the rights of the CUWC, but rather to provide sufficient definition of the right to assure that other vested rights are not impaired by this change. Therefore, the formula $REL = .15 (TA) - .35 (ID)$ is interlocutory, and if subsequent studies or a Court decree - either in a review of this decision or in a subsequent action - adjudicates that this right is entitled to more or less water, the State Engineer will adjust the above condition accordingly."
(R. 18 - 20)

The protestants named as plaintiffs filed an action to review pursuant to Section 73-3-14, Utah Code Annotated, 1953, as amended, and the defendants answered the complaint presenting to the court the following factual issues, among others:

- 1) Whether the plaintiffs are owners of rights to the use of water in the Sevier River system.
 - 2) Whether the proposed change would impair the rights of other water users in the water sources involved.
 - 3) Whether the approval of the application would constitute an enlargement of the original rights sought to be changed.
- (R. 1 - 16, 30 - 33, 35 - 38, 40 - 44)

The defendants filed a motion for a summary judgment dismissing the case (R. 54, 55) and supported it by the affidavits

of experts to the effect that the change would not constitute an enlargement, but would benefit the protestants and would not result in a decrease of recharge into the underground basin and would not impair the rights of others. (R. 56 - 76) The plaintiffs filed an affidavit of an expert disputing the findings and conclusions set out in the affidavits of the defendants' experts, particularly as relates to the effect on recharge of the underground basin and on return flow and impairment of water rights. (R. 138 - 145, 168 - 175) The affidavits will be discussed in more detail in the argument portion of this brief.

The trial court made and entered an order and summary judgment granting the defendants' motion to dismiss, without formal findings of fact and conclusions of law, but stating generally in a recitation that the change application 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. This appeal was taken from the summary judgment so made and entered. (R. 227 - 230, 236, 237)

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 as above stated to the facts in this case. The motion for summary judgment is supported by the affidavits of experts, Reed W. Mower (R. 56-62) and Roger Walker (62-76). Mr. Mower stated with respect to Application No. a-10927 that the changes proposed will not reduce the natural recharges into the artesian aquifers of the Sevier Desert ground water basin. (R. 59, 60) He said nothing about plaintiffs' ownership of water rights or the enlargement issue based on increasing the time of the diversions from the irrigation season to year around.

Roger Walker's affidavit relates not only to Change Application No. a-10927, involved in this case, but to applications Nos. a-10862, a-10863, and a-10864 involved in other cases. With respect to No. a-10927, he states that it is his considered opinion that available water supply and diversion records amply support each and all of the findings of the state engineer (R. 70). He concludes in paragraph 14 that the benefits which will accrue to eighty percent of the shares of stock in the DMAD companies which were not sold to IPA, as set forth in the affidavit, "...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." (R. 74, 75)

Parley R. Neeley, plaintiffs' expert, states in his affidavit that the facts as set forth in the Mower affidavit are based on incomplete and out-of-date data, that they are inaccurate and are disputed. (R. 140). He states further that all year around water use and the changes proposed will have a net effect on the basin opposite to that set out in the Mower affidavit. Water levels will generally lower in elevation and all wells will be adversely affected. (R. 140 - 144, 168 - 175).

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 return flow, by affidavit, which 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. This would deprive the court of essential facts in considering whether there is reason to believe that a change in existing diversions may adversely affect the water rights of others.

The pleadings and conflicting affidavits of experts present genuine issues of material fact as to (1) ownership of water rights by plaintiffs which would be affected by the proposed change; (2) whether the change from seasonal irrigation use of water with return flow to industrial use from which there is no return flow constitutes an enlargement of the decreed water rights and (3) whether there is an impairment of vested water rights. These factual issues clearly require reversal of the case and remand for a full 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-10927 in the Appendix. It involves extensive surface water rights on a large river system and return flow problems. The state engineer's solution is based on preliminary tests and an appearance that "...approximately 15% of the water diverted for irrigation purposes has returned to the river as return flow which in part satisfy downstream rights." (R. 19) It is stated in his opinion that if subsequent studies or a court decree in review of this decision adjudicates that this right is entitled to more or less water, an adjustment will be made. It is stated that the formula used is interlocutory. (R. 20)

The matter is so involved, and the facts are so indefinite that the state engineer approved the application only conditionally. His statement that the tests and research were preliminary indicates that more tests and research will be undertaken and the statement that the decision is interlocutory and may be adjusted in a court decree indicates that the facts are not clear and complete.

It is very apparent that in view of the complexity of the water rights set out in the Sevier River decree, the problems of the extent and nature of return flow and its affect on downstream rights are not fully determined. 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 preliminary nature of the tests and research on return flow, and the conflicting statements of the experts, 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 important factual issues presented by a proposal to physically remove a large quantity of water from the river and to convey it to a new area where it would be fully consumed.

CONCLUSION

The statutory question as to whether the changes proposed by Application No. a-10927 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 an issue of fact and the issues are framed by the pleadings. The State Engineer stated that the tests and research on the crucial issue of historical return flow were merely 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 the merits.

Respectfully submitted,

SKEEN AND SKEEN

By:


E. J. SKEEN

Attorneys for Plaintiffs and

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 Sevier River Decree, pps. 191-193, 195-198, 202, 204
(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. a-1923 Cert. No. a-258

- The name of the applicant is Board of Water Resources and Central Utah Water Company.
- The post-office address of the applicant is c/o Phil Neilson, Lyndyl, Utah 84640.
- The flow of water which has been or was to have been used in second-feet is See Expl. (cont.).
- The quantity of water which has been or was to have been used in acre-feet is See Expl. (cont.).
- The water has been or was to have been used for and during periods as follows:
Irrigation from See Expl. (cont.) to See Expl. (cont.) incl.
 (purpose) (month) (day) (month) (day)
Stockwatering from January 1 to December 31 incl.
 (purpose) (month) (day) (month) (day)
 and stored each year (if stored) from January 1 to December 31 incl.
 (month) (day) (month) (day)
Sevier River and Lower Molen Spring in Juab and Millard Counties.
 (well, spring, stream, drain, river; if other explain)
- The point or points of diversion See 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.)

- Diversion works:
 If a well give diameter and depth None.
 If a dam and reservoir give height, capacity, and area inundated See Expl. - par. 8 (continued).
 If other give type of diversion facility See Explanatory - paragraph 8 (continued).
- 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 and stockwatering - The Sevier Decree does not specify the number of acres irrigated nor the number of livestock watered - See Expl. - par. 9 (continued)
 Total acres to be irrigated
 Stockwatering (number and kind)
 Domestic (number of families and/or persons, etc.) None
 Other None
- 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

- The flow of water to be changed in cubic feet per second is Same as paragraph 3.
- The quantity of water to be changed in acre-feet is Same as paragraph 4.

13. The water will be used each year for:

Irrigation (purpose) from March 1 (month) (day) to November 15 (month) (day) incl.
Industrial and stockwatering (purpose) from January 1 (month) (day) to December 31 (month) (day) incl.
and stored each year (if stored) from January 1 (month) (day) to December 31 (month) (day) incl.

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 - and additional point of diversion and
rediversion at DMAD Reservoir - as described in Explanatory - paragraph 14 (continued)

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 Expl. 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 4,683.10 acres as described under Explanatory - paragraph 17
(continued)

Total acres to be irrigated 4,683.1
but limited to the sole irrigation supply of 4,683.1 acres.

Stockwatering (number and kind)

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

Other Industrial purposes as described under Expl. - par. 17 (continued)

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. The water rights covered by this change application are 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 Co. v. West View Irrigation Co., et al., commonly known and referred to as the "Sevier River Decree" with page references to the printed copy thereof as follows, to-wit:

(See Explanatory - continued)

BOARD OF WATER RESOURCES

CENTRAL UTAH WATER COMPANY

By

Paul L. Heltz

Its Director

By

Phillip C. Nielson

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

Direct Flow Rights

- (1) 3.3 c.f.s. of Class "AA" - March 1 to October 1 - pps. 197, 198
- * (1) 18.7 c.f.s. of Class "A" - March 1 to October 1, p. 195
- (1) 12.5 c.f.s. of Class "C" - March 1 to October 1, p. 196
- (1) 5.8 c.f.s. of Class "E" - March 1 to October 1, p. 197
- (1) 4.3 c.f.s. of Class "F" - March 1 to October 1, p. 197
- 1,000 acre feet - Lower Molen Spring (Blue Spring) - March 15 to October 15, p. 204 - Certificate No. a-258
- (2) 51.1% of Application No. 1367A covering surplus water accruing to Sevier River below Sevier Bridge Reservoir from January 1 to December 31, inclusive - pps. 191, 192 - quantified in c.f.s. by Certificate No. 2391 (App. No. 1367-a) as 169.7 c.f.s. diversion from April 1 to September 30, inclusive.

Storage Rights - Sevier Bridge Reservoir

- 5% of new storage water up to 104,000 acre feet, p. 192
- 57% of storage water above 104,000 acre feet, p. 193
- 35.4% of Application No. 4562 - pps. 191, 192
- 3,000 acre feet of exchange water when total new storage for Sevier Bridge Reservoir and Piute Reservoir is 129,280 acre feet or less - page 202.
- 35.3% of exchange water when total storage for Sevier Bridge Reservoir and Piute Reservoir is above 129,280 acre feet - page 202.

Storage Rights - Fool Creek Reservoirs

- (2) 51.1% of Application No. 1367A covering surplus water accruing to Sevier River below Sevier Bridge Reservoir from January 1 to December 31, inclusive - pps. 191, 192 - quantified in acre feet by Certificate No. 2391 (App. No. 1367-a) as 19,333.2 acre feet for storage in Fool Creek Reservoir Nos. 1 and 2 from January 1 to December 31, inclusive, for release and delivery into Sevier River from June 1 to September 30, inclusive, at a maximum rate of 100 c.f.s. in exchange for like quantities of water concurrently diverted from Sevier River into Central Utah Water Company's main canal.

(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.

* The 18.7 c.f.s. consists of 12.4 c.f.s. awarded to Central Utah Water Company plus 6.3 c.f.s. out of the 12.1 c.f.s. awarded to Dover Irrigation Company conveyed to Central Utah Water Company.

(2) The 51.1% of Application No. 1367A after deducting Delta Canal Company's segregated portion under Application No. 1367A-1 is equivalent to 35.4% of Application No. 1367A before deducting said segregated portion.

Paragraph 3 (continued)

The primary rights as quantified in c.f.s. in the Sevier River Decree are 3.3 c.f.s. of Class "AA", 18.7 c.f.s. of Class "A", 12.5 c.f.s. of Class "C", 5.8 c.f.s. of Class "E" and 4.3 c.f.s. of Class "F" for a total of 44.6 c.f.s. from March 1 to October 1. The waters accruing to all of the foregoing primary water rights are stored in Sevier Bridge Reservoir.

The right from Lower Molen Spring (Blue Spring) is quantified in the Sevier River Decree as 1,000 acre feet from March 15 to October 15. The surplus direct flow right quantified in c.f.s. under Certificate No. 2391 is 169.7 c.f.s. from April 1 to September 30, inclusive, and a maximum of 100 c.f.s. from June 1 to September 30, inclusive, by exchange. The water accruing to the foregoing water rights are diverted by direct flow from the Sevier River into applicant's main canal

Paragraph 4 (continued)

The only primary right quantified in acre feet in the Sevier River Decree is 3,000 acre feet of exchange water. However, the Sevier River Decree does not quantify the total storage rights and it is impossible to do so since some of the water rights are stated in percentages of new storage water up to 104,000 acre feet, percentages of storage water above 104,000 acre feet and percentages of exchange waters when the total storage for Sevier Bridge Reservoir and Piute Reservoir is above 129,280 acre feet. Certificate No. 2391 quantifies the surplus storage right in Fool Creek Reservoir Nos. 1 and 2 as 19,333.2 acre feet.

Paragraph 5 (continued)

The periods of use vary under the various water rights set forth in the Sevier River Decree. However, some of the
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waters under all of the primary rights can be and are stored in Sevier Bridge Reservoir the water so stored can be withdrawn in such quantities as the necessities may require under the provisions of §73-3-20, U.C.A., 1953.

Paragraph 7 (continued)

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

- (1) Sevier Bridge Reservoir - South 25° - 35' East
972 feet from Southwest Corner, Section 1, Township 17 South,
Range 2 West, S.L.B. & M.
- (2) Fool Creek Reservoir No. 1 - North 84° - 35' West
1,116 feet from Southeast Corner, Section 1, Township 16
South, Range 5 West, S.L.B. & M.
- (3) Fool Creek Reservoir No. 2 - South 84° - 15' East
1,898 feet from East Quarter Corner, Section 11, Township 16
South, Range 5 West, S.L.B. & M.

The point of diversion from Sevier River into applicants' main canal which is also the point of rediversion of applicants' storage waters in Sevier Bridge Reservoir is situated North 2,385 feet and East 1,757 feet from Southwest Corner, Section 28, Township 14 South, Range 3 West, S.L.B. & M.

The point of return to Sevier River of applicants' storage waters in Fool Creek Reservoir Nos. 1 and 2, previously situated South 18° 30' West, 1,127 feet from Northeast Corner, Section 9, Township 16 South, Range 5 West, S.L.B. & M. (Cert. No. 2391) is now situated South 500 feet and East 400 feet from Northwest Corner, Section 10, Township 16 South, Range 5 West, S.L.B. & M.

Paragraph 8 (continued)

The diversion works, storage reservoirs and conveyance facilities are described as follows:

Sevier Bridge Reservoir

Height of impounding dam: 90 feet

Inundated area when full: 10,120 acres of land in Sections 1, 2, 3, 10, 11, 12, 13, 14, 15, 22, 23, 24, 25 and 26 of Township 18 South, Range 1 West; Sections 5, 6, 8, 9, 17, 16, 21, 28, 27, 34 and 35 in Township 17 South, Range 1 West; Sections 19, 30 and 31 in Township 16 South, Range 1 West; Sections 24, 25 and 36 in Township 16 South, Range 2 West, Section 1 in Township 17 South, Range 2 West.

Maximum safe capacity: 235,962 acre feet

Fool Creek Reservoir No. 1

Height of impounding dam: 20 feet

Inundated area when full: Approximately 1,551 acres of land in Section 31, Township 15 South, Range 4 West; Section 1, Township 16 South, Range 5 West; Sections 6 and 7, Township 16 South, Range 4 West; all S.L.B. & M.

Maximum safe capacity: 17,781 acre feet

Fool Creek Reservoir No. 2

Height of impounding dam: 18 feet

Inundated area when full: 651.5 acres of land in Sections 11, 12 and 13, Township 16 South, Range 5 West; Section 7, Township 16 South, Range 4 West; both S.L.B. & M.

Maximum safe capacity: 5,217 acre feet

The diversion works also include applicants' main diversion (or redirection) dam, main canal and tunnels and Lynndyl lateral and inverted syphon under Sevier River. The main canal extends from the main diversion dam to its terminus in Section 35, Township 20 South, Range 5 West, S.L.B. & M.

Paragraph 9 (continued)

There are numerous underground water rights from wells owned by applicants' stockholders in their individual capacities which are used on their own lands as a supplemental supply to their respective shares of the waters accruing under the water rights of applicants.

Paragraph 14 (continued)

The waters to be used for industrial purposes will be diverted and/or rediverted from Sevier River at the DMAD Reservoir impounding dam situated 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., and rediverted from DMAD Reservoir at a point South 1,880 feet and East 30 feet from Northwest corner, Section 25, Township 16 South, Range 6 West, S.L.B. & M.

Paragraph 15 (continued)

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

Paragraph 17 (continued)

IRRIGATION:

Township 14 South, Range 5 West, S.L.B. & M.

Parts of Sections 35 and 36.

Township 15 South, Range 3 West, S.L.B. & M.

Parts of Section 6.

Township 15 South, Range 4 West, S.L.B. & M.

All or parts of Sections 1, 8, 9, 10, 11,
12, 14, 15, 16, 17, 18, 19, 20, 29 and 30.

Township 15 South, Range 5 West, S.L.B. & M.

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

Township 16 South, Range 5 West, S.L.B. & M.

Part of Section 2.

INDUSTRIAL:

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 title is vested in Central Utah Water Company. This change application is filed at the instance and request of stockholders of the Central Utah Water Company who in their individual capacities have collectively committed themselves to the sale of 85% of the issued and outstanding stock owned by them 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" (Chapter 13, Title 11, U.C.A., 1953, as amended.)

The waters under the rights of Central Utah Water Company as hereinabove set forth, except under Certificate No. 2391, are stored in the Sevier Bridge Reservoir. The waters of the Lower Molen Spring (Blue Spring) discharge directly into the Sevier River below the Sevier Bridge Reservoir. However, such waters are credited to applicants as storage waters in Sevier Bridge Reservoir.

The waters under the rights of applicants stored in Sevier Bridge Reservoir are released on call into the natural channel of the Sevier River and are conveyed thereby a distance of 24 miles to applicants' diversion dam where said waters are rediverted into applicants' main canal and are conveyed thereby approximately three miles where distribution to stockholders of the Central Utah Water Company for irrigation purposes begins in Section 6, Township 15 South, Range 3 West, S.L.B. & M. The balance of the waters are conveyed by means

of applicants' main canal approximately eight miles where a part of the waters are distributed into the Lynndyl lateral in Section 18, Township 15 South, Range 3 West, S.L.B. & M., and are conveyed thereby and through an inverted syphon under the Sevier River and are distributed along its entire length and used for irrigation and stockwatering purposes. The waters remaining in the main canal are conveyed thereby approximately two miles to the Landis Check situated North 300 feet and East 3,200 feet from Southwest Corner, Section 20, Township 15 South, Range 4 West, S.L.B. & M. where part of such waters are discharged into an open channel and lateral and are distributed therefrom and used for irrigation and stockwatering purposes. The waters remaining in the main canal at the Landis Check are conveyed thereby in a general southerly direction and are distributed and used for irrigation and stockwatering purposes along its entire length to its terminus in Section 35, Township 20 South, Range 5 West, S.L.B. & M.

The surplus waters accruing to the Sevier River below Sevier Bridge Reservoir under applicants' rights evidenced by Certificate No. 2391 are diverted into applicants' main canal and are used by direct flow the same as described above or are conveyed by applicants' main canal to the Landis Check where said waters are discharged into an open channel and lateral and are conveyed thereby Southwesterly approximately 1½ miles to Fool Creek Reservoirs Nos. 1 and 2 for storage therein. The waters so stored are released and conveyed by open channel for delivery into the Sevier River at a point previously situated South 18° 30' West, 1,127 feet from Northeast corner, Section 9, Township 16 South, Range 5 West, S.L.B. & M., (Cert. No. 2391) and now situated South 500 feet and East 400 feet from Northwest corner, Section 10, Township 16 South, Range 5 West, S.L.B. & M., in exchange for like quantities of water concurrently diverted from Sevier River into applicants' main canal.

The purpose of this change application is to amend the water rights of applicants evidenced by the Sevier River Decree, as amended, to include the use of the waters for year-around industrial purposes by the Intermountain Power Agency at the proposed Intermountain Power Project as described in paragraph 17 herein. Under the proposed change, the waters under the rights of applicant will be diverted and stored the same as heretofore. The releases from storage, rediversions and uses for irrigation and stockwatering purposes 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 and excepting further that no water will be conveyed by means of applicants' main canal south of the Landis Check nor will any water be used from applicants' canal south of the Landis Check for any purpose unless waters accruing to the rights of applicants otherwise would be wasted into Sevier Lake. In such event the necessary temporary change applications will be filed to cover the use of such waters from applicants' main canal south of the Landis Check.

The waters to which the Intermountain Power Agency will be entitled as a stockholder of applicant Central Utah Water Company which are stored in Sevier Bridge Reservoir will be released at the call of Intermountain Power Agency or may be held over in storage for release in subsequent years at its direction to provide for the continued operation of the Intermountain Power Project. The waters so released at the call of the Intermountain Power Agency will be conveyed by means of the natural channel of the Sevier River and will bypass applicants' main diversion dam and will be conveyed to the DMAD Reservoir and comingled therein with other waters of the Sevier River to which Intermountain Power Agency will be entitled as a stockholder in the Delta Canal Company,

Abraham Irrigation Company, Melville Irrigation Company, Deseret Irrigation Company, and under a portion of a separate decreed right (Cropper) covered by similar change applications to be filed.

The waters to which Intermountain Power Agency will be entitled as a stockholder of applicant Central Utah Water Company which are stored in Fool Creek Reservoirs Nos. 1 and 2 under Certificate No. 2391 may be released at the call of the Intermountain Power Agency and will be conveyed by open channel and delivered into Sevier River at the point of return hereinabove described. The waters so returned will be conveyed by means of the natural channel of the Sevier River approximately six miles to the DMAD Reservoir and will be comingled therein with other waters of the Sevier River to which Intermountain Power Agency will be entitled as hereinabove described.

The waters so comingled will be rediverted year-around at the direction of the Intermountain Power Agency from the DMAD Reservoir at the point of redirection as described in paragraph 14 herein. The redirection 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 waters 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 water so comingled will be used year-around for industrial purposes by the Intermountain Power Agency at the Intermountain Power Project as described

The 15% of remaining stock of applicant Central Utah Water Company not acquired by Intermountain Power Agency shall remain obligated in accordance with the agreements of sale between the selling shareholders of applicant and Intermountain Power Agency to compensate for any reductions from loss of return flows to the Sevier River or other appropriated waters which might result from the changes covered by this change application.

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

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:

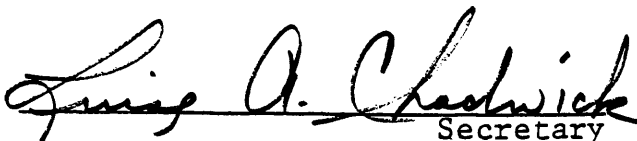
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on this 6th day of January, 1982.


Secretary