9-11-1984

7 Utes Corp. v. District Court of Eighth Judicial Dist.

SUPREME COURT, STATE OF COLORADO

Case No. 84SA333

ORIGINAL PROCEEDING, DISTRICT COURT NO. 84CV4

REPLY BRIEF OF PETITIONER

---

7 UTES CORP., a Colorado corporation,

Petitioner,

vs.

THE DISTRICT COURT IN AND FOR THE EIGHTH JUDICIAL DISTRICT (JACKSON COUNTY, COLORADO); HON. JOHN A. PRICE, on of the Judges thereof; and STATE BOARD OF LAND COMMISSIONERS; ROWENA ROGERS, WM. H. CLAIRE, and TOMMY NEAL, as members of and constituting the State Board of Land Commissioners; ANTHONY SABATINI; LARNED A. WATERMAN; 7 UTES RESOLT LTD., a Colorado corporation; MELVIN A. WOLF; HARRY WOLF; STATE BOARD OF AGRICULTURE; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON,

Respondents.

The Petitioner, 7 UTES CORP., respectfully submits this brief in reply to the answer of certain Respondents to the Order and Rule to Show Cause with Stay issued in the above-captioned matter:

STATEMENT OF THE CASE

In the opinion of the Petitioner, the facts, the nature of the case, the course of proceedings, and its disposition in the Jackson County District Court are adequately stated in the Petition under its "Introduction" and "The Nature of the Action by the District Court Below".

SUMMARY OF ARGUMENT

I. Rule 98(a), Colorado Rules of Civil Procedure, clearly provides:

> "All actions affecting real property . . . shall be tried in the county in which the subject of the action, or a substantial part thereof is situated."

The action in the Court below is an action in rem, affecting specific property in Jackson County, Colorado, described with particularity on Exhibit 3 of the Petition, with the Petitioner (Plaintiff below) claiming a right to possession and use of said property. Clearly, Rule 98(a) mandates that this action be tried in Jackson County, where said real property is situated.

II. Rule 98(b)(2) provides that an action against a public officer or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who by his command, or in his aid, does anything touching the duties of such officer, or failure to perform any act or duty which he is by law required to perform, shall be tried in the county where the claim, or some part thereof, arose.

a. The attorney general has pointed out that the Supreme Court has construed said rule as meaning "the county in which the public body has its official residence and from which any action by the board pursuant to the injunction (or, presumably, any other action) must emanate".

b. The attorney general fails to take into consideration:

1. There are three different public officials, or public bodies, in this action, to which Rule 98(b)(2) would be applicable: the State Board of Land Commissioners, the State Board of Agriculture, and the Board of County Commissioners of the County of Jackson;

2. Because each of said public bodies has its official residence in a different county, and because action by each of said public bodies emanates from a different county, the original action might have been commenced in Denver County, Jackson County, or Larimer County;

3. By reason of the fact that the real property which is the subject matter of this action and which will be affected by this action is in Jackson County, Rule 98(a) mandates that the action be brought and tried in Jackson County.

III. None of the other Defendants, each of whom has a substantial, present interest which would be affected by the declaration requested in the lower Court, have joined in the motion for change of venue, or consented thereto, and the motion, therefore, should have been denied.

IV. The Respondents, in the answer filed with this Honorable Court, have failed to show cause why the relief requested in the prayer of the Petition on file herein should not be granted.

A STATEMENT OF THE ISSUES

The only issues before the Court in this matter are as follows:

1. Have the Respondents failed to show cause why the relief requested in the prayer of the Petition before the Court should not be granted?

2. Where an action affects real property, is it mandatory that said action be tried in the county where the subject of the action is situated?

3. When a rule or statute mandates that an action be brought in several different counties, may said action be brought in any such county, with the choice of place of trial resting with the plaintiff?

4. Where there are two or more defendants in an action, may the place of trial (venue) be changed if a motion for change of venue is not made by or with the consent of all defendants?

ARGUMENT

I. The Respondents have failed to show cause why the relief requested in the prayer of the Petition on file herein should not be granted, because:

A. The Respondents seem to argue that this is not "an action in rem". If the principal action is an action "affecting real property", Rule 98(a), Colorado Rules of Civil Procedure, is applicable because said rule provides:

> "All actions affecting real property . . . shall be tried in the county in which the subject of the action or a substantial part thereof, is situated."

Our Colorado Courts have clearly defined "an action affecting real

property, and if there is an issue as to title, lien, injury, quality or possession of specific real property, the action is one "affecting real property".

In Craft vs. Stumpf, 115 Colo. 181, 170 P.2d 779, 780 (1946), our Court said:

> "It is urged that this is an action 'affecting property' which under Rule 98(a) should be tried in the county where located. That section, which combines former code sections 25 and 26, has to do with actions affecting specific property and does not control in an action in which there is not issue as to title, lien, injury, quality or possession, but which is concerned only with the recovery of the purchase price."

Certainly, in the present action, as is shown in the Petition before this Court, and in the Complaint before the lower Court, the Respondent (Plaintiff) is claiming a right to possession and use of particular, specific property, located in Jackson County, Colorado.

Whether an action relating to possession of real property is an action "affecting real property" was further settled and determined in Gordon Inv. Co., et al. vs. Jones, 123 Colo. 253, 227 P.2d 336, 339 (1951), when our Colorado Supreme Court clearly determined that an action to recover possession of real estate is an action "affecting real property", in the following language:

> "Venue of the action is controlled by Rule 98(a), Rules of Civil Procedure, which provides that all actions 'affecting property . . . shall be tried in the county in which the subject of the action, or a substantial part thereof, is situated.' An action which

> is brought to recover possession of real estate, upon the ground that covenants of a lease thereon have been violated, is an action 'affecting' real estate and is properly brought in the county in which the said real estate is situated." (Citing Jameson vs. District Court, 115 Colo. 298, 172 P.2d 449.)

Clearly, in the instant case, the Plaintiff's right to possession of specific property under a lease is at issue, and, accordingly, there can be no question but that this is an action "in rem".

B. The Complaint on file in this action alleges facts showing that this action is an action in rem, "affecting real property".

1. Said Complaint alleges:

> "2. The Plaintiff is entitled to a lease from the State Board of Land Commissioners leasing the real property identified on Ex. 3, attached hereto and incorporated herein, which real property is the subject matter of this action, and the Plaintiff claims an interest in said property described on Ex. 3 . . ."

2. Allegation 31 contains the following allegations:

> "31. Said Special Use Permit 45-F contains many ambiguities and questions of construction which require determination, and which require this Honorable Court to declare the rights, status, or other legal relations as may be affected thereunder by parties to this action including, without limitation, the following:
>
> A. Determination of the 'permit' area;
> . . .
>
> C. Determination of uses permitted;

D. Construction of uses that would be incompatible with the uses permitted under said Special Use Permit 45-F;

E. Construction of the right of the Land Board to prevent reasonable use, or improvement, of the permit area by failing to approve and consent to any such use and improvement."

3. The prayer in the Third Claim for Relief of said Complaint requests an order of Court:

"B. Determining that the Land Board and those Defendants comprising its membership and staff, are estopped to deny that the Plaintiff is entitled to a reasonable lease, which lease shall permit the development, operation, and management of a destination, year-round recreational facility; . . ."

The entire Complaint on file in the lower Court, attached to the Petition on file herein, shows that the Plaintiff is claiming a right to a lease of, and to possession of, specific real property, and that, by reason of such entitlement, the action before the Court is an action "affecting real property".

C. The Hon. John A. Price, in the hearing on June 29, 1984, on the Motion for Change of Venue, by his Order, found, among other things:

". . . In this case it is not necessarily a matter of discretion of the trial court because of Rule 98(a) and Rule 98(b)(2), the latter having been interpreted by the Supreme Court, I think in the Eagle County case, which the court immediately, as far as land goes, would differentiate from this case because of the fact that it was really a matter not involving the possession of the land or lease, it involved that land to an extent as to who was to control its regulation, as I recall." (Order dated June 29, 1984 - page 3, lines 18 through 25, and page 4, lines 1 through 3).

Judge Price further held:

> ". . . In this case we have Rule 98(a), which the Court is of the opinion is applicable; . . ." (page 4, lines 11, 12)

There is little doubt but that - the answer of the Respondents to the contrary notwithstanding - the present action is an action, in rem, in which the Plaintiff (Petitioner) is claiming an interest in specific real property in Jackson County, and is claiming the right to possession and use of said property; therefore, this is an action in rem "affecting specific property".

II. The Respondents have further failed to show cause why the relief requested in the prayer of the Petition should not be granted because the answer filed by said Respondents states simply that "Rule 98(j) should not apply (underlining added) to request for change of venue under C.R.C.P. Rules 98(a) or (b)(2)". In concluding that said Rule 98(j) should not apply, the Respondents completely disregard not only the mandatory language of Rule 98(j), but also the decisions of the Colorado Supreme Court concerning its application.

A. Respondents state that said rule should apply only to "discretionary" changes of venue, and not "mandatory" changes. The rule makes no such provision. Said rule states:

> "Where there are two or more plaintiffs or defendants, the place of trial shall not be changed unless the motion is made by or with the consent of all the plaintiffs or defendants, as the case may be."

The rule clearly applies to all requests for changes of the place of trial where there are two or more plaintiffs or defendants. In the instant case, there are several Defendants, all of whom are parties Defendant to this action, and none of whom (other than the Respondents, State Board of Land Commissioners, its members and personnel) have consented to the change of venue.

B. The Respondents state that it is unreasonable to obtain the consent of named Defendants who had not been served at the time that the Motion for Change of Venue was filed. The Board of County Commissioners of Jackson County had been served prior to the filing of said Motion for Change of Venue, and all of the Defendants had been served prior to the hearing on said motion on June 29, 1984. None of said Defendants have filed consents to said motion, as shown by the certificate of the Clerk of the Jackson County District Court, attached as Exhibit 4 to the Petition on file in this action.

C. In stating that Rule 98(j) should not apply in the instant case, the Respondents' answer takes the position that other Defendants had not been served at the time the Motion for Change of Venue was filed (and that, presumably, they were not parties to this action at that time). Attached to this brief is a photostatic copy of a Motion for Extension of Time filed by the Board of County Commissioners of Jackson County and an Order granting such extension of time, dated May 24, 1984, and May 25, 1984, respectively. By said Motion for Extension of Time, the

Board of County Commissioners of Jackson County entered its appearance and requested additional time within which to file an answer or other responsive pleading. By said motion, the Defendant, the Board of County Commissioners of the County of Jackson, certainly, consented to the jurisdiction of the Jackson County District Court.

D. In addition to the Motion for Change of Venue, and Order, above referred to, the Defendants, 7 Utes Resort Ltd., Melvin L. Wolf, and Harry L. Wolf, have filed their answer to the allegations of the Complaint in the original proceeding, a copy of which was mailed to the parties to this proceeding and is attached hereto as Exhibit B.

It should be particularly noted that, among other things, paragraphs 15 and 16 of the Complaint are admitted. Said paragraphs 15 and 16 allege the interest of said Defendants in the declaration requested by the Petition, in the following language:

> "15. The Defendant, 7 Utes Resort Ltd., has or claims and interest which would be affected by the declaration and construction hereinafter requested in this action.
>
> 16. The Defendants, Melvin L. Wolf and Harry Wolf, are officers, directors, and stockholders of 7 Utes Resort Ltd., and, as such, have or claim an interest which would be affected by the declaration and construction hereinafter requested in this action."

No matter to what extent the Respondents, State Board of Land Commissioners, its members and personnel, take the position that the "other Defendants" have no interest which would be affected by the declaration requested in the Complaint, the Complaint alleges

that said parties have such interest, and said Defendants admit such interest. The Respondents, certainly, are not in a position to claim that the other Defendants have no real, substantial, or present interest in said declaration.

E. No pleading has been filed in the lower Court by the State Board of Agriculture because, on June 13, 1984, the office of Attorney General, representing said State Board of Agriculture directed a letter to the attorney for the Petitioner herein (7 Utes Corp.) requesting additional time to respond in behalf of said State Board of Agriculture. On June 20, 1984, the attorney for the Petitioner (Donald M. Lesher) in writing agreed that no default would be taken against the Board of Agriculture until after said Defendant had been given ten days written notice requesting responsive pleading. By said correspondence, no mention was made of any request for change of venue, nor was any objection stated to the jurisdiction of the Jackson County District Court.

F. Whether the request for change of venue is based upon mandatory, or discretionary, rules, any order requiring the transfer of the case from Jackson County, Colorado, to Denver County, Colorado, will affect, and apply to, <u>each</u> Defendant in this action, and would require each of said Defendants to submit to other jurisdictions. Accordingly, it is just and reasonable to conclude that Rule 98(j) applies to any motion for change of venue where there are more than one Defendants, as is the case in this action. In the event that it was intended that said Rule 98(j) should apply

only to discretionary changes of venue, the rule would have been so written. To determine otherwise is contrary to the language of the rule and, as a matter of fact, contrary to the decisions of our Supreme Court, as will be hereinafter shown.

III. The Respondents have failed to show cause why the relief requested in the prayer of said Petition should not be granted because they claim that naming other parties to said action constitutes a misjoinder.

A. Respondents disregard the requirements of Rule 57(j) which provides:

> "When declaratory relief is sought, all persons shall be made parties (underlining added) who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding."

The joinder of all parties who might claim an interest which would be affected by the declaratory judgment is mandatory; to omit any of said persons might well be fatal to the proceeding and, certainly, any such declaratory judgment would have no effect whatsoever on the rights of any persons not parties to the proceeding.

B. For the Respondent, Board of Land Commissioners, to take the position that the other Defendants are not "parties in interest" is in direct conflict to the letter from Jackson County, signed by each member of the Board of County Commissioners of Jackson County, dated September 9, 1983, and attached to the Petition herein as Ex. 7.

By said letter, the Colorado Board of Land Commissioners was advised by the Board of County Commissioners of Jackson County, as follows:

> ". . . It is our sincere hope that the uses authorized in your lease to 7 Utes Corporation will be compatible with and limited to the uses authorized in our special use permit. 7 Utes Corporation has in the past indicated that it would eventually pursue downhill skiing (with mechanical lifts) on 7 Utes Mountain. If properly planned and financed, a downhill ski area could be beneficial to the economy of Jackson County.
>
> A project of the magnitude of a downhill ski area is obviously going to require a lot of time and effort from the Board of Land Commissioners and the Board of County Commissioners of Jackson County to ensure that it is done properly. We would be willing to meet with members of your board and staff, as well as with all interested developers, as soon as possible, to discuss our mutual interests, local concerns and statutory responsibilities.
>
> As you know, Jackson County has developed and prepared a joint review process for major developments such as a downhill ski area. This inter-governmental review process is intended to provide a complete planning program that coordinates and combines requirements of the county, the land board, and other state and federal agencies. With proper planning, financing, and commitment of time, it may be possible to realize a downhill ski area that could be an asset to Jackson County and the State of Colorado as well . . ."

In taking the position that none of the Defendants other than the State Board of Land Commissioners, its members and personnel, are parties in interest (and, accordingly, are misjoined), the Respondent, State Board of Land Commissioners, is disregarding

the advise, direction, and request specifically given to the Land Board by the Board of County Commissioners of Jackson County.

There can be no question but that said Board of County Commissioners have or claim an interest which would be affected by the declaration.

C. As has previously been shown in this brief, the Defendants, 7 Utes Resort Ltd., Melvin A. Wolf, and Harry Wolf, have admitted, in their answer, that said Defendants have or claim an interest which would be affected by the declaration and construction requested in the Complaint before the lower Court.

It, certainly, cannot be said that the joinder of said parties is improper and that said parties do not have an interest in the declaration requested.

D. In the Complaint which is before the Court as Exhibit 1, allegations have been made in paragraphs 14, 15, 16, 17, 18, 19, 20, and 21, alleging that each of the other Defendants has or claims an interest which would be affected by the declaration and construction hereinafter requested in this action. Until a Court of competent jurisdiction determines that any of said parties does not have a present, substantial interest in the declaration, all of said parties remain mandatory parties under Rule 57(j) and, in claiming that none of said parties are parties in interest and are misjoined, the Respondents have grossly failed to show cause why the relief requested in the prayer of said Petition should not be granted.

IV. The Respondents have failed, in any particular, to address the real issues before this Court.

A. The only issues before the Court are whether or not an action may be brought in any proper county where a rule or statute mandates that such action may be brought in several different counties, and if the choice of such jurisdictions rests with the Plaintiff; whether the place of trial (venue) may be changed, where there are two or more defendants in an action, if the motion for change of venue is not made by or with the consent of all defendants; and whether, in action affecting real property, jurisdiction is proper in the county where the subject of the action is located. In the present proceeding, it has been shown that said proceeding is an action in rem affecting real property.

Judge Price, in his Order (page 4, lines 11 and 12) specifically determined that Rule 98(a) is applicable. In other words, Judge Price found that this was an action affecting possession of real property in the County of Jackson. If for no other reason, the action must be tried, under Rule 98(a), in the county where the real property which is the subject of the action is situated.

Rule 98(a), Colorado Rules of Civil Procedure, provides:

> "All actions affecting real property . . . shall be tried in the county in which the subject of the action, or a substantial part thereof, is situated."

The real property which is the subject of the action being located in Jackson County, Colorado, it is mandatory, under said rule, that the action shall be tried in Jackson County. The Dis-

trict Court, therefore, exceeded its jurisdiction in granting change of venue and, accordingly, the relief requested in the prayer of the Petition on file herein should be granted, and made absolute.

B. When a rule or statute provides that an action may be brought in several different counties, such action may be brought in any such county, any one jurisdiction being proper, and the choice of the place of trial rests with the Plaintiff.

In the present action, three public bodies are Defendants, with the action of each such body emanating from a different county. Because the State Board of Land Commissioners is a party Defendant, the base action may be tried in Denver County which is the home office of said Defendant; because the State Board of Agriculture is a Defendant, the base action may be tried in Larimer County, from which actions of the State Board of Agriculture emanate (although said Board of Agriculture also maintains an office in the City and County of Denver); because the Board of County Commissioners of the County of Jackson is a party, the base action may be tried in Jackson County which is, certainly, the "official residence" of the Board of County Commissioners of the County of Jackson. Each of said counties (Denver, Larimer, and Jackson) may, under the provisions of Rule 98(b)(2), be a proper place of venue in the present action; because Rule 98(a) mandates that the action be brought in Jackson County, and because there appear to be several proper counties of jurisdiction, any one jurisdiction is proper, and the choice of place of trial rests with the Plaintiff. Accordingly, granting the

motion for change of venue by the District Court was improper, and the relief requested in the prayer of the Petition on file herein should be granted and made absolute.

Our Colorado Court, in Smith vs. Huber, 666 P.2d 1122 (Colo. App. 1983), has clearly determined that, where more than one county is a proper place for trial, the Plaintiff may select the jurisdiction, as follows:

> "Generally, when there is more than one proper place of venue, the choice of place of trial rests with the plaintiff. And where an action is originally brought in a proper county, a change of venue should not ordinarily be granted." (Citing Welborn vs. Bucci, 95 Colo. 478, 37 P.2d 399 (1934); Progressive Mutual Insurance Co. vs. Mihoover, 87 Colo. 64, 284 P. 1025 (1930).)

The case of Progressive Mutual Insurance Co. vs. Mihoover, 87 Colo. 64, 284 P. 1025 (1930), cited by the Court in Smith vs. Huber, clearly states the rule in an instance where more than one county is a proper place of venue, as follows:

> "Either county was the proper one, and from neither can a change of venue be properly granted." (Citing Denver and RGRR Co. vs. Cahill, 8 Colo. App. 158, 162, 45 P. 285; Brewer vs. Gordon, 27 Colo. 111, 113, 59 P. 404, 83 Am. St. Rep. 45; Chutkow vs. Wagman, etc., 80 Colo 11, 13, 248 P. 1014; Enyart vs. Orr, et al., 78 Colo 6, 10, 238 P. 29.)

As recited in the Petition in this matter, such rule has become so general as to have been stated in 92 C.J.S. (Venue) Section 54, Page 761, as follows:

> "Under a statute providing that suits against public officers must be brought in the county in which the officer or one of several offi-

> cers, holds his office, if the cause of action is against public officers in different counties, the suit may be brought in either county."

For the above reasons, the action in the lower Court was properly commenced in Jackson County, at the election of the Plaintiff, and a change of venue cannot properly be granted from said Jackson County; the relief requested in the prayer of the Petition should be granted and said rule should be made absolute.

C. Where there are two or more defendants in an action, the place of trial (venue) may not be changed if the motion for change of venue is not made by or with the consent of all the defendants. Not only must the motion for change of venue be made by or with the consent of all of the defendants, but also any appearance in the lower Court by any of said other defendants constitutes acquiescence of said defendant to the jurisdiction of said Court.

Rule 98(j) clearly provides:

> "Where there are two or more plaintiffs or defendants, the place of trial shall not be changed (underlining added) unless the motion is made by or with the consent of all the plaintiffs or defendants, as the case may be."

It should be noted that said Rule 98(j) prohibits any change of venue unless the motion is consented to by all of the plaintiffs or defendants, as the case may be.

In this case none of the Defendants other than the State Board of Land Commissioners, its members and personnel, joined in, or consented to, the Motion for Change of Venue, as has been heretofore shown.

Even though the Respondents' answer takes the position that the "other defendants" are not real parties in interest and are misjoined, it is clear that each of said Defendants claims a substantial, present interest in the declaration requested by the Complaint:

1. The Board of County Commissioners of Jackson County has entered its appearance in the lower Court, requesting an extension of time, and has, thus, consented to the jurisdiction of the Jackson County District Court; in addition, the letter of the Board of County Commissioners to the Board of Land Commissioners, dated September 9, 1983, clearly expresses an interest in the matters to which the request for declaratory judgment is directed;

2. The Defendants, 7 Utes Resort Ltd., Melvin A. Wolf, and Harry Wolf, have filed their answer admitting their claim;

3. The State Board of Agriculture has, by stipulation, agreed to an extension of time to file responsive pleadings in the Jackson County District Court and has expressed no objection to the jurisdiction of said Court. In addition, the State Board of Agriculture did not join in or file any consent to the Motion for Change of Venue.

The Colorado Supreme Court, in 1948, in an action where jurisdiction of the Court had been selected because the action affected real property and, accordingly, was brought in the county where the real property was located (rather than the county of the

of the Defendants' residence) (Kirchhoff vs. Sheets, et al., 118 Colo. 244, 194 P.2d 320 (1948)) held as follows after citing Rule 98(j) in full:

> "Consent as used in the statute, supra, is not a mere acquiescence. It 'is not a vacant or neutral attitude . . . it is affirmative in its nature' DeKlyn vs. Gould, 165 N.Y. 282, 59 N.E. 95, 97, 80 Am. St. Rep. 719. The coal company's statement that so far as it was concerned the venue was 'immaterial', did not constitute consent, and the trial court was right in overruling the motion."

It should be noted that, in such case, the motion for change of venue was based upon mandatory provisions of Rule 98(a).

As recently as April 9, 1984, the Colorado Supreme Court in Howard vs. District Court, County of Jefferson, 678 P.2d 1020 (April 9, 1984), has further construed Rule 98(j) in determining its effect on motions for change of venue under mandatory provisions of Rule 98 (Rule 98(c)(1)) in the following language:

> "This rule (C.R.C.P. 98(j)) states: 'Where there are two or more plaintiffs or defendants, the place of trial shall not be changed unless the motion is made by or with the consent of all the plaintiffs or defendants, as the case may be'.
>
> Under this rule all of the defendants must agree to the requested change of venue. Here, Sombrero and Mantle by filing an answer to the complaint have clearly demonstrated their acquiescence in the choice of venue by the petitioner. There action forecloses any favorable consideration of the request Sheraton and Ski-Time for change of venue pursuant to C.R.C.P. 98(c)(1)." (See Kirchhoff vs Sheets, 118 Colo. 244, 194 P.2d 320 (1948). See also Board of County Commissioners vs. District Court, 632 P.2d 1017 (Colo. 1981).)

In the Howard vs. District Court case, this Supreme Court

clearly stated that any favorable consideration of a motion for change of venue - even though based upon mandatory provisions of Rule 98 - is foreclosed if an answer to the complaint is filed demonstrating the acquiescence of any of the defendants to the choice of venue by the petitioner. In this case, the Board of County Commissioners of Jackson County have filed an appearance in the lower Court and requested an extension of time to file responsive pleadings; three of the Defendants (7 Utes Resort Ltd., Melvin A. Wolf, and Harry Wolf) have filed an answer admitting an interest which would be affected by the declaration and construction requested in said action; the State Board of Agriculture has stipulated to an extension of time for the filing of responsive pleadings and has not joined in the Motion for Change of Venue.

Each of said actions constitutes an acquiescence in the choice of venue by the Petitioner.

All of the Defendants accordingly have not agreed to the requested change of venue and, accordingly, any favorable request for change of venue pursuant to C.R.C.P. 98(b)(2) or under any other provision of Rule 98, is foreclosed, and the relief requested in the prayer of the Petition on file herein should be granted and made absolute.

CONCLUSION

The Respondents have failed to show cause why the relief requested in the prayer of the Petition on file herein should not be granted because:

1. It is Respondents' position that the action before the Jackson County District Court is not an action in rem, whereas, in fact, the Plaintiff in said action is claiming an interest, and a right to possession, of specific property in Jackson County, Colorado, and the lower Court so held;

2. The Respondents have failed to show cause why the relief requested in the Petition should not be granted because the Respondents' claim that Rule 98(j) should not apply is contrary to the language of the rule, and contrary to determinations by this Court as to the mandatory character of said rule;

3. The Respondents have failed to show cause why the relief requested in the Petition should not be granted because the Respondents' claim that all Defendants other than the State Board of Land Commissioners are not parties in interest and are misjoined is contrary to the provisions of Rule 57(j), and to the facts, and to the pleadings filed by said parties;

4. The Respondents fail to address the real issues which are:

a. If an action affects real property is it proper that said action be tried in the county where the subject of the action is situated?

b. When a rule or statute mandates that an action may be brought in several different counties, may said action be brought any such county, and does the choice of place of trial rest with the plaintiff?

c. When there are two or more defendants in an action (as is here the case), may the place of trial (venue) be changed if the motion is not made by or with the consent of all the defendants?

The granting of change of venue by the lower Court was in excess of its jurisdiction and contrary to law. The relief requested in the prayer of the Petition on file in this action should be granted, and the rule to show cause should be made absolute.

Respectfully submitted,

KNIGHT AND LESHER, P.C.

By Donald M. Lesher

Donald M. Lesher, No. 2510
3201 East 2nd Avenue
Suite 300
Denver, Colorado 80206
(303) 321-2929
ATTORNEYS FOR PETITIONER

CERTIFICATE OF MAILING

I hereby certify that, on the 11th day of September, 1984, I mailed a copy of the foregoing Reply Brief of Petitioner by depositing true copies thereof in the United States mail, postage prepaid, addressed to the following:

District Court in and for the
Eighth Judicial District
(Jackson County, Colorado)
P. O. Box 308
Walden, Colorado 80480

Hon. John A. Price
District Court
Larimer County Courthouse
P. O. Box 2066
Fort Collins, Colorado 80521

Patricia Blizzard
Assistant Attorney General
1525 Sherman Street
3rd Floor
Denver, Colorado 80203

Hasler and Fonfara
Clifford P. Harbour
1250 South Howes Street
Suite 650
Fort Collins, Colorado 80522

Milton R. Larson
Assistant Attorney General
1525 Sherman Street
3rd Floor
Denver, Colorado 80203

Jeffery B. Stalder
717 Seventeenth Street
Suite 2900
Denver, Colorado 80202

Daniel J, Kaup
P. O. Box 1100
Walden, Colorado 80480

Jean Susan Cogar

APPENDIX

EXHIBIT A

DISTRICT COURT, JACKSON COUNTY, COLORADO

Action No. 84 CV 4

ORDER GRANTING EXTENSION OF TIME IN WHICH TO FILE AN ANSWER OR OTHER RESPONSIVE PLEADING

---

7 UTES CORPORATION, a Colorado Corporation,

Plaintiff,

vs.

STATE BOARD OF LAND COMMISSIONERS; ROWENA ROGERS, WM. H. CLAIRE, and TOMMY NEAL, as members of and constituting the State Board of Land Commissioners; ANTHONY SABATINI; LARNED A. WATERMAN; 7 UTES RESORT LTD., a Colorado Corporation; MELVIN L. WOLF; HARRY WOLF; STATE BOARD OF AGRICULTURE; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON,

Defendants.

THE COURT, having considered the within Motion and being otherwise fully advised in the premises, hereby grants Defendant's, Board of County Commissioners of Jackson County, Colorado, Motion for Extension of Time in which to file an Answer or other responsive pleading;

IT IS HEREBY ORDERED, that the Defendant, Board of County Commissioners of Jackson County, Colorado, shall file an Answer or other responsive pleading within twenty (20) days after the date of any Court order granting or denying Plaintiff's Motion for Preliminary Injunction.

DONE AND SIGNED this 25th day of May, 1984.

BY THE COURT:

John A. Price
District Judge

DISTRICT COURT
COUNTY OF JACKSON
STATE OF COLORADO

Action No. 84 CV 4

MOTION FOR
EXTENSION OF TIME

---

7 UTES CORPORATION, a Colorado Corporation,

Plaintiff,

vs.

STATE BOARD OF LAND COMMISSIONERS; ROWENA ROGERS, WM. H. CLAIRE, and TOMMY NEAL, as members of and constituting the State Board of Land Commissioners; ANTHONY SABATINI; LARNED A. WATERMAN; 7 UTES RESORT LTD., a Colorado Corporation; MELVIN L. WOLF; HARRY WOLF; STATE BOARD OF AGRICULTURE; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON,

Defendants.

COMES NOW, the Board of County Commissioners of Jackson County, Colorado, one of the Defendants herein, by and through its attorney of record, DANIEL J. KAUP, and respectfully moves this Court for an Order extending the time period in which to file an Answer or other responsive pleading, and as grounds therefore states as follows:

1. That at this time the Defendant, Board of County Commissioners of Jackson County, Colorado, must file an Answer or other responsive pleading on or before May 28, 1984.

2. That the Plaintiff has filed a Motion for Preliminary Injunction against the Defendant, State Board of Land Commissioners, which was initially set for hearing on May 25, 1984, but has been continued until June 29, 1984.

3. That any decision by this Court regarding the granting or denial of said Motion for Preliminary Injunction may influence or affect the form and content of the Answer or other responsive pleading which the Defendant, Board of County Commissioners of Jackson County, Colorado, may file herein.

4. That Donald M. Lesher, attorney for Plaintiff, has been informed by the undersigned of the filing of this Motion and that Mr. Lesher has stated to the undersigned that he has no objection to the granting of said Motion.

WHEREFORE, the Defendant, Board of County Commissioners of Jackson County, Colorado, hereby requests an Extension of Time in which to file an Answer or other responsive pleading through and including twenty (20)

days after the date of any Court order granting or denying the Motion for Preliminary Injunction.

DATED THIS 24th day of May, 1984.

Daniel J. Kaup (#8345)
Attorney for Board of County Commissioners
of Jackson County, Colorado
P.O. Box 1100
Walden, Colorado 80480
Telephone: (303) 723-4691

Defendant's Address:

P.O. Box 337
Walden, Colorado 80480

EXHIBIT B

DISTRICT COURT, JACKSON COUNTY, COLORADO

CASE NO. 84CV4

ANSWER

---

7 UTES CORP., a Colorado corporation,

Plaintiff,

vs.

STATE BOARD OF LAND COMMISSIONERS; ROWENA ROGERS, WM. H. CLAIRE and TOMMY NEAL, as members of and constituting the State Board of Land Commissioners; ANTHONY SABATINI; LARNED A. WATERMAN; 7 UTES RESORT LTD., a Colorado corporation; MELVIN L. WOLF; HARRY WOLF; STATE BOARD OF AGRICULTURE; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON,

Defendants.

COME NOW the above-named Defendants, 7 Utes Resort Ltd., a Colorado corporation, Melvin L. Wolf and Harry Wolf ("the Defendants"), by and through their attorneys, HASLER AND FONFARA, and for their Answer to the Plaintiff's Complaint, state and allege as follows:

I. ANSWER TO GENERAL ALLEGATIONS

1. The Defendants are without sufficient information or belief to admit or deny the allegations contained in paragraphs 1, 2, 7, 8, 11, 12, 13, 17, 18, 19, 22, 23, 24, 25, 26 and 27 and, therefore, deny the same.

2. The Defendants admit the allegations contained in paragraphs 3, 4, 5, 6, 9, 10, 15, 16, 20 and 21.

3. With respect to paragraph 14, the Defendants state that the Defendant 7 Utes Resort Ltd. is the assignee under certain State Leases affecting real property which adjoins and abuts the real property described on Exhibit "3" to the Plaintiff's Complaint. The Defendants deny the remaining allegations contained in said paragraph 14.

II. ANSWER TO FIRST CLAIM FOR RELIEF

1. With respect to paragraph 28, the Defendants incorporate herein by reference their responses to paragraphs 1 through 27 of the Plaintiff's General Allegations.

2. The Defendants are without sufficient information or belief to admit or deny the allegations contained in paragraphs 29, 30, 33, 34 and 35 and, therefore, deny the same.

3. The Defendants admit the allegations contained in paragraph 31.

4. With respect to paragraphs 32 and 36, the Defendants note the requests made by the Plaintiff to the Court with respect to the issues and matters contained in paragraphs 32 and 36, but deny any allegations contained in the same.

III. ANSWER TO PLAINTIFF'S SECOND, THIRD AND FOURTH CLAIMS FOR RELIEF

1. The Defendants note that the Plaintiff's Second, Third and Fourth Claims for Relief do not assert any claims against the Defendants. The Defendants deny any and all allegations contained in said claims.

IV. AFFIRMATIVE DEFENSES

1. That the Plaintiff's Complaint fails to state a claim against the Defendants upon which relief may be granted.

2. That the Defendant 7 Utes Resort Ltd. claims an interest in and to certain real property ("the Defendant's Property"), which is adjacent or adjoining to real property which is the subject of Special Use Permit 45-F issued by the State Board of Land Commissioners. The Defendant's Property is approximately one hundred (100) acres in size and has not been surveyed. The Defendant 7 Utes Resort Ltd. claims an interest and right in and to the Defendant's Property pursuant to certain state leases, permits, and other rights granted to it by the State Board of Land Commissioners which are prior and superior to any interest of the Plaintiff in the Defendant's Property.

3. That upon information and belief, the Lease which the Plaintiff seeks to obtain from the State Board of Land Commissioners may conflict with the interest of the Defendants. To the extent that the Plaintiff seeks a lease which does conflict with the interests of the Defendants, the Defendants maintain that they have a prior and superior right to utilize the

Defendant's Property in accordance with the previously negotiated state leases regarding the same.

V. RESERVATION OF COUNTERCLAIMS AND CROSSCLAIMS

The Defendants herein expressly reserve any and all counterclaims or crossclaims which they may have against the parties to this litigation as discovery in this action discloses the existence of the same.

WHEREFORE, having fully answered the Plaintiff's Complaint and offered Affirmative Defenses thereto, the Defendants pray for an Order from the Court dismissing the Plaintiff's claim for relief against them with prejudice; for an Order from the Court adjudicating the rights of the parties hereto pursuant to Rule 57 of the Colorado Rules of Civil Procedure; for their costs; and for such other and further relief as the Court deems proper.

Respectfully submitted this 12th day of July, 1984.

HASLER AND FONFARA

By _____
Clifford P. Harbour, No. 11307
Attorneys for Defendants
125 South Howes, Suite 650
Post Office Box 2023
Fort Collins, Colorado 80522
Telephone: (303) 493-5070

Defendant Melvin L. Wolf's Address:
Post Office Box 886
Loveland, Colorado 80537

Defendant Harry Wolf's Address:
900 Greenfield Court
Fort Collins, Colorado 80524

Defendant 7 Utes Resort Ltd.'s Address:
Box 117
Walden, Colorado 80480

CERTIFICATE OF MAILING

I hereby certify that on this 12th day of July, 1984, a true and correct copy of the foregoing Answer has been placed in an

envelope, postage prepaid, and deposited in a United States depository, addressed to the following:

Donald Lesher, Esq.
3201 East 2nd Avenue, Suite 300
Denver, Colorado 80206

Patricia Blizzard, Esq.
1525 Sherman Street
Denver, Colorado 80203

Daniel Kaup
Post Office Box 1100
Walden, Colorado 80480

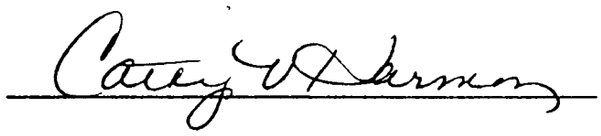

TABLE OF AUTHORITIES

Cases:

Rules of Civil Procedure:

TABLE OF CONTENTS