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IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY
 STATE OF UTAH

CENTRAL UTAH WATER CONSERVANCY)	
DISTRICT, a body politic and)	
PROVO RIVER WATER USERS)	MEMORANDUM IN SUPPORT OF
ASSOCIATION)	MOTION TO COMPEL DISCOVERY
Plaintiffs)	
vs.)	Civil No. 5472
	(consolidated)
DEE C. HANSEN and JEFF D.)	
KIMBALL)	
Defendants)	

STATEMENT OF FACTS

On or about May 27, 1980, Plaintiffs mailed Interrogatories and a Document Demand to Ellen Maycock, Attorney for Defendants Kimball, Peets, Korfonta, Rose, Anderson, O'Toele and Farrell at 620 Kearns Building, Salt Lake City, Utah 84101.

Defendants responded to the Interrogatories and Document Demand on or about July 25, 1980. However, in so responding, Defendants objected to answering Interrogatories Nos. 1, 2 and 5 on the grounds that the information sought was not relevant or material in the case and not calculated to lead to the discovery of admissible evidence. Defendants also failed to produce any of the documents requested in the Document Demand.

The consolidated cases in this action essentially request a review of actions by the Office of the State Engineer in approving seven different applications to appropriate .015 cfs of water from seven wells in close proximity to one another in a subdivision in the Heber City area.

Point 1. The Requested Discovery is Relevant and Material to
the Issues Raised in this Case.

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ATTORNEY GENERAL
 NATURAL RESOURCE AGENCIES

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Over the past few years, the State Engineer has developed a policy or a policy has evolved, of granting isolated .015 well applications for domestic purposes even where all the water in a river basin is fully appropriated. This policy appears to have been followed in this case notwithstanding the fact that the Provo River and its tributaries (both surface and underground) are, in fact, fully appropriated except during extreme high water in random years. The policy has not been heretofore extended to subdivisions and land development projects.

The applications in question here are for domestic wells and each is for .015 c.f.s. The Plaintiffs assert that the wells drilled as contemplated by the applications will intercept ground water which is tributary to the Provo River. The Provo River was decreed in the early 1920s. The entire river was divided into three divisions, and there were 19 classes, with the first class being the earliest right, and the 19th class being high water rights. All of the rights decreed under the Provo River Decree would have priorities earlier than 1921. The Plaintiffs will offer evidence which will show that every year, after extreme high water, the river is placed under regulation, and the high water rights with 1921 or earlier priorities decreed under the Provo River Decree will be curtailed, and that by July and August, only the earliest rights receive water under their priorities.

Beyond the rights decreed in the Provo River Decree, there are numerous other filings, including the filing for the Deer Creek Reservoir and the filing for the Central Utah Project, all of which are prior to the rights covered by the applications at issue here. Plaintiffs will contend that there is no unappropriated water in the Provo River system in Heber Valley, and that except during random years, and then only during high water, there will not even be water available for the Central Utah Project from the Provo River under its priorities (which are earlier than the applications here at issue), but occasionally there is. Thus, the filings made by the applicants here involved seek to

appropriate water for a single family home in a fully appropriated river basin. The applications contemplate a year around water supply and a year around use. Plaintiff District asserts that it will not be economically feasible to develop a domestic supply for a home if the water is only available during extreme high water in random years.

The State Engineer has, however, developed some kind of a policy for approving isolated domestic filings in a fully appropriated basin (on the basis that such an isolated filing has only a de minimis effect), but the policy has never been extended and applied so as to permit a land developer to subdivide a large tract of land and develop a water supply for the individual lots through having the several purchasers each file for an individual well.

In this case, the Plaintiffs assert that a subdivision, which includes some 320 acres of land, has been subdivided into 64 lots by a land developer. One Brent C. Hill, or some group or entity of which Brent C. Hill is a principal, owns a large number of those lots. Plaintiffs want to know whether the individual applicants are bona fide purchasers of lots, or whether they are a part of the development or ownership group, either as investors or employees, or agents thereof. The interrogatories which the applicants have refused to answer ask about this. Plaintiffs do not believe that applicants fit the policy of the State Engineer in approving isolated domestic filings in a fully appropriated basin, in any event. They are not isolated, but are concentrated in one area, and if the applications here filed were to be upheld, there will be many other filings made on other lots in this same subdivision. There are also other lots which have been heretofore approved by Wasatch County, which are in a like situation. The cumulative effect of these filings is substantial, and the interference with the rights of the Plaintiffs will be substantial. Thus, even if the individual applicants are bona fide purchasers of the lots and are not acting in concert

with the developers or owners of a block of lots within the subdivision, to circumvent and pervert the State policy on isolated filings, the applications should not have been approved. However, the case becomes much stronger if they are a part of or are acting in concert with the developers of the subdivision or the owners of a large block of lots within the subdivision. The State Engineer has no policy and the law does not permit someone to develop a 320 acre tract by a new appropriation of ground water in a fully appropriated basin. The effect is not de minimis, the hardship which may come from a complete closing of the basin to isolated filings is not present, and there is no reason why the developer shouldn't do what all developers generally do, and that is to acquire a water right by purchase, and drill his well under a change application. The drilling of a well for a large number of homes, or the drilling of individual wells for a large number of homes simply encroaches upon the vested rights. It is clear under the cases that the new applicant cannot encroach at all. See Piute Reservoir and Irrigation Co. v West Panguitch Irrigation and Reservoir Co., 13 Ut.2d 6, 367 P.2d 855 (1962).

Plaintiffs believe that an effort is being made under these applications to acquire a water right for a subdivision in a fully appropriated river basin by having the agents, employees, servants, and investors in the land promotion file individual well applications. In short, we do not believe that the State Engineer's policy is in accordance with the law, although we have never protested on behalf of the Plaintiff District the isolated domestic well. If these applications fit that policy, it would present one problem--(Is the policy permitted by the law?); however, if they are acting in concert with the developer or owner of a large number of lots, they don't even fit the policy, and we then don't need to reach the question of whether the policy fits the law. The Interrogatories they have refused to answer will reveal whether or not they are several bona fide individual purchasers

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of lots unconnected with the developer or owner of many lots, except by reason of the purchase, or whether they are part of a scheme on the part of the developer or owner of many lots, to obtain the water for a 320 acre subdivision or a substantial portion of it.

Plaintiffs assert that there are in the upper reaches of every stream in the State of Utah thousands of acres of land which have no water rights. Much of these lands are suitable for summer homes, or permanent homes, but there is no unappropriated water to provide a year around supply. The Central Utah Project contemplates the use through storage of the extreme high water in numerous streams along the entire south face of the Uinta Mountains and including the Provo River. The Project is a billion dollar project, designed to provide storage and conveyance facilities to appropriate all of the unappropriated water, including even the extreme high water available only in random years. If hundreds of homes are permitted to acquire water rights on head waters of these streams, it will impair the project, and the effect will not be de minimis, but we believe that this case goes beyond the isolated filing, and that the applicants here named were in fact the employees and associates of the land developer or an owner of numerous lots in the subdivision and that they are engaged in subterfuge calculated to bring a 320 acre subdivision under the policy of the State Engineer of approving isolated domestic filings, and the Interrogatories served are calculated to find out if this is so. It is relevant and material, and they should be compelled to answer.

Agree but isn't that use of

We do not by the above argument concede that the State Engineer has the right to develop a policy which will permit even isolated appropriations in a fully appropriated basin. We believe that the State Engineer's authority is absolutely controlled by Sec. 73-3-8, U.C.A., 1953, as amended, and that he cannot, over the protest of existing water users, approve hundreds of individual domestic filings, which have the cumulative effect of taking

significant amounts of water already appropriated by others. The State Engineer appears to be following the policy of permitting individual isolated filings, but denying the application of a land developer new water for a subdivision. We thus do have two situations: First, can a land developer who owns 320 acres of land, or an owner of a large block of lots within a 320 acre subdivision, which is absolutely dry, appropriate water in a fully appropriated basin for his subdivision or portion thereof? If these applicants are acting in concert with the land developer or owner of numerous lots, that is the issue presented here. If, on the other hand, they are bona fide purchasers, not connected with the land developer, or owner of numerous lots, then we still have the question of whether their individual applications can be approved in a fully appropriated basin over the protest of the owner of senior rights. We are entitled to know which situation confronts us here, and the refusal of the applicants to answer the Interrogatories on the grounds that the material requested is irrelevant is not justified. For this reason, Plaintiffs seek an Order compelling the answer.

Companion Interrogatories to the State Engineer which have been heretofore served will determine whether or not he has any kind of formalized policy in regard to these isolated domestic filings. The pattern of his approvals, including the approval of these applications, indicates that he does. If he does, we have two contentions. One is that his policy, if it is out of harmony with Sec. 73-3-8, is illegal. We don't believe that a single land developer or owner of numerous lots, or his employees, servants, agents, or associates can do what the applicants collectively appear to be doing here, and that is to develop a water right for a subdivision or a portion of it through numerous individual filings made in a fully appropriated basin.

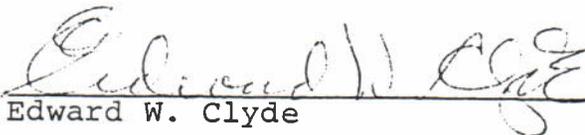
We have no doubt that the evidence will show that the Provo River Basin is fully appropriated during normal and dry years even before the filings for the Central Utah Project. For decades, the river has been placed

on regulation after high water. Even rights with priorities 50 or 60 years ahead of the instant filings are curtailed because there isn't enough water. However, in random years, there was occasional high water not needed by existing rights. The evidence will show that there are storage rights in the Provo River for both Deer Creek and in Utah Lake, but in random years these are filled, and the water spilled into the Jordan River. The Central Utah Project, however, covers even this extreme high water during random years and proposes to store the water in the Jordanelle Reservoir. The Jordanelle Reservoir will also store the winter flows of the Provo, which now are stored in Utah Lake, and this storage will occur under exchange arrangements, with water being released to Utah Lake from the Strawberry Reservoir. It thus becomes possible for the Central Utah Project to store and beneficially use the extreme high water available only in random years, because that water is tied to the entire development of reservoirs and aqueducts extending along the south flank of the Uintah Mountains and Heber Valley to Roosevelt. However, even this water is not now available to the instant applications, because it has been filed on by the Central Utah Project, and Plaintiffs will contend and believe they can show that the basin is fully appropriated even during extreme high water in the wettest of years. If, however, water were available several days in an occasional year, it is not economically feasible for an individual house to be dependent upon such an occasional supply. As the lots in the subdivision are sold and individual houses are built, it is absolutely certain that the homes will endeavor to use water year around, and during nearly all of the year, they will be encroaching upon the vested rights of others. We submit that it is in the public interest to have this matter stopped at the land development stage, rather than through quiet title actions after innocent purchasers have acquired their lots and built their homes, and we submit that it is relevant whether these applicants are acting in concert with or as agent for the

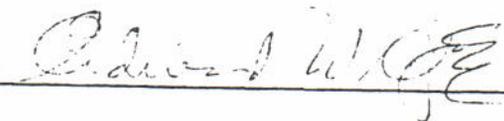
developer or owner of numerous lots, or whether they are bona fide purchasers who might conceivably fit the State Engineer's policy of approving applications of this type for isolated homes. If they fall in the latter class, then the issue here will be the validity of the State's policy.

They should be compelled to answer.

Dated this 3 day of October, 1980.


Edward W. Clyde

I certify that I mailed a copy of the foregoing Memorandum in Support of Plaintiff's Motion to Compel Discovery to Mr. Joseph Novak, Attorney for Plaintiff Provo River Water Users Association, 520 Continental Bank Building, Salt Lake City, Utah 84101; Mr. Dallin W. Jensen and Michael M. Quealy, Assistants Attorney General, Attorneys for Defendant Dee C. Hansen, 301 Empire Building, 231 E. 4th South, Salt Lake City, Utah 84111 and to Ms. Ellen Maycock of Cruse, Landa, Zimmerman & Maycock, Attorneys for Defendants Kimball, Peets, Korfonta, Rose, Anderson, O'Toele and Farrell at 620 Kearns Building, Salt Lake City, Utah 84101 this 3 day of October, 1980.


Edward W. Clyde