

BEFORE THE STATE ENGINEER OF THE STATE OF UTAH

IN THE MATTER OF CHANGE APPLICATION)
)
NUMBER 55-7981 (a15217))

MEMORANDUM DECISION

Change Application Number 55-7981 (a15217) was filed by Midway City Corporation on August 11, 1989, to change the point of diversion, place and nature of use of 265.44 acre-feet of water as evidenced by ownership of 56 shares of stock in Midway Irrigation Company. Heretofore, the water has been diverted from the Provo River at a point North 1000 feet and East 180 feet from the SW Corner of Section 18, T3S, R5E, SLB&M and used for the irrigation of 56.0 acres of land.

It is proposed to divert the 265.44 acre-feet of water from a 12-inch diameter well, 400 feet deep located South 250 feet and East 600 feet from the NW Corner of Section 27, T3S, R4E, SLB&M. On the application it is stated that 168.0 acre-feet of water will be consumed and 95.2 acre-feet of water will be returned. It is proposed to use the water year-round for municipal uses within the service area of Midway City. It is also stated that the water will be stored in the Midway Culinary Water Tank that has a maximum capacity of 2.455 acre-feet of water.

The application was advertised in the Wasatch Wave from August 23, 1989 until September 6, 1989. Protests were received from Provo Water Users' Association, Bureau of Reclamation, Midway Irrigation Company, Emer Wilson, Island Ditch Water Company, Mountain Spaa Resort, Division of Parks and Recreation and David Wilson.

The issues raised in the written protests are summarized as follows:

- 1) The proposed change would cause problems in distribution of water in the area.
- 2) There are other existing rights in the area that will be adversely affected.
- 3) There are two sources for Midway Irrigation Company, namely, the Snake and Pine Creek water and the Provo River water. These waters serve two different areas. The change that is proposed will utilize shares of water that are based on both sources of water and used in both areas.
- 4) The proposed change would be an enlargement of water rights due to changing from the irrigation season to year-round use.
- 5) The applicant does not have the right to file the change, the owner of the underlying right, Midway Irrigation Company, should file the change.
- 6) Paragraph 116 of the Provo River Decree prohibits such a change due to seepage or drainage being diverted away from the channel of the river or canals, or from the lands theretofore irrigated.

Midway City submitted a written response to the protests along with two reports from S. Bryce Montgomery, Geologist, regarding the new well site. In summary the response states:

- 1) The new well will not affect upgradient springs.
- 2) Thermal water will not be disturbed, the City is seeking shallow cold water.
- 3) Midway City owns stock in the irrigation company and by virtue of ownership of stock owns a vested portion of the company and has the right to file a change application.
- 4) The change as proposed by Midway City will not be an enlargement of the water right because the water has been used in the area for irrigation and the city proposes to use the water for municipal purposes causing an increase in return flow to downstream users.
- 5) Distribution of the waters in the area should not be not be a problem.
- 6) The water proposed to be diverted by the well is tributary to Provo River, hence, Provo River water rights are those upon which the change is based.
- 7) The well is proposed to be located at a point where water can be taken from Quaternary alluvium and Pennsylvanian Weber Quartzite aquifers which are down-gradient from the aquifer from which Gerber, Mahogany and Epperson Springs issue. Any water that the proposed well would have the potential of diverting would have already been spilled from these springs.
- 8) The potential does exist of affecting wells and springs south of the Dutch Hollow Fault within the Midway City area.

A hearing was held November 29, 1989, at the Wasatch County Courthouse in Heber City, Utah. At the hearing the applicant explained the need for the water and stated that Midway City would only be diverting 168 acre-feet of the 265.44 acre-feet of water. The applicant also stated that limiting the application to the irrigation season was not an acceptable option. The well site is down gradient and separated by faults from the springs in the area.

The protestants stated their concerns about potential impairment and problems of distribution of waters in Midway Irrigation Company. The proposed location is on Utah State Parks property and the State Parks is not willing, nor could they allow the City to utilize property for that purpose. Provo River Water Users' Association stated that this stems from the policy of recognizing share holders to file a change application. The control is then removed from the Company to the shareholder, which is not the jurisdiction of the State Engineer. The burden of proof to show that existing rights will not be impaired rests with the applicant, which the applicant has not done.

Correspondence from Midway City was received on January 18, 1990, stating to relieve some of the concern of the protestants, they wished to change the period of use to the irrigation season only, however, communication with Mayor Reed Bezzant indicated that they would like to go year-round if possible.

It is the opinion of the State Engineer that ownership of shares in an irrigation company entitles the stockholder to divert and use water; consequently, a stockholder meets the criteria of Section 73-3-3 Utah Code which allows "any person entitled to the use of water" to file a change application. The applicant should be able to utilize the 168.0 acre-feet of water that was actually available for irrigation heretofore. 168.0 acre-feet of water is the extent of water considered by the State Engineer.

It appears that the applicant is proposing to divert the amount of water that would have been available at the farm field headgate under ownership of the 56 shares of stock in Midway Irrigation Company. This amount was quantified at 3.0 acre-feet per acre. Under historic flood irrigation practice, an estimated 50 percent of the water diverted or 84 acre-feet of water would have been consumptively used. In evaluating the proposed uses of the applicant, it is estimated that only 20% of the water diverted by the applicant from the well will become available to downstream users, hence, the applicant will be limited to 62% of the water available at the farm field headgate, or a maximum of 105.0 acre-feet of water to allow for the same amount of return flow to downstream users that has historically occurred.

Because the applicant will not increase the consumptive use of water over historic uses and because of the location of the well, it is the opinion of the State Engineer that year-round diversion of water from the well should not impair the rights of downstream users.

The issue of rights-of-way and/or easements are not an issue before the State Engineer, however, the applicant is cautioned that granting of a water right in no way grants any right-of-way and the applicant is responsible for obtaining all necessary rights-of-way and/or easements.

After review of the issues and the geohydrology of the area, it is the opinion of the State Engineer that this change can be approved without impairing existing rights provided certain conditions are imposed; however, the State Engineer will require a pump test to be performed on the well and after evaluating the results of the pump test, may restrict withdrawal and/or place other conditions that he deems necessary under this application.

It is, therefore, ORDERED and Change Application Number 55-7981 (a15217) is hereby APPROVED subject to all prior rights and the following conditions:

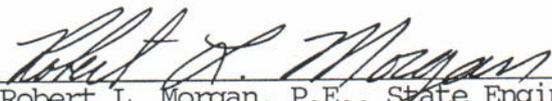
1. No more water shall be diverted annually under this change application than the applicant is entitled to through ownership of 56 shares of stock in the Midway Irrigation Company. The applicant shall maintain ownership of the 56 shares of stock, pay the assessment to the Midway Irrigation Company, and meet any other obligations which may be incurred as a shareholder in the Company.

2. The applicant shall install a permanent totalizing water meter on his water system to measure the water diverted from the well, and the meter shall be available for inspection by the State Engineer and at all reasonable times as may be required by the duly appointed Provo River Commissioner and/or the authorized water master involved in the distribution of water for the Midway Irrigation Company in regulating this change application. The total quantity of water diverted annually as evidenced by this totalizing meter shall be reported by the Provo River Commissioner in his annual report to the State Engineer.
3. At the time of submittal of proof of permanent change, the applicant shall include a description of the land taken out of irrigation that was formerly irrigated by the applicant's 56 shares of water in the Midway Irrigation Company.
4. Any additional costs incurred by the Provo River Commissioner in the administration of this change application shall be borne by the applicant. The amount of such costs shall be determined by the River Commissioner and/or the State Engineer.
5. Midway City or Midway Irrigation Company, based on Midway City's shares, shall release to the natural channel up to 168.0 acre-feet of water depending on the water available based on the 56 shares of stock. The balance of the 265.44 acre-feet of water under the application is considered to be losses in the Midway Irrigation system. The releases of water shall be measured by the applicant by means of a weir, flume or other measuring device.
6. Midway City will only be able to divert from the well 62.5% of the amount released as outlined in Condition Number 5 above. This equates to 105.0 acre-feet if 168.0 acre-feet are released. This water may be diverted from the well on a year-round basis. On November 1st of each year a determination will be made by the river commissioner as to the amount of water released by the applicant to determine the quantity of water that may be diverted by the applicant from the well during the following 12 months.
7. A pump test of the well shall be conducted by a licensed professional engineer of the applicant's choice and at the applicant's expense prior to the well being placed in production. Prior to the pump test being conducted, a plan shall be submitted to and approved by the State Engineer. Following the pump test, the State Engineer may reevaluate this change or add additional conditions that he deems necessary.

8. The location of the points of release of the water to the natural channel must be approved by the State Engineer and the river commissioner prior to making this change.
9. Once the total system is in place (the well drilled and a plan for the water to be released), the applicant must contact the duly appointed river commissioner to conduct an on-site inspection of the facilities (the meter on the well, the measuring device for the water released and the place of release) to ensure that the exchange can be made without impacting other rights.

This Decision is subject to the provisions of Rule R625-6-17 of the Division of Water Rights and to Sections 63-46b-13 and 73-3-14 of the Utah Code Annotated, 1953, which provide for filing either a Request for Reconsideration with the State Engineer or an appeal with the appropriate District Court. A Request for Reconsideration must be filed with the State Engineer within 20 days of the date of this Decision. However, a Request for Reconsideration is not a prerequisite to filing a court appeal. A court appeal must be filed within 30 days after the date of this Decision, or if a Request for Reconsideration has been filed, within 30 days after the date the Request for Reconsideration is denied. A Request for Reconsideration is considered denied when no action is taken 20 days after the Request is filed.

Dated this 23rd day of February, 1990.


Robert L. Morgan, P.E., State Engineer

RLM:JER:ap

Mailed a copy of the foregoing Memorandum Decision this 23rd day of February, 1990 to:

Midway City Corporation
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Midway, UT 84049

David Wilson
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Midway, UT 84049

Provo Water Users' Association
c/o Marc T. Wangsgard
P.O. Box 45000
Salt Lake City, UT 84145

Mountain Spaa Resort
c/o Linda Payne-Pritchett
800 North Mountain Spaa Lane
Midway, UT 84049

U.S. Bureau of Reclamation
c/o P. Kirt Carpenter
P.O. Box 51338
Provo, UT 84605

Division of Parks & Recreation
c/o Martin L VanRoosendall
1636 West North Temple
Salt Lake City, UT 84116

Midway Irrigation Company
c/o Harold Call
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Heber City, UT 84032

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Stanley H. Roberts, Jr.
River Commissioner
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Lee Sim
Distribution Directing Engineer

By:


Robin Campbell, Secretary