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November 20, 1991

Gunnison Irrigation
c/o Eugene Jensen
200 West Jensen Lane
Centerfield, Utah 84622

Re: Review of Water Rights

Gentlemen:

Pursuant to your request, we have examined your water rights in light of a question raised by the State Engineer regarding a competing right belonging to the Gunnison/Fayette Canal Company.

As a preface to examining the competing rights, we have set forth certain basic principles established in the *Cox Decree* which is the controlling document.

PLACE OF MEASUREMENT

The *Cox Decree* provides, ". . . all waters herein decreed shall be and are hereby placed upon headgate duty, and the place of measurement of all waters herein decreed shall be as near the point of diversion as is practicable."¹

FULL SATISFACTION OF PRIOR RIGHTS

The *Cox Decree* further provides, ". . . all waters shall be measured to the owners and the users thereof as of their respective dates of priority so that each user or owner of the waters herein decreed shall be assured that his right will be satisfied in full before any subsequent appropriators shall receive any water whatever."²

1

Cox Decree, Page 230. Photocopy of selected pages attached as Exhibit "A".

2

Cox Decree, Page 230.

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GUNNISON'S RIGHT TO DIVERT AND USE

Exclusive of the Highland Canal Company rights, which were the subject of a prior lawsuit,³ the Gunnison Irrigation Company (hereafter Gunnison) is the owner of several rights to divert and use waters of the Sanpitch River and its tributaries. Its rights include those initially decreed and others which it has subsequently acquired. The rights vary during different periods of the irrigation season. While most of the rights commence on April 1st, the maximum right is achieved during the period following May 1st. Its rights for the period beginning on that date, the priority and origin are as follows:

- a. 145 c.f.s., 1860 priority, Gunnison Irrigation Company⁴
- b. 1 c.f.s., 1860 priority, Gunnison Irrigation Company (Morrison Tunnel)⁵
- c. 2.1518 c.f.s., 1860 priority, Gunnison Irrigation Company (Nine Mile Creek)⁶
- d. 2.5 c.f.s., 1860 priority,⁷ Gunnison Irrigation Company (domestic and stock water)
- e. .98 c.f.s., 1860 priority, Gunnison Irrigation Company.⁸
- f. .75 c.f.s., 1862 priority, Charles R. Peterson⁹
- g. 1.25 c.f.s., 1864 priority, Joseph Christensen¹⁰

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Gunnison/Fayette Canal vs. Gunnison Irrigation Co., 448 P.2d 707 (Utah 1968).

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Cox Decree, Page 176.

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Cox Decree, Page 176.

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Cox Decree, Page 176.

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Cox Decree, Page 177.

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Cox Decree, Page 169.

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Cox Decree, Page 178. Acquired by Gunnison during or about 1955.

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Cox Decree, Page 178. Acquired by Gunnison during or about 1955.

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- h. .50 c.f.s., 1866 priority, Elmer A. Poulson ¹¹
- i. 1.25 c.f.s., 1864 priority, W.H. Gribble ¹²
- j. 32 c.f.s., 1878 priority, Newfield Canal ¹³
- k. .37 c.f.s., 1880 priority, Funk's Springs ¹⁴
- l. .77 c.f.s., 1881 priority, R.S. Yardley ¹⁵
- m. .50 c.f.s., 1886 priority, R.S. Yardley ¹⁶

The *Cox Decree* divides Gunnison's irrigation season into three periods, (1) April 1st to June 15th, (2) June 15th to October 1st, (3) October 1st to November 1st. During each of these periods, Gunnison is entitled to the quantities provided in the Decree plus the quantities represented by the secondary rights which it has acquired. The total quantity of water which Gunnison is entitled to use during any given period can be determined by converting the cubic feet per second to acre feet. As will appear hereafter, the total acre feet during any given period can be drawn and used at will during that period.

STORAGE RIGHTS

The Gunnison Reservoir storage right is 20,264.2 acre-feet with an 1860 priority. The storage is from January 1st to December 31st of each year.¹⁷ The storage right is identified separately from the use right. Under the Decree, Gunnison has a "first right" to certain waters to satisfy not only its right to divert and use,

11 Cox Decree, Page 174. Acquired by Gunnison during or about 1988.

12 Cox Decree, Page 178. Acquired by Gunnison during or about 1968.

13 Cox Decree, Page 175. Owned by Newfield until fully merged in Gunnison in 1963. This is a high-water right and is secondary to the rights of Mayfield Irrigation Company.

14 Cox Decree, Page 170. Acquired by Gunnison during or about 1973.

15 Cox Decree, Page 175. Acquired by Gunnison during or about 1988.

16 Cox Decree, Page 175. Acquired by Gunnison during or about 1988.

17 Cox Decree, Page 176.

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but also its right to store "to the extent [the water is] available".¹⁸

STORAGE VS. DIVERSION AND USE

Under the plain language of the Decree, Gunnison is not to be charged with the water it stores, but rather the water that it diverts and uses. With respect to the stored water, the Decree provides,

". . . storage water is released into the natural channel of the Sanpitch River and from there diverted into the Gunnison Irrigation system at the points described in paragraph (a) and used as a supplemental supply to satisfy the rights herein decreed".¹⁹

When this language is considered in light of the general principles set forth above, it is clear that Gunnison is not charged until the water is diverted from the Sanpitch into Gunnison's canals or ditches. The points of diversion described in the said paragraph (a) of the Decree are all below the reservoir; hence the measurement is at these points.

The Decree goes on to state that it is the "withdrawals" with which the Irrigation Company is charged rather than the water placed in storage:

Said storage is supplied from the Sanpitch River and Six Mile Creek and the water thus stored may be withdrawn and used and the reservoir refilled, but all such withdrawals to be charged up to the direct flow rights herein provided for.²⁰

It appears that the only limitation on the Company's right to refill the reservoir at any time during the calendar year is the requirement,

"That all of the water stored as herein before provided shall be exhausted each season in supplying the rights set out

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Cox Decree, Page 177.

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Cox Decree, Pages 176-177.

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Cox Decree, Page 177.

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in paragraph (a) [the flow rights]".²¹

The fact that the Decree places the limitation on "use" rather than "storage" is further made clear in the following language,

"Provided, that the right to the use of water from the said sources, including the waters released from storage, shall not exceed the award herein made in paragraph (a) [the flow rights] hereof, and the right to water for culinary and domestic purposes set out in paragraph (f) hereof" ²²

GUNNISON/FAYETTE CANAL RIGHT

The Decree contains the following language:

"To the Gunnison/Fayette Canal Company, a maximum of 40 second feet of the water yielded by the Sanpitch River above the intersection of Gunnison/Fayette Canal and Sanpitch River after all prior rights are satisfied above the said intersection of said Sanpitch River and the said Gunnison/Fayette Canal, to be used from March 1st to October 1st on lands under the Gunnison/Fayette Canal system north of the Sanpitch River." ²³

The foregoing appears as Subsection D under a section of the Decree dealing with "Well Rights". It is not identified with the decreed rights of Gunnison/Fayette and no priority is assigned to the right. It appears to have arisen as an afterthought, which a brief review of its history confirms.

The Gunnison/Fayette right surfaces in Claim No. 387²⁴ filed in the District Court in Millard County in the Richlands Irrigation Co. vs. Westview Irrigation Co., which resulted in the *Cox Decree*. It is a diligence claim filed in February of 1922. The claimed water right is described as follows:

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Cox Decree, Page 177. This would not necessarily preclude "holdover storage", but presumably the same would have to come from a failure to use the full decreed acre feet during the preceding season. Such "holdover" would not interfere with lower-priority rights and may actually foster the enjoyment of those rights during the succeeding season. The natural consequence of a full reservoir is a greater likelihood of higher downstream flows during the early season, thus potentially benefiting low-priority rights.

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Cox Decree, Page 177.

23

Cox Decree, Pages 198-199.

24

A photocopy is attached as Exhibit "B".

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"Also to 40 second feet of water from Sanpitch River during the high-water period commencing about May first and ending about July first, diverted into its canal at the dam commonly known as the Fayette Canal Dam across Sanpitch River, . . . when, during said above-named period, there is water in said Sanpitch River available at said point. Said last above named claim to water is based upon a necessary and beneficial use thereof diverted at the above mentioned point and used for a period of more than twenty five years, and has been applied to irrigate the lands under said Fayette Canal during said period by the stockholders of the Gunnison Fayette Canal Company and their predecessors in interest, and has been used in connection with and supplemental to the decreed rights above mentioned; and the same is not more than sufficient, in addition to said decreed rights, for the proper beneficial irrigation of the lands under said during said period.

The claimed right was completely excluded from the proposed determination of water rights on Sevier River System by the State Engineer, George Bacon, filed February 21, 1926.²⁵ With respect to this claimed right, Gunnison/Fayette filed an objection to the proposed determination stating,

"That in addition to the rights set forth in subparagraph 317 out of the Sevier River, the defendant claims a diligence right of 30 Sec. Ft. out of the Sanpitch River at a point where the defendant's canal crosses the said Sanpitch River."²⁶

Shortly after filing the foregoing objection and on August 4, 1926, Gunnison/Fayette filed an Amended Objection in which it described the right as follows:

Also 40 second feet of water from Sanpitch River during the high-water period commencing about May first and ending about July first, which water this claimant and defendant diverts and is entitled to divert into its canal at the dam commonly known as the Fayette Canal Dam across Sanpitch River, . . . when during the above period there is water available at said point. The claim to this water is based on a diligence right acquired by this defendant and claimant and its predecessors in interest by the beneficial use thereof for

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See paragraph no. 317 on page 100 of proposed determination in which is set forth the rights of the Gunnison/Fayette Canal Company.

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A photocopy of the objection is attached as Exhibit "C".

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more than 30 years, and such water has been used in connection with and supplemental to all of the decreed rights of this defendant and claimant and its stockholders."²⁶

It can thus be seen that the claimed water right is not a "decreed right", but a "diligence right" with a claimed use of 25 years prior to filing Claim No. 387 in February of 1922 and a claimed use of 30 years as set forth in the amended objection filed on August 4, 1926. Based on either document, the claimed right dates only to the late 1890's.

It therefore appears that between the filing of the proposed determination by State Engineer Bacon and the issuance of the Decree by Judge Cox, the water right in question found its way into print. There is no known explanation for why it was included under an obscure section dealing with "Well Rights" nor why there was a failure to mention priority. Perhaps the solution, if not the explanation, is found in the express provision that this right comes into play only ". . .after all prior rights are satisfied above the said intersection of Sanpitch River and said Gunnison/Fayette Canal. . .".²⁷

With the exception of the Highland rights, which were not listed above and which were the subject of specific litigation between these parties,²⁸ the Gunnison/Fayette right arising from the diligence claim is junior and inferior to all of the other Gunnison rights including its storage rights which have an 1860 priority.

IMPACT OF LITIGATION

The following review of litigation should not be taken as compromising Gunnison's position that the plain language of the Decree gives Gunnison a "first right" to "use" and also to "store" water. The limitations of these rights are set forth in the language of the Decree and do not require supplemental material to construe.

With the foregoing caution, we proceed hereafter to examine litigation which has related to Gunnison's rights. With the

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A photocopy of the Amended Objection is attached hereto as Exhibit "D".

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Cox Decree, Page 198-199.

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Gunnison/Fayette Canal Co. vs. Gunnison Irrigation Co., 22 Ut 2d 45 (1968).

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possible exception of the inconclusive testimony of John M. Knighton in a collateral hearing, the litigation appears to support the Decree as heretofore construed.

THE RICHLAND CASE

The official position of the Irrigation Company in the litigation resulting in the *Cox Decree* was set forth in its objection to the proposed determination of the State Engineer.²⁹

"The state engineer has failed and neglected to recommend that this defendant have the privilege of re-filling the Gunnison Reservoir in the springtime after drawing off water for early irrigation so long as the said company does not exceed the quantity of water which it is recommended should be awarded to it. The fact is that it has been the practice of the Gunnison Irrigation Company to re-fill its reservoir annually when there has been water available during the spring flush of high waters for such purpose and it has been necessary almost annually to draw from the said reservoir on or about the 1st day of April and through the month of April until the high waters begin to flow from the canyon streams, after which, and while the water has been available for such purpose, the said reservoir has been re-filled each and every year when the water has been available for such purpose, and this has been the uniform practice of the said company for a period of about 40 years continuously next prior hereto, all of which this defendant is ready and prepared to show.

That by decree of this court, this defendant be given the right annually to re-fill from the high waters of the Sanpitch River and Six Mile Creek the Gunnison Reservoir after having drawn from the said reservoir prior to the high water season for irrigation purposes so long as this defendant does not use water in excess of the quantity proposed to be decreed to it from all of the sources mentioned in the said proposed determination of the said state engineer."

The quoted language appears over the signature of John M. Knighton, President of the Gunnison Irrigation Company. Sometime later, the said Knighton apparently appeared as a witness on behalf of the Newfield Canal Company. At first blush, Knighton's testimony appears directly contrary to the official position of the

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irrigation company as recited in the language above. A more thorough reading indicates Knighton may not have understood the full import of the questions. It further appears that the questions were so awkwardly phrased that the answers become inconclusive. Knighton affirms that the Irrigation Company had complied with the Decree in the case of Gunnison Irrigation Co. vs. Gunnison Highland Canal Co. (discussed below). He states that the company does not claim any right to re-fill the reservoir if by so doing it would increase the "flow" in excess of 145 second feet (plus stock watering etc.).³¹ It is unclear if Knighton really understood what he was being asked. The difficulty with the questions as well as the answers can be seen in this exchange:

Q: "And you wouldn't claim any right to fill your reservoir if in doing so it required, or in any way changed or reduced the flow of water in excess of 145 second feet?"

A: "That is all we claim. I would like to make a statement with respect to the operation of the reservoir that the Judge may fully understand the conditions. As I stated, any years we could tell by the snow fall in the valley, or our watershed whether we are going to fill our reservoir or not by the time our storms come from the mountains, after we have drained it for the first irrigation season, you can tell how much we are going to have to store, and if the waters run short, in order to store it, we may have to hold up a little water to mature our crops, but not to exceed 145 feet, and the two and a half we are allowed, we try to protect ourselves that way."

Knighton appears to be mentally locked on Gunnison's "flow rights" and its commitment to not use more water than it has beneficially appropriated. The portion of his testimony which can be construed to the contrary, cannot overcome a hundred years of uniform practice. Since the Richland case resulted in the *Cox Decree*, the language of the Decree governs and this inconclusive testimony should not be given much credit.

THE HIGHLAND/PETERSON LITIGATION

This litigation commenced some time during the first decade

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A photocopy of the Knighton testimony is attached as Exhibit "F".

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of the 20th Century, involved two appeals to the Supreme Court and did not conclude until 1929. The Gunnison Irrigation Company was the plaintiff. There were numerous defendants including the Gunnison Highland Canal Company and one Charles Peterson, each of whom became a moving party in the two Supreme Court appeals. The opinion in the first appeal bears Highland's name and the opinion in the second appeal bears Peterson's name.³¹

I.

The focal point of the Highland/Peterson litigation was the relationship between Gunnison's storage, including the right to re-fill, and the secondary rights of Peterson, and others, and the tertiary rights of Highland. The precise issue in the first decision dealt with the meaning of the language regarding payment which was included in the following paragraph from the District Court decision:

"(2) That whenever in the opinion or judgment of the said commissioner the annual flow of the waters of Sanpitch river and the tributaries, together with the water stored in the reservoir of the plaintiff, will be more than sufficient to supply the claims of the Plaintiff, together with other rights that are not disputed in this case, the excess may be measured out by the plaintiff, under the direction of the commissioner, to the defendants on the defendants paying or guaranteeing to the plaintiff such price as the parties hereto may agree upon; or, if agreement by them cannot be reached, then to be fixed by the commissioner."³²

None of the parties nor the District or Supreme Court appear to question Gunnison's right to utilize its full decreed right while at the same time, storing the high-water runoff for use later in the season. In fact, that was recognized as the very purpose of constructing the reservoir. In the Highland decision, handed down in 1918, the Supreme Court states:

". . . The Sanpitch river, in common with most of the small streams of the arid regions, has excessively high waters

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The two cases are: Gunnison Irrigation Co. v. Gunnison Highland Canal Co., 174 Pac. 852 (June 12, 1918), a photocopy attached as Exhibit "G"; Gunnison v. Peterson, 280 Pac. 715 (May 9, 1929, Rehearing denied Oct. 1, 1929), a photocopy attached as Exhibit "H".

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Gunnison Irr. Co. v. Gunnison H. C. Co., 52 Utah at 352.

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in the early part of the irrigation season, much more than sufficient in volume to satisfy the needs of the respondent [Gunnison] at such time; but the flow of the river later in the season is insufficient to supply the respondent's later needs. Therefore in 1888 the respondent constructed a reservoir across the channel of the Sanpitch river for the purpose of storing from the excessive flow of the early season an amount of water in excess of its needs for that time, but to be used during the low-water period to follow. After the construction of this reservoir the defendants below and the appellant also acquired by appropriation and application to a beneficial use upon their lands, respectively, secondary and tertiary rights to the use of such waters of the streams in question as were in excess of the amount appropriated and beneficially applied by the respondent".

The question before the Supreme Court concerned the water in the reservoir in excess of Gunnison's full footage entitlement for the irrigation season as set forth in the *Cox Decree*. Highland, owner of the tertiary right, contended that when the reservoir contained an adequate quantity to deliver Gunnison its full decreed right, then upon "payment" to Gunnison of an equitable fee for the use and upkeep of the reservoir, it should be delivered water not belonging to prior appropriators (the secondary rights). Gunnison on the other hand contended that if there was water in the reservoir in excess of that required to satisfy its flow rights over the course of the irrigation season, then it should be permitted to sell the excess, arguing that this was the meaning of the lower court's reference to "payment".

The Supreme Court held that Gunnison could not sell the excess for the reason that such would constitute an expansion of what it had "beneficially appropriated". The Supreme Court concluded that Highland could not compel Gunnison to store water for it, nor could Gunnison store water in excess of its right and then compel Highland to make payment for the same. If an agreement could be reached, the lower Court could appoint a commissioner to supervise the release of the waters in the proper amounts and according to priorities. If not, Highland could commence an action to condemn a right to common use of the reservoir, a right which would presumably depend upon the availability of space above that required by Gunnison to meet its needs throughout the irrigation season, and further, if there were water available for delivery to Highland given its priority.

I am unaware of any agreement having been reached between

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Gunnison and Highland pursuant to the suggestion of the Supreme Court and it is further clear from the District Court file and the later Supreme Court decision that no commissioner was ever appointed. Following the remand, the District Court under date of December 31, 1920 entered Findings of Fact and Conclusions of Law³⁴ which re-enforced the superiority of Gunnison's right to "divert and use" as well as its right to "impound and store". Consistent with the *Cox Decree*, the District Court sets out the specific flow rights during the various times of the year³⁵ and then identifies the storage right as follows:

"For the purpose of providing and insuring an adequate quantity of water to supply the plaintiff's uses, as above set forth, the said plaintiff has the right to impound and store waters from all available sources in its said reservoir, each year preferring such available periods for storing, when the defendants herein are unable to use any of said waters decreed to them for irrigation purposes."³⁶

The District Court goes on to state,

"That the rights of the said plaintiff, as herein described, are superior and paramount to any right of the defendants to the use of said waters or any part thereof."³⁷

The superiority of Gunnison's rights is not limited to its flow rights, but, as noted, includes its "right to impound and store waters from all available sources" as a means of "insuring an adequate quantity of water to supply the plaintiff's uses, as above set forth [to-wit its full diversionary and use entitlement for the year as set forth by the Highland Court and later included in the *Cox Decree*.]".

The Court went on to identify the "secondary rights", including the rights of Peterson and others, and then identified the tertiary rights belonging to Highland. In each instance, however, it was careful to note that they were "secondary to the rights of the said plaintiff [Gunnison]".³⁸ Finally the District

34 Photocopy attached as Exhibit "I".
35 See Conclusion of Law, No. 1, December 31, 1920.
36 See Conclusions of Law, No. 2, December 31, 1920.
37 See Conclusions of Law, No. 3, December 31, 1920.
38 See Conclusions No. 4, 5, & 6, December 31, 1920.

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Judge noted that a commissioner should be appointed to measure and divide the waters according to the Decree.³⁸

Gunnison has now acquired all of the secondary rights, as well as the tertiary rights that were involved in the litigation. All the secondary rights were superior to the Gunnison/Fayette right now at issue, and accordingly the latter could not enjoy a status more favorable than that afforded the secondary rights. In fact, when the District Court entered its findings and conclusions (Dec. 31, 1920) after the remand from the Supreme Court, the Gunnison/Fayette right was unknown and was not reduced to writing until the filing of the diligence claim in 1922.

II.

In the late 1920's Gunnison sought contempt proceedings against Peterson for taking water in violation of the lower court decree which followed the Supreme Court ruling in Highland. The District Court held Peterson in contempt and on appeal the Supreme Court reversed.³⁹

The basis for the Supreme Court reversal was the inexactness of the evidence regarding Peterson's use verses the waters that had been available for use during the season. The decision treats the fact that Gunnison has three different flow and use rights during three separate periods of the irrigation season.⁴⁰ Gunnison took the position that it could multiply these flow-rights by the number of days, determine the total entitlement for the full irrigation season and then use the same "at will". The Supreme Court accepted the "at will" construction, but concluded that each period, or term, needed to be treated individually and that Peterson's secondary right should be served to the extent that the water available during any one of the three irrigation periods exceeded Gunnison's primary right. It further concluded that the secondary rights would not have to wait until the end of a given period, if excess water could be accurately projected. The Supreme Court stated:

"Even though the plaintiff has not used for irrigation during a given period the amount of water for that period if

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See Conclusions of Law, No. 8, December 31, 1920.

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Gunnison Irrigation Co. v. Peterson, 74 Utah 460, 280 Pac. 715 (1929).

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These are the same as embodied in the Cox Decree at page 176.

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it can reasonably be determined that there will be flowing in the stream an amount of water available for the use of the parties in excess of the amount plaintiff [Gunnison] is or will be entitled to divert during the particular term, the defendant is entitled to use the amount decreed to him out of the excess. This he should be permitted to do just as early in the season as such determination can be reasonably made."⁴²

Perhaps the most useful portion of the Court's opinion is its recitation of the oral decision of the trial court regarding matters which did not appear in the formal findings, conclusions or judgment of conviction.⁴³ The Supreme Court re-enforces the oral decision, but then finds the evidence insufficient to support a judgment of contempt thereunder. The language is particularly revealing because it stands for the proposition that Gunnison may take all of the flow until there is enough water in its reservoir to satisfy its use entitlement throughout the irrigation season. The Court stated:

". . . The court is of the opinion that the plaintiff is not limited from the period of April 1st to June 15th to the use of only 147.50 cubic feet per second continuous flow, and from June 15th to October 1st, the plaintiff is not limited to 111 35/65 plus culinary water, but the plaintiff may take all the flow even though it exceeds the amount until there is enough water in the reservoir to satisfy plaintiff's allotment. * * * I think possibly there were times, under the evidence here, when the combined flow of the streams exceeded 147.50 cubic feet per second, but under the theory which the court has adopted, that would not make any difference, because the evidence all goes to show that even so, there is not and has not been--there probably will not be--enough water in the system to satisfy the allotment to plaintiff. * * * The findings of fact therefore may be made in accordance with the allegations of the petition."⁴⁴ [Emphasis Added]

CONCLUSION

It appears that there is an effort to bootstrap Gunnison/Fayette's diligence claim into a decreed right that would upset Gunnison's primary rights, having an 1860 priority and over

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Gunnison Irrigation Co. v. Peterson, 74 Utah at 472-473.

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Gunnison Irrigation Co. v. Peterson, 74 Utah at 470.

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Gunnison Irrigation Co. v. Peterson, 74 Utah 460, 470 (1929).

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one hundred years of history.

The Gunnison/Fayette right, at best, first arose in the 1890's as a high water right only, is expressly junior and inferior to Gunnison's right not only to "divert and use", but to "impound and store". It is further junior and inferior to the "secondary rights" which Gunnison has acquired from Peterson and others.

Peterson, Highland, and others, along with the District and Supreme Court, recognized the right of Gunnison to hold back all the flow until there was adequate water in the reservoir to satisfy Gunnison's "use rights" throughout the irrigation season.

This construction of Gunnison's storage right is virtually inescapable, since if it had to fill the reservoir out of its direct flow right, it would be impossible to use the reservoir to "supplement" the same flow right and "ensure" Gunnison its full season allotment. A contrary construction would require Gunnison to store part of the flow it admittedly needs and has "beneficially appropriated" during the early irrigation season in order to receive its entitlement during the late irrigation season. The effort would be self-defeating, and rather than ensure Gunnison its full primary entitlement, it would ensure the contrary result. Gunnison would either be forced to cheat itself during the first irrigation period in order to protect the later periods, or visa-versa. Such would be contrary to both the letter and spirit of the *Cox Decree* and the priorities therein established, as well as the entire history of the relationship of these parties; and would nullify any benefit derived from the construction of the reservoir. It is a simple "non-sequitur" to argue that Gunnison must deprive itself in order to protect itself, or that it must "deplete" its flow in order to "supplement" its flow.

It is clear from the plain language of the *Cox Decree* that the flow limitations imposed on Gunnison relates to its "use", including "withdrawals" from the reservoir, and not upon the waters it stores and impounds. The storage right is specifically designed to allow Gunnison to enjoy the full use right for the entire irrigation season. Its 1860 priority is entitled to be satisfied "in full" from direct flow and reservoir supplement before any other right comes into play.

In order for the Gunnison/Fayette right to receive water, it would require stream flows at the points of Gunnison's use which exceeded Gunnison's decreed rights together with a sufficient quantity of water in the reservoir to insure delivery of Gunnison's full right throughout the entire irrigation season.

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If there is some point in time when, in the words of the Supreme Court, "it can reasonably be determined that there will be flowing in the stream an amount of water available for the use of the parties in excess of the amount Gunnison is or will be entitled to divert . . ." ⁴⁵ then the excess would go to Fayette/Gunnison and Highland according to their respective priorities.

By its own terms, the Gunnison/Fayette right was to be limited to May and June when the water is exceptionally high and when it would otherwise go to waste downstream because Gunnison is receiving its full entitlement and when there is enough water in its reservoir to last it for the remainder of the season. I am told that this can and occasionally does happen, but it is a far cry from the claim that has been advanced.

Please review and advise.

Sincerely,



K. L. McIff

KLM/mj

DOMESTIC AND STOCK WATER:

(b) 3 c.f.s. From one-fourth of the yield of Six Mile Creek. Priority: 1880. Period of Use: October 15 to April 1. Point of Diversion: Said water to be diverted as described in paragraph (a).

(c) Morrison Tunnel Water (Developed Water) 0.5 c.f.s. Period of Use: January 1 to December 31. Diverted and used as above.

TO STERLING IRRIGATION COMPANY, INC., Sterling, Utah, IRRIGATION:

(a) 12.50 c.f.s. From one-fourth of the yield of Six Mile Creek. Priority: 1880. Period of Use: April 1 to October 15. Points of Diversion: To be diverted from Six Mile Creek at each, either or both of the following points:

- (1) 1386 feet N. and 1980 feet W. of the SE corner Sec. 35, T. 18 S., R. 2 E., into the Upper Ditch.
- (2) 2574 feet W. and 594 feet S. of the NE corner Sec. 3, T. 19 S., R. 2 E., into the South Ditch.

STORAGE AND IRRIGATION:

(b) 100 ac. ft. Priority: 1872. Period of Use: June 1 to September 15. Period of Storage: November 1 to May 15.

Points of Diversion: Said water to be diverted on Six Mile Creek in three reservoirs as follows:

- (1) Parley's Lake Reservoir in Sec. 4, T. 19 S., R. 1 E.;
- (2) Skidway Lake in Sec. 34, T. 18 S., R. 1 E.;
- (3) Birch Creek Reservoir in Sec. 32, T. 18 S., R. 1 E.

After having been so stored said water is released and allowed to flow down the natural channel and diverted as described in paragraph (a) and used as a supplemental supply to irrigate the lands described in paragraph (a).

Said storage right is subject to all other rights awarded from said Six Mile Creek.

DOMESTIC AND STOCK WATER:

(c) 3 c.f.s. From one-fourth of the yield of Six Mile Creek. Priority: 1872. Period of Use: October 15 to April 1. Points of Diversion: Same as described above.

(d) Morrison Tunnel Water (Developed Water) 0.5 c.f.s. Period of Use: January 1 to December 31. Diverted and used as above.

TO MANTI IRRIGATION & RESERVOIR COMPANY, Manti, Utah,

STORAGE AND IRRIGATION:

(a) 1541.1875 ac. ft. Priority: 1899. Period of Use: April 1 to November 1. Period of Storage: January 1 to December 31. Point of Diversion: To be diverted from Six Mile Creek at a point near the center of Sec. 35, T. 18 S., R. 2 E., into the Funk's Lake Reservoir, from which it is diverted and used in connection with irrigation of 3500 acres of land. The capacity of the reservoir is 1232.95 acre feet, one-fourth of which is drawn off for early spring irrigation and the reservoir then refilled, thus making

total storage 1541.1875 acre feet. Funk's Lake Reservoir is situated in Sections 34 and 35, T. 18 S., R. 2 E.

The said right of storage shall be satisfied out of the yield of Six Mile Creek and subject only to the rights of Gunnison Irrigation Company to one-half of the yield thereof until its rights are satisfied, and to the rights of Six Mile Creek Irrigation Company and to the rights of the Sterling Irrigation Company, each to a flow of 12.5 c.f.s. from the yield of said creek, and subject to an equal right in the Highland Canal Company to any excess yield- ed by said Six Mile Creek.

(b) All of the yield of the Morrison Tunnel water in excess of 2 c.f.s. Priority: 1880. Period of Use: January 1 to December 31 incl. Point of Diversion: Same as in paragraph (a).

TO GUNNISON IRRIGATION COMPANY, Gunnison, Utah,

IRRIGATION:

(a) 98 c.f.s. Priority: 1860. Period of Use: April 1 to October 15. Point of Diversion: From Six Mile Creek at a point 2130 feet N. and 1210 feet E. of the SW corner Sec. 33, T. 18 S., R. 2 E. into the Feeder Canal.

TO J. ROSS THOMPSON, Sterling, Utah,

IRRIGATION:

1.50 c.f.s. Period of Use: From April 1 to October 15 when available. Points of Diversion: From Six-Mile Creek (1) N. 29 deg. 15 min. E. 180 feet from SW corner of Sec. 34, T. 18 S., R. 2 E., S. 1. M. (2) N. 82 deg. 15 min. E. 587 feet from SW corner, Sec. 31, T. 18 S., R. 2 E., S. 1. M. (3) S. 80 deg. 50 min. E. 1113 feet from NW corner, Sec. 3, T. 19 S., R. 2 E., S. 1. M. Said right is subsequent and subject to the rights of the Gunnison Irrigation Company.

SIX MILE CREEK

TO TELLURIDE POWER COMPANY, Salt Lake City, Utah,

FOR POWER PURPOSES:

20 c.f.s. Priority: April 22, 1909. Application No. 2382. Certificate No 131-B. Period of Use: January 1st to December 31st. Point of Diversion and Use: Said water to be diverted from Six Mile Creek at a point S. 17 degrees 45 minutes W. 1825 feet of the E 1/4 corner Sec. 35, T. 18 S., R. 2 E., conveyed by means of a canal 4926 feet long and used to generate power for electric lighting and propelling machinery at the towns of Sterling, Mayfield, Gunnison and Centerfield. After having been so used the water is returned to the natural channel at a point S. 86 degrees 24 minutes W. 1873 feet from the SE corner Sec. 34, of the afore-said township and range.

COVE CREEK

TO ANDREW FUNK, Sterling, Utah,

IRRIGATION:

(a) 50 c.f.s. Priority: 1880. Period of Use: April 1 to

October 15. Point of Diversion: From Cove Creek Spring at a point approximately in Lot 3, Sec. 34, T. 18 S., R. 2 E., into the Upper Ditch.

DOMESTIC AND STOCK WATER:

(b) 50 c.f.s. Priority: 1880. Period of Use: October 15 to April 1. Point of Diversion: Same as above described.

Said award is made to Andrew Funk subject to the following right in the Town of Sterling.

TO TOWN OF STERLING, Sterling, Utah.

All of the waters of Upper Spring in Cove Hole below the Upper end of the Big Dugway, in Lot 8, Sec. 2, T. 19 S., R. 2 E. Salt Lake Base & Meridian, in Saupete County, at a point approximately 1473 feet N. and 855 feet W. from the SE corner of the NE 1/4 of said Sec. 2, to be diverted from said Town of Sterling at said point, and used for municipal, domestic and stock watering purposes.

WHISKEY SPRING:

TO G. A. FUNK, Sterling, Utah.

FOR IRRIGATION:

12 c.f.s. Priority: 1880. Period of Use: June 1st to November 30th. Point of Diversion and Use: Said water to be diverted from the Whiskey Spring at a point 2230 feet E. and 650 feet S. of the NW corner Sec. 3, T. 19 S., R. 2 E., into the Whiskey Spring Ditch.

FUNK'S SPRINGS

TO MRS. MARY C. FUNK, Ephraim, Utah.

FOR IRRIGATION:

27 c.f.s. Priority: 1880. Period of Use: April 1st to October 1st. Point of Diversion and Use: Said water to be diverted from Funk Spring at a point 1650 feet E. and 2330 feet N. of the SE corner Sec. 33, T. 18 S., R. 2 E., into the Funk's Spring Ditch.

PEACOCK CREEK

TO GUNNISON CITY, a Municipal Corporation, Gunnison, Utah.
FOR DOMESTIC AND MUNICIPAL PURPOSES:

705 c.f.s. Priority: 1870. Period of Use: January 1st to December 31st. Point of Diversion and Use: Said water to be diverted from the Peacock Spring at a point N. 43 degrees 34 minutes E. 1682 feet from the S 1/4 corner Sec. 4, T. 19 S., R. 2 E. into a pipe line.

NINE MILE CREEK

TO DAVID OLSEN, Manti, Utah.

FOR IRRIGATION PURPOSES:

50 c.f.s. Priority: 1875. Period of Use: April 1st to October 15th. Point of Diversion: Said water to be diverted from Nine Mile Creek at a point 3750 feet W. and 1900 feet N. of the SE corner Sec. 8, T. 19 S., R. 2 E. into the Olsen Ditch.

LITTLE NINE MILE SPRING

TO HYRUM CHRISTENSEN, Mayfield, Utah.
IRRIGATION:

15 c.f.s. Priority: 1877. Period of Use: April 1st to October 15th. Point of Diversion and Use: Said water to be diverted from Little Nine Mile Spring, by ponding, at a point approximately in the SW 1/4 Sec. 8, T. 19 S., R. 2 E. into the Spring Ditch.

FOR DOMESTIC AND STOCK WATER:

15 c.f.s. Priority: 1877. Period of Use: October 15th to April 1st. Point of Diversion and Use: Said water to be diverted as described in Paragraph (a).

ORDER CANYON CREEK

TO FERD ROSENLUEND, Mayfield, Utah.

FOR IRRIGATION:

(a) 1 c.f.s. Priority: 1880. Period of Use: April 1st to October 15th. Point of Diversion and Use: Said water to be diverted from Order Canyon Creek at a point 600 feet W. and 650 feet S. of the SE corner Sec. 3, T. 20 S., R. 2 E. into the Rosenlund No. 1 Ditch.

OLSEN CANYON CREEK SPRING - TRIBUTARY TO

SANPETCH RIVER.

SUPPLEMENTAL:

(b) Amount not specified. Priority: 1880. Period of Use: April 1st to October 15th. Point of Diversion and Use: Said water to be diverted from Olsen Canyon Creek Spring at a point 270 feet E. and 810 feet N. of the SE corner Sec. 3, T. 20 S., R. 2 E. into the Rosenlund No. 2 Ditch.

DOMESTIC AND STOCK WATER:

(c) 1 c.f.s. Priority: 1880. Period of Use: October 15th to April 1st. Point of Diversion and Use: Said water to be diverted at either of both of the points above described.

TWELVE MILE CREEK

TO MAYFIELD IRRIGATION COMPANY, INC.

Mayfield, Utah.

IRRIGATION:

Prior Right:

(a) 150 c.f.s. from 12 percent of Twelve Mile Creek. Priority:

SPRING

TO HYRUM OLSEN & H. C. BOGH, Mayfield, Utah.

FOR IRRIGATION:

.04 c.f.s. Priority: 1890. Period of Use: April 1st to October 15th. Point of Diversion and Use: Said water to be diverted from an unnamed spring at a point 350 feet N. and 400 feet W. of the SE corner Sec. 20, T. 19 S., R. 2 E. into the Spring Ditch. FOR STOCK WATERING PURPOSES:

.04 c.f.s. Priority: 1890. Period of Use: October 15th to April 1st. Point of Diversion and use: Said water to be diverted from the Spring above described.

MADS PETER SORENSON SPRING

TO TOWN OF CENTERFIELD, A MUNICIPAL CORPORATION Centerfield, Utah.

FOR DOMESTIC, STOCK WATER & MUNICIPAL PURPOSES: 1 c.f.s. Priority: 1881. Period of Use: January 1st to December 31st. Point of Diversion and Use: Said water to be diverted from the Mads Peter Sorenson Spring at a point 330 feet N. and 440 feet W. of the SE corner Sec. 20, T. 19 S., R. 2 E. into a pipe line.

SPANISH STREAM

TO ELMER A. POULSON, Mayfield, Utah.

IRRIGATION:

.56 c.f.s. Priority: 1881. Period of Use: April 1st to October 15th. Point of Diversion and Use: Said water to be diverted from Spanish Stream at a point 3000 feet N. and 600 feet W. of the SE corner Sec. 19, T. 19 S., R. 2 E. into the North Ditch and used as a supplemental supply.

TWELVE MILE CREEK

IRRIGATION:

.50 c.f.s. Priority: 1866. Period of Use: April 1st to October 15th. Point of Diversion and Use: Said water to be diverted from Twelve Mile Creek at a point S. 80 degrees 30 minutes E. 1800 feet from the NW corner Sec. 19, T. 19 S., R. 2 E. into the South Ditch.

FOR DOMESTIC AND STOCK WATERING:

.50 c.f.s. Priority: 1866. Period of Use: October 15th to April 1st. Point of Diversion and Use: Said water to be diverted at the point described above in Paragraph (a).

SPANISH STREAM

TO ARTHUR J. BJERREGAARD, Mayfield, Utah.

FOR IRRIGATION:

2.62 c.f.s. Priority: 1881. Period of Use: April 1st to

October 15th. Point of Diversion and Use: Said water to be diverted from Spanish Stream at a point 3000 feet N. and 600 feet W. of the SE corner Sec. 19, T. 19 S., R. 2 E. into the North Ditch. FOR DOMESTIC AND STOCK WATERING PURPOSES:

.25 c.f.s. Priority: 1881. Period of Use: October 15th to April 1st. Point of Diversion: From the Spanish Stream at the point above described.

SPANISH STREAM

TO WALTER WILKINSON, Sigurd, Utah.

FOR IRRIGATION:

1.66 c.f.s. Priority: 1881. Period of Use: April 1st to October 15th. Point of Diversion and Use: Said water to be diverted from Spanish Stream at a point 3000 feet N. and 600 feet W. of the SE corner Sec. 19, T. 19 S., R. 2 E. into the North Ditch. FOR DOMESTIC AND STOCK WATER:

.25 c.f.s. Priority: 1881. Period of Use: October 15th to April 1st. Point of Diversion and Use: Said water to be diverted from the Spanish Stream at the point above described.

SPRINGS

TO R. S. YARDLEY, Gunnison, Utah.

FOR IRRIGATION:

.77 c.f.s. Priority: 1881. Period of Use: April 1st to October 15th. Point of Diversion and Use: Said water to be diverted from 3 springs in the SE 1/4 SW 1/4 Sec. 18, and 4 springs in the NE 1/4 NW 1/4 Sec. 19, T. 19 S., R. 2 E. into the Spring Ditch. FOR DOMESTIC AND STOCK WATER:

.25 c.f.s. Priority: 1881. Period of Use: October 15th to April 1st. Point of Diversion: From 3 springs in Sec. 18, and 4 Springs in Sec. 19, as described above.

TO ORSON WILKINSON, Administrator of the Estate of WALTER WILKINSON, Deceased, for the use and benefit of the heirs of said Walter Wilkinson, Deceased, Sevier County, Utah.

IRRIGATION:

(a) .50 c.f.s. Priority: 1886. Period of Use: April 1 to October 15. Point of Diversion: From Twelve Mile Creek at a point S. 80 deg. 30' E. 1800 ft. from the NW corner Sec. 19, T. 19 S., R. 2 E. into the South Ditch.

(b) SUPPLEMENTAL. .56 c.f.s. Priority: 1881. Period of Use: April 1 to October 15. Point of Diversion: From Spanish Stream at a point 3000 ft. N. and 600 ft. W. of the SE corner Sec. 19, T. 19 S., R. 2 E. into the North Ditch.

TWELVE MILE CREEK

TO NEW FIELD CANAL COMPANY, INC., Centerfield, Utah.

Acquired (1991) (1998)

Acquired (1991) (1998)

IRRIGATION:

32 c.f.s. Priority: 1878. Period of Use: May 1st to June 20th. Point of Diversion and Use: Said water to be diverted from Twelve Mile Creek at a point S. 71 degrees E. 1950 feet from the NW corner Sec. 19, T. 19 S., R. 2 E. into the Gunnison New Field Canal and used to irrigate 2179 acres of land described as follows: 7.2 acres in Sec. 18, T. 19 S., R. 2 E.; 192.3 acres in Sec. 13, 2.6 acres in Sec. 14, 186.4 acres in Sec. 23, 134.7 acres in Sec. 24, 194.9 acres in Sec. 26, 134.5 acres in Sec. 27, 119.8 acres in Sec. 34, 321.5 acres in Sec. 33, 1.5 acres in Sec. 32, T. 19 S., R. 1 E.; 465.8 acres in Sec. 4, 69.2 acres in Sec. 5, 7.8 acres in Sec. 8, 340.8 acres in Sec. 9, T. 20 S., R. 1 E.

Said rights are secondary to the rights of Mayfield Irrigation Company to 150 c.f.s. from 42 percent of the flow of said Twelve Mile Creek.

SANPITCH RIVER

TO GUNNISON IRRIGATION COMPANY, INC., Gunnison, Utah.

IRRIGATION

(a) 145 c.f.s. from April 1st to June 15 111.54 c.f.s. from June 15 to October 1 27.84 c.f.s. from October 1 to November 1
 Priority: 1860. Points of Diversion: To be diverted from the Sanpitch River at each, either or all of the following points:
 (1) S. 70 degrees E. 1920 feet from the NW corner Sec. 18, T. 19 S., R. 2 E. into the Larson Ditch.
 (2) S. 50 degrees 50 minutes W. 3075 feet from the NE corner Sec. 13, T. 19 S., R. 1 E. into the City Canal.
 (3) S. 47 degrees 30 minutes W. 3080 feet from the NE corner Sec. 23, T. 19 S., R. 1 E. into the Lee Ditch.
 (4) 1300 feet N. and 530 feet E. of the SW corner Sec. 23, T. 19 S., R. 1 E. into the Gunnison Old Field Canal.
 (b) 1.00 c.f.s. Morrison Tunnel Water (Developed Water) Priority: 1860. Period of Use: January 1 to December 31. Point of Diversion: Said water flows from Morrison Tunnel into Six Mile Creek and from thence into Sanpitch River and diverted as described in paragraph (a).

(c) 2.1518 c.f.s. Priority: 1860. Period of Use: April 1 to November 1. Point of Diversion: Said water flows into Sanpitch River from Nine Mile Creek and diverted therefrom at points described in paragraph (a). Said water is included as a part of the award as set out in paragraph (a).

STORAGE!
 (d) 20264.2 ac. ft. Priority: 1860. Period of Storage: January 1 to December 31. Period of Use: April 1 to November 1. Said water is stored in the Gunnison Reservoir situated in Sections 9, 15, 16, 21, 22, 28, 32 and 33, T. 18 S., R. 2 E., said storage water is released into the natural channel of Sanpitch River and from there diverted into the Gunnison Irrigation Sys-

Measurement and charge to Irr. Co at this point below reservoir
 P. 258 730

tem at the points described in paragraph (a) and used as a supplemental supply to satisfy the rights herein decreed.

Said storage is supplied from the Sanpitch River and Six Mile Creek and the water thus stored may be withdrawn and used and the reservoir refilled, but all such withdrawals to be charged up to the direct flow rights herein provided for.

(e) 320 ac. ft. Priority: 1860. Period of Storage: January 1 to December 31. Period of Use: April 1 to November 1. Points of Storage and Diversion: Said water is stored in two reservoirs as follows:

- (1) Deep Lake Reservoir, situated in the NW 1/4 Sec. 31, T. 19 S., R. 4 E. S. L. M., capacity 240 ac. ft.
- (2) Shingle Mill Reservoir, situated in the SW 1/4 Sec. 6, T. 20 S., R. 4 E., capacity 80 acre feet.

Said water is diverted from said reservoirs into the natural channel of Twelve Mile Creek and thence into Sanpitch River and diverted into the Gunnison Irrigation System at points described in paragraph (a) as a supplemental supply to satisfy the direct flow rights herein decreed.

DOMESTIC AND STOCK WATER:

(f) 215 c.f.s. April 1 to November 1. 10 c.f.s. November 1 to April 1. Priority: 1860. Points of Diversion: Diverted from Sanpitch River at the points described in paragraph (a).

Said Gunnison Irrigation Company is entitled to a first right to the sources hereinafter named to satisfy the award made to it in paragraph (a) hereof: S.S.C. River and Sanpitch River above the impounding dam of the Gunnison Reservoir;

- (1) The waters of the S.S.C. River above the impounding dam of the Gunnison Reservoir;
- (2) One-half of the natural flow of Six Mile Creek;
- (3) 2.1518 c.f.s. of the waters of Nine Mile Creek;
- (4) 58 per cent of the natural flow of Twelve Mile Creek;

And from said sources to the extent available the rights herein provided are satisfied.

Provided, that the right to the use of water from the said sources including the waters released from storage shall not exceed the award herein made in paragraph (a) hereof, and the right to water for culinary and domestic purposes set out in paragraph (f) hereof, and provided further that all of the water stored as hereinbefore provided shall be exhausted each season in supplying the rights set out in paragraph (a).

UNNAMED WASHES.

TO LEWIS LARSON, Manti, Utah.

IRRIGATION:

(a) 5.00 c.f.s. Priority: January 26, 1915, Application No. 6043, Certificate No. 1712. Period of Use: April 1 to November 15. Point of Diversion: From unnamed washes at a point 2112 feet S. and 1036.2 feet E. of the NW corner Sec. 12, T. 19 S.,

It is the withdrawal use that are to be charged against the primary flow rights -
 The withdrawal is not storage

j

↑

↑

b

Diversion are below reservoir

c

R. 1 E., S. L. M.
STORAGE:

(b) 500 acre feet. Priority: January 26, 1915. Period of Storage: January 1 to December 31. Said water to be stored in the Larson Reservoir located in the W 1/2 of Sections 1 and 12, T. 19 S., R. 1 E., and the said water stored to be released and used whenever needed in connection with the 5.00 c.f.s. set out in paragraph (a) hereof.

SANPITCH RIVER

TO T. J. EDMUNDS, Wales, Utah.

IRRIGATION:

2.00 c.f.s. Priority: Period of Use: March 1 to December 1. Point of Diversion: Said water to be diverted from Sanpitch River into the T. J. Edmunds Ditch in Sanpete County, Utah, and used to irrigate 140 acres of land.
Provided, that the right is limited to a total quantity of 630 acre feet during the above period of use in each year, and not to exceed 2.00 c.f.s. shall be diverted at any one time.

SANPITCH RIVER

TO CHARLES P. PETERSON, Gunnison, Utah.

IRRIGATION:

10.75 c.f.s. Priority: 1862. Period of Use: April 1 to October 15. Point of Diversion: From Sanpitch River at a point N. 20 degrees 00 minutes W. 750 feet from the SE corner Sec. 22, T. 17 S., R. 1 E. into an unnamed ditch and used as a supplemental supply to irrigate lands owned by the claimants, and subject only to the rights to the Gunnison Irrigation Company as herein decreed.

See 191-1920-1929
Acquired by Gunn 1955

TO JOSEPH CHRISTENSEN, or Successor, Gunnison, Utah.

IRRIGATION:

1.25 c.f.s. Priority: 1864. Period of Use: April 1 to October 15. Point of Diversion: From Sanpitch River at each, either or both of the following described points:
(1) 1610 feet W. and 180 feet N. of the SE corner Sec. 17, T. 19 S., R. 1 E. into South Ditch.
(2) 100 feet S. and 40 feet W. of the SE corner Sec. 18, T. 19 S., R. 1 E. into the North Ditch.

Acquired by Gunn 1955
1960
1966
1965

Said right is subject only to the rights of the Gunnison Irrigation Company and Charles P. Peterson.

TO W. H. GRIBBLE, Gunnison, Utah.

IRRIGATION:

1.25 c.f.s. Priority: 1864. Period of Use: April 1 to October 15. Point of Diversion: From Sanpitch River at each, either or both of the following described points:
(1) 1610 feet W. and 180 feet N. of the SE corner Sec. 17, T. 19 S., R. 1 E. into South Ditch.

Acquired by Gunn 1955
1960
1966
1965

(2) 100 feet S. and 40 feet W. of the SE corner Sec. 18, T. 19 S., R. 1 E. into the North Ditch.

Said right is subject only to the rights of the Gunnison Irrigation Company and Charles P. Peterson.

TO THE PARTIES HERINAFTER NAMED, REPRESENTED IN THIS PROCEEDING BY JACOB THOMPSON, JOSEPH H. NIELSON AND NELS P. MADSEN, COMMITTEE.

IRRIGATION:

15527.2 acre feet. Priority: 1859. Period of Use: January 1 to December 31. Points of Diversion: From Sanpitch River at each, either or all of the following points of diversion:

- (1) At a point known as Briggs Dam 190 feet E. and 125 feet N. from the SW corner Sec. 31, T. 16 S., R. 3 E.
- (2) East Drainage Canal Diversion 1320 feet E. and 2110 feet N. from the SW corner of the NW 1/4 Sec. 6, T. 17 S., R. 3 E.
- (3) Center Canal at a point 20 feet E. and 20 feet S. from the SW corner of the NW 1/4 Sec. 6, T. 17 S., R. 3 E.
- (4) At a point 1314 feet E. and 20 feet S. from the center of Sec. 1, T. 17 S., R. 2 E.
- (5) From West Drainage Canal 657 feet N. and 15 feet E. from the NW corner of the SW 1/4 of the SE 1/4 Sec. 1, T. 17 S., R. 2 E.
- (6) West Drainage Canal at a point 350 feet W. and 150 feet N. from the NW corner of the NE 1/4 of the NW 1/4 of Sec. 12, T. 17 S., R. 2 E.
- (7) From the West Drainage Canal at a point 580 feet W. and 365 feet N. of the SW corner of N 1/2 of the SW 1/4 of the NW 1/4 Sec. 12, T. 17 S., R. 2 E.
- (8) From West Drainage Canal at a point 200 feet E. and 46 feet S. from the SW corner of the NE 1/4 of the NW 1/4 of Sec. 14, T. 17 S., R. 2 E.
- (9) From West Drainage Canal at a point 690 feet W. and 1150 feet N. from the SE corner of the SW 1/4 of the SW 1/4 Sec. 23, T. 17 S., R. 2 E.
- (10) From the West Drainage Canal at a point 1900 feet S. and 600 feet W. from the NE corner of the SW 1/4 of the NW 1/4 Sec. 23, T. 17 S., R. 2 E.

Provided, that other diversions may be made along said West Drainage Canal if deemed suitable to facilitate the distribution of the waters upon the lands entitled to the same if constructed so as to enable the Commissioner, or other person that may be appointed under this decree, or otherwise, to measure the same.

It is further provided, that the parties hereinafter named as being entitled to the use of the Waters of Sanpitch River hereunder have a first and primary right to all of the waters of the Sanpitch River available at either or all of the points of diversion hereinafter stated during any and all seasons of the year when available for the irrigation of the lands hereinafter mentioned,

intersection of Saupitch River and the said Gunnison Fayette Canal, to be used from March 1 to October 1 on lands under the Gunnison Fayette Canal system north of the Saupitch River.

The following named companies and individuals hereinafter called "Exchange Users", shall have the right annually from April 16 to October 10, inclusive, to divert from the river the following percentages of the water yielded by said river for satisfying their respective rights as specified in this paragraph and as follows, to-wit:

Name of Company	Second Feet	Class of Water	Percentage Allowed
West View Irrigation Co.	23.7	A	90
West View Irrigation Co.	1.5	AA	90
West View Irrigation Co.	1.0	Well Water	90
West View Irrigation Co.	28.6	F	90
Gunnison Fayette Canal Co.	16.5	A	97
Gunnison Fayette Canal Co.	1.4	AA	97
Gunnison Fayette Canal Co.	14.3	F	97
Ray P. Dyring and W. J. Wintch	6.0	A	90
Ray P. Dyring and W. J. Wintch	1.0	F	90
J. W. Nielson or his successors	2.0	A	90
Fritsch Loan & Trust Co., or its successor in interest	3.2	A	90
State of Utah	1.0	AA	90
Howard Roberts	.7	AA	90
Archie M. Mellor	.7	AA	90
Dover Irrigation Company	20.1	A	90

Provided that the said companies and individuals herein referred to as Exchange Users, shall each have the right to divert from the yield of the river below Vermillion Dam at their respective head gates any amount in second feet and at any time between April 16 and October 10, inclusive, provided that any company's or individual's diversion does not exceed the value of their respective diversion right or rights as above defined in this paragraph measured in total acre feet at any time between April 16 and October 10, inclusive, and provided further that the said companies and individuals may collectively overdraft the amount of water collectively available as stated in this paragraph at the time of the overdraft, but not exceeding in the aggregate 1,000 acre feet at such time, and provided further that all overdrafts shall be paid back from their portion of the yield of the river for satisfying the rights of the companies and parties as above set out in this paragraph on or before October 10 of the year in which said overdraft occurs.

There shall be no drafting on call of any water yielded by said river for satisfying the rights in this paragraph prior to April 16 or after October 10 in each and every year, but the companies and/or individuals owning said right or rights shall have

Central Utah Water Company Canal and used to irrigate lands under its canal system.

6. Nicholson Seed Farms, from right decreed to Elizabeth Roberts, et al, in the Higgins decree, 1.1 second feet to be used from March 1 to October 1, to be diverted through its canals and used to irrigate lands under its canal system.

Well Rights

The following rights not being the subject of pro rata division under rights above defined as A, B, C, D, E, and F, and having their sources in wells as now driven adjacent to the Sevier River are hereby designated as "Well Water", and are hereby limited to the quantity of water available for satisfying their respective rights from their respective sources of supply.

A. Dover Dam Wells

West View Irrigation Company, the first 1.0 second foot yielded by the so-called Dover Dam Wells as now driven situated near the quarter-corner common to sections 24 and 25, Township 19 South, Range 1 West, to be used from April 1 to October 15 on lands under the West View Canal. Gunnison Valley Land & Livestock Co. is to have a maximum of 3 second feet additional water yielded by said wells to be used from April 1 to October 1 on lands under the Gunnison Fayette Canal system. Any additional water yielded by said wells shall be turned into the Sevier River and allocated as Sevier River Water.

B. Kearns Ranch Wells

To Gunnison Valley Land and Livestock Company a maximum of two second feet yielded by said wells as now driven and located in Section 1, Township 20 South, Range 1 West and Section 6, Township 20 South, Range 1 East, to be used from April 1 to October 1 on lands under the Gunnison Fayette Canal System. Any additional water yielded by said wells shall be turned into Sevier River and allocated as Sevier River water.

C. Spaulding Livingston Wells

To the Abraham Irrigation Company the water yielded by the Spaulding Livingston Wells as now driven and located in Sections 25 and 30, Township 19 South, Range 1 West, and Section 30, Township 19 South, Range 1 East, not exceeding a maximum of 15 second feet to be used from April 1 to October 1 through the Abraham Irrigation Company Canals for the irrigation of lands under its canal system. Any additional water yielded by said wells shall be turned into Sevier River and allocated as Sevier River water.

D. Saupitch River Rights

To the Gunnison Fayette Canal Company, a maximum of 40 second feet of the water yielded by the Saupitch River above the intersection of Gunnison Fayette Canal and Saupitch River after all prior rights are satisfied above the said

Limited low-priority right - no date reflected

rights of each other to the use of said waters or any part of the same, and enjoined and restrained from interfering with the head-gates and or diversion works of each other.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Sevier River and its tributaries, for the purposes of this decree in the distribution of the rights herein provided but not including the storage rights in the Piute Reservoir and in the Sevier Bridge Reservoir, is divided into two zones as above stated; that is, Zone A or the Upper Zone, which includes all of that portion of the Sevier River and its tributaries above and including the Vermillion Dam as now located in the Northwest quarter of Section 32, Township 23 South, Range 2 West, in Sevier County, Utah; and Zone B or the Lower Zone, which includes all that portion of the Sevier River and its tributaries below the said Vermillion Dam. The right in each zone are primary to and have priority over the rights in the other zone. The Lower Zone, as herein defined, embraces two sections, one known as the Saupitch River section, and the other as the Lower Sevier River Section. The Saupitch River section includes the waters of Saupitch River and its tributaries. The Lower Sevier River section includes the main channel of the Sevier River below the Vermillion Dam, and its tributaries, other than Saupitch River.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that, except as herein otherwise specifically provided, all waters herein decreed shall be and are hereby placed upon headgate duty, and the place of measurement of all waters herein decreed shall be as near the point of ~~the dam~~ as is practicable.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that, except as herein otherwise specifically provided, all waters shall be measured to the owners and users thereof as of their respective dates of priority, so that each user or owner of the waters herein decreed shall be assured that his right will be satisfied in full before any subsequent appropriators shall receive any water whatever; provided, however, that where a maximum and minimum right is herein decreed, such prior appropriator shall be entitled only to the minimum right herein decreed, as against each and every subsequent appropriator, until the minimum rights of all subsequent appropriators are satisfied, and provided further that in times of scarcity while priority of appropriation as determined in this decree shall govern and give the better right between those using water for the same purpose; the use for domestic purposes without unnecessary waste shall have preference over use for all other purposes, and use for agricultural purposes shall have preference for use over any and all other purpose except domestic use.

That each of the parties hereto and herein are hereby required to construct weirs or other measuring devices of a design approved by the State Engineer of this state, under the direction and supervision of the commissioner or commissioners appointed by the State Engineer of the State of Utah, and maintain the same

in their respective canals and ditches for the purpose of accurately measuring the quantities of water decreed to them; and thereafter shall maintain and keep all dams, headgates, flumes, canals, penstocks, and other means by which said waters are diverted, conveyed, or used, together with said weirs or other measuring devices in a good state of repair, to the end that no unnecessary loss from seepage or leakage may occur, and that the waters shall be economically applied to the uses for which they are awarded, and all waters diverted from said river and the streams, springs, and tributaries within its drainage basin, by any of the parties hereto, shall be measured at their respective weirs or other measuring devices, and by means thereof.

That the title of the parties hereto to the right to the use of said waters, as herein decreed, is hereby quieted as against each and every other party to this action; and each and every party hereto, their successors and assigns, and their agents, servants, and employees, are hereby forever enjoined from in any manner or at all interfering one with the other in the full, free, and unrestricted use of the quantities of water decreed to them, and from in any manner or at all interfering with each others' canals, dams, or headgates, or from in any manner or at all interfering with the distribution of said water by the commissioner or commissioners distributing the same, or by his or their agents or assistants.

That the rights herein decreed are founded upon appropriations of water for beneficial uses, and the rights herein decreed are subject to the condition that they are required and necessary for beneficial uses, and such rights are subject to the limitations and conditions that the same are used for beneficial purposes, economically and without waste. Any water diverted from the said river and or its tributaries, not beneficially used under the rights of the respective parties to this decree shall be returned to the river by the most practical and direct route.

Original jurisdiction of this cause and the subject matter thereof and of the parties hereto, is hereby regained for a period of two years from the date hereof for the purpose of correcting errors, omissions, and inadvertences which may have crept into this decree, and for all administrative purposes.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that where the period of use of water for irrigation purposes, not including culinary, stock watering or storage rights, is not specified or fixed by the State Engineer's proposed findings or stipulation or stipulations, or by the court's orders, or the court's decree,

Exhibit B

Manufactured by
JULIUS BLUMBERG, INC.
NYC 10013

Date Sent Out.....

Claimant's No. 381
(Do not fill in)

381
41

STATE ENGINEER'S OFFICE

STATE CAPITOL BUILDING

SALT LAKE CITY, UTAH

WATER CLAIMANT BLANK

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR THE COUNTY OF
MILLARD UTAH.

In the Matter of the Adjudication of Water Rights of

Gunnison Fayette Canal Company
Successor in Int. to Fayette Canal Company WATER USER'S CLAIM.

Sevier River System
Richlands Irr. Co. a corp. vs. Westview Irr. Co. a corp. et al.

Note:—This blank is sent you in accordance with Section 24, Session Laws of Utah, 1919. The information called for herein will be used in connection with the adjudication of your water rights on the above mentioned stream and its tributaries. All questions in so far as they refer to your claim should be answered, and the blank filed with the clerk of the district court at Fillmore within sixty (60) days from the above mentioned date. Failure to do so will forever bar and estop you from subsequently asserting any right to the use of water from the stream or tributaries in question.

- Name of Claimant: Gunnison Fayette Canal Company
(If a company, state whether or not incorporated)
- Postoffice address: Fayette, Utah President: Archie M. Mellor, Fayette, Utah.
(If a company, give name and address of President and Secretary) Secretary: Arthur M. Christenson, Gunnison, Utah.

- Name of particular spring, stream or tributary from which water is diverted: Sevier and Sanpitch Rivers in Sanpete County. Deseret Irrigation Co. et al. vs Samuel McIntyre et al; Millard Co. Land and Water Co. vs, Abraham Irr. Co.

- Nature of Right: Diligence right
Right decreed by court, cite title of case. Application filed with State Engineer's Office No. 12-511
(Strike out ones not needed. If right has been decreed by court, attach verified copy of decree to blank when returning it)

(see summary attached)

- Nature of Use: Irrigation
Mining
Domestic
Municipal
Stockwatering
Power
(Strike out ones not needed.)

(If for use other than here listed, set forth in blank space)

- Direct Flow Appropriation:
 - Amount of water claimed in second-feet: 90.50 sec feet from Sevier River as dec. above 15 sec feet from Sanpitch as shown on map attached to this blank. 40 sec feet from the Sanpitch River as shown on map attached to this blank.
(Where claimant is a company or association selling or distributing water by shares of stock, the enclosed blank entitled "Water Company's Distribution Blank" must also be filled in and attached to statement.)
 - Annual period of use: Entire year
 - Point or points of diversion from stream or tributary: (Must be described with reference to government land corner)
Sevier River: West 1474.4 feet, South 450.8 feet from the North East Corner of Section 18, Twp. 20 South, R. 1 East, S. 1. N. Sanpitch River: North 10° West 400 feet from the South East Corner of Section 13, Twp. 19 South Range 1 West S. 1. N.

7. Appropriation for Storage Purposes:
(If claimant stores water in more than one reservoir some information should be given for each reservoir. A fly sheet may be attached under paragraph 6 for this purpose, if necessary.)

- Name of reservoir, if known by name.....
- Maximum capacity of reservoir in acre-feet
- Location of reservoir. (State legal subdivisions inundated in whole or in part)

Final July 25 1922
W.D. [Signature]
[Signature]

- (d) Is reservoir located on or off stream from which water is claimed for storage purposes?.....
- (e) Period of storage.....
- (f) Period of use.....
- (g) Area inundated by reservoir at full stage in acres
- (h) Maximum depth of water in reservoir.....
- (i) Is reservoir completely filled each year?.....If not, state what per cent of reservoir capacity is filled during normal year.....
- (j) If a yearly record of amount of water stored in past is available, give same.....
- (k) Is reservoir drained each year.....
- (l) Do you claim right to fill reservoir more than once each year?..... If so, how many times?
- (1) Length..... Width, Top..... Bottom..... Depth.....
- (m) Give general description of dam and other storage works used in storing water.....
- (n) Give following information as to supply canal in case reservoir is off source of supply:
 - Grade per 1000 ft..... Maximum carrying capacity in second feet.....
 - Nature of material through which canal passes
 - (2) Point of diversion of supply canal from stream or tributary. (Must be described with reference to government land corner)

8. Diverting Works:

(If claimant is operating several structures of the same kind, information should be given for each. A fly sheet may be attached under paragraph 7 for this purpose, if necessary.)

- (a) Diverting dam: nature, type and dimensions of Sevier R.: Rock and Timber across Sevier R.: about 125 wide feet wide.; about 75 feet through Sanpitch R. Dam; 100 feet across river, and 50 through, about 8 feet high. Dam made of rock and timber.
- (b) Headgate: nature and type of Sevier R.: Radial Steel headgate, 10 feet wide and 6 feet high and set in cement. Sanpitch R. Timber gate flush boards. 12 feet wide and 8 feet high.
- (c) Water measuring device: nature and type of Cement Wier.
- (d) Canal: Length 23 Mi. Width at top 16 feet Width at bottom 14 feet. Depth 3 feet Grade per 1000 feet .70 of foot Maximum carrying capacity in second feet 70 sec. feet Material through which canal passes clay, sand and gravel.
- (e) Flume: Material..... Length..... Width..... Depth.....
- (f) Pumps: Number..... Type..... Capacity.....
Make..... How operated
- (g) Date when work on diverting system was first begun Sevier R.: 1882, Sanpitch R. 1894.
- (h) Nature of such work Building dam and constructing canal where now located and built.
- (i) Date when diverting system was completed Sevier R.: 1883, and Sanpitch R. 1894.
- (j) Date when water was first used and amount 1883
- (Date)
- (Amount)
- (k) If canal has been enlarged, give date of enlargement and additional capacity.....

9. Where Water is Used for Irrigation Purposes:

- (a) Legal subdivisions of land irrigated the first year
 - (b) Legal subdivisions of land irrigated each year thereafter
- These subdivisions cannot be answered with any degree of definiteness, but the lands herein mentioned were brought under cultivation gradually from year to year until all the lands herein mentioned were brought under cultivation, which was many years ago, at least twenty five years ago.

- (c) Total area of land irrigated at present time 6200 acres.
- (d) Give legal subdivisions of land (40 acre tracts) irrigated at present time, if only parts of legal subdivisions are irrigated give acreage in each (See Exhibit "A" attached to this statement
- (e) Character of soil irrigated sandy loam, clay and gravel. Depth 3 to 10 ft
- (f) Character of sub-soil sand and gravel and clay.
- (g) Kind of crops raised last year and acreage of each Beets 350 Acres, alfalfa, 1000 Acres, grain 2000 Acres, meadow hay and grass land 1650 Acres.
- (h) Maximum acreage of various crops irrigated at any time during period of use same as above
- (i) Minimum acreage of various crops irrigated at any time during period of use 350
- (j) How much irrigable land do you own that is not now irrigated? Land under system owned by stock holders, and others not irrigated 1000.
- (k) Is water available for irrigation whenever you are entitled to use it? at times not sufficient and other times enough to meet requirements, depending on season
- (l) Do you use water for irrigation outside the growing season? yes.
 - (1) If so, to what extent? 30 second feet, under Greenwood Decree.
 - (2) For what crops? Hay, alfalfa, and fall wheat, meadow and pasture, and for stock water purposes.
- (m) Is any portion of the land listed as irrigated water logged? no. If so, how much in each legal subdivision?

- (n) Is any portion of the land listed as irrigated drained by artificial means? yes
- (o) Do you get water under a partnership ditch? yes. If so, give names and addresses of partners and amount of land each irrigates at present H.A. Kearns Gunnison, Utah, H.C. Hicken looper and others, Centerfield, Utah, amount of land not known, and also Ray P. Dyreng and W.J. Winton.

10. Where water is used for power purposes:

- (a) Number of water wheels used
- (b) Type of water wheel used
- (c) Actual water capacity of each wheel used at full gate opening
- (d) Head under which each wheel operates
- (e) Rated horsepower of each wheel used
- (f) Purpose for which power is used
- (g) Place or places where power is used
- (h) Point where water is returned to the natural stream (Must be described with reference to government land corner)

11. Where Water Is Used for Mining Purposes:

- (a) Name of mining district
- (b) Name of mine
- (c) Kind of ore or ores mined
- (d) Particular purpose for which the water issued

(e) Point where unused water, if any, is returned to the natural stream. (Must be described with reference to government land corner)

12. Where Water is Used for Stock Watering:

(a) Type of conserving works:

- (1) Troughs, number and size.....
- (2) Ponds; number, size and depth.....
- (3) Sumps; number, size and depth.....

(b) Number and kind of range stock watered. Sheep, cattle and Horses about 2000 cattle and Horses, 10,000 sheep.

13. Where Water is Used for Domestic and Municipal Purposes:

(a) If for domestic use:

- (1) Place or places where used.....
- (2) Number of persons supplied.....
- (3) Extent of domestic stock watered.....
- (4) Number and total acreage of gardens and lawns irrigated.....

(b) If for municipal use:

- (1) Name of city or town supplied.....
- (2) Population.....
- (3) Approximate quantity of water in gallons per day used.....

14. Where Water is Used for a Purpose Not Above Enumerated. (Describe in detail in space below the nature and extent of such use)

Sumner F. Ogden
Signature of Claimant.

STATE OF UTAH,
County of _____ } ss.

_____ being first duly sworn, upon oath deposes and says that he is the claimant whose name appears hereon, that he has read the foregoing statement of his claim and knows the contents thereof, that he has signed the same, and that the answers set forth therein are true to his best knowledge and belief.

Subscribed and sworn to before me this _____ day of _____, 192____.

My commission expires _____ Notary Public.

STATE OF UTAH,
County of Sanpata } ss.

Archie M. Mellor being first duly sworn, upon oath deposes and says that he is the President of the organization above named, that he makes this certification on behalf of said organization, that he has read the foregoing statement of claim and knows the contents thereof, and that he has signed the name of said organization to said statement, that the answers set forth therein are true to his best knowledge and belief.

Subscribed and sworn to before me this 4th day of February, 1922.

My commission expires May 8, 1925. Residence Lanti, Utah Public.

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF UTAH, COUNTY
OF MILLARD.

The Deseret Irrigation Company a Corporation
and the Leamington Irrigation Company, a
corporation.

vs Plaintiffs.

Samuel McIntyre Wm. H. McIntyre, the Wellington
Irrigation Company, a corporation; the
Dover Irrigation Company, a corporation; the
Fayette Canal Company, a corporation; The
Robbins and Kearns Dam and Canal Company,
a Corporation; the Deseret and Salt Lake
Agricultural and Manufacturing Canal Company
a Corporation; the West View Irrigation
Company, a corporation; Edward Robbins,
Robbins, whose name is other
wise unknown, Cazier Brothers, whose names
are otherwise unknown R. C. Roberts, Benja-
min Christensen, Reuben Christensen, and
L. H. Eriksen, and other persons unknown
to plaintiffs.

DECREE.

.....

This cause came on regularly for trial on the 16th
day of May, A.D. 1900, before Hon. J. V. Higgins, Judge
sitting without a jury upon the amended complaint of the
Deseret Irrigation Company and the Leamington Irrigation Company
corporations, plaintiffs, and the answers of the defendants,
Samuel McIntyre Wm. H. McIntyre, the Wellington Irrigation
Company, a corporation, the Fayette Irrigation District,
sued as the Dover Irrigation Company, a corporation; the
Fayette Canal Company, the Robbins and Kearns Dam and Canal
Company; the Deseret and Salt Lake Agricultural and
Manufacturing Canal Company, the West View Irrigation Company
corporations; and Henry Robbins, sued as Edward Robbins and
Alfred J. Robbins, Elizabeth Roberts, Benjamin Christensen,
Reuben Christensen, Samuel Edward Cazier, Edoil Cazier,
Owen Cazier, Joseph Cazier and Myrum Cazier sued as Cazier
Brothers, and L. H. Erickson; Rawlins, Thurman, Kurd and
Wedgwood appearing as attorneys for the plaintiffs, and
Richards & Varian for the defendants Samuel McIntyre and Wm.
McIntyre; D. D. Houtz for the defendants, the Wellington
Irrigation Company, Edward Cazier, Edoil Cazier, Joseph
Cazier, and Myrum Cazier and L. H. Erickson; W. H. Reid for
the defendant, the Fayette Irrigation District, sued as the
Dover Irrigation Company, and for the West View Irrigation
Company and Elizabeth Roberts, Benjamin Christensen, and Reuben
Christensen; King, Burton and King for the defendant, the
Fayette Canal Company, the Robbins & Kearns Dam and Canal
Company; Henry Robbins, sued as Edward Robbins and Alfred J.
Robbins; Ferguson & Cannon for the defendants, the Deseret
and Salt Lake Agricultural & Manufacturing Canal Company;
said trial being continued from day to day until the 29th day
of JUNE, A.D. 1900, and the Court, having considered the
pleading and heard the evidence and the arguments of counsel,
and having heretofore made and filed his findings of fact
and conclusions of law; now on motion of S. R. Thurman,
of counsel for plaintiff, it is ordered, adjudged and decreed:

1.

That the plaintiff corporation, the Loanington Irrigation Company is the owner of the right to the use of thirty five and fifty seventieths cubic feet per second of the waters of said River during the irrigation season of each and every year.

2.

That the defendant corporation, the Wellington Irrigation Company is the owner of the right to the use of twenty six and twenty five seventieths cubic feet per second of the waters of said river during the irrigation season of each and every year.

3.

That the plaintiff corporation, the Deseret Irrigation Company, is the owner of the right to the use of one hundred and forty two and sixty seventieths cubic feet per second of the waters of said Sevier river during the irrigation season of each and every year and that it holds the title to the right to the use of three sevenths of said amount in trust for the use and benefit of the Deseret and Salt Lake Agricultural and Manufacturing Canal Company.

4.

That the defendant Corporation, the Fayette Irrigation District, is the owner of the right to the use of fifty seven and ten seventieths cubic feet per second of the waters of said Sevier River during the irrigation season of each and every year.

5.

That the defendant corporation, Robins and Kearns Dam and Canal Company is the owner of the right to the use of thirty two and sixty seventieths cubic feet per second of the waters of said Sevier River during the irrigation season of each and every year.

6.

That said above named parties are the owners of a primary right to the use of the waters of said Sevier River during the irrigation season and are the owners of the right to use of the ordinary flow of said River, ordinarily amounting to the aggregate volume of two hundred and ninety four and sixty five seventieths cubic feet per second, measured in the canals of said parties at or near their respective headgates, and if the volume of water flowing in said river during the irrigation season be less than two hundred and sixty five seventieths cubic feet per second, said parties are the owners of the right to the use thereof pro rata in proportion to the respective quantities of which they are the owners of the right to the use hereinbefore stated.

7.

That whenever the waters of said Sevier River, its springs, tributaries and percolating and seepage waters exceed in volume the flow of two hundred and ninety five seventieths cubic feet per second, the defendants, Samuel McIntyre and William McIntyre are the owners of the right

to the use of such excess to the extent of fifteen and fifty five seventieths cubic feet per second thereof during the irrigation season of each and every year.

8.

That the defendants, Elizabeth Roberts, Benjamin Christensen, and Reuben Christensen are the joint owners to the extent of one and thirty seventieths cubic feet per second of the waters of these certain springs situate in what is commonly known as Robbins or Ryan Meadow in Sanpete County tributaries to said river, during the irrigation season of each year, and are also joint owners of the right to the use of the waters of the Sanpitch River, diverted at or near one mile west of Rocky Point, Sanpete County from said river to fill a ditch of a capacity of seven feet wide by two feet deep, having a fall of two feet to the mile, and the said right to the use of said water in said Sanpitch River and said springs is a primary right and not subject to the rights decreed to any other parties to this action.

9.

That the defendant L. H. Erickson, is the owner of three and twenty three seventieths cubic feet per second of the waters of certain springs situate near the natural channels of the Sevier River and the tributary to said River at West View, Sanpete County, which said springs rise in what is commonly known as the Gunnison Meadows, and which are commonly known as the Gunnison Meadow Springs and which said springs are produced and caused by the use of water upon land in the vicinity of said Sevier River for irrigation purposes, and that said right is a primary right and not subject to the right of any of the other parties to this action to the waters of Said Sevier River.

10.

That whenever the waters of said River, its springs, tributaries and percolating and seepage waters exceed in volume a flow of three hundred and ten and forty five seventieths cubic feet per second, the defendants Henry Robbins and Alfred J. Robbins, jointly, are the owners of the right to the use of such excess to the extent of twelve and thirty five seventieths cubic feet per second of the waters of said river during the irrigation season of each and every year.

11.

That whenever the volume of water in said river, its springs, tributaries and percolating and seepage water exceed in volume a flow of three hundred and twenty three and ten seventieths cubic feet per second during the high water season of each and every year, the defendant The Deseret & Salt Lake Agricultural and Manufacturing Canal Company is the owner of the right to the use of such excess to the extent of a continuous flow of such excess to fill its reservoir having a capacity of ten thousand acre feet once full during the high water season of each and every year; and that it is the owner of the right, and said right is prior to the rights of any other party to this

action, to sufficient of the waters of said river during the non-irrigation season of each year to fill its said reservoir with a capacity of ten thousand acre feet once full; and said defendant holds the title to four sevenths of said right or ownership to the waters of said river in trust for the use and benefit of the plaintiff the Deseret Irrigation Company.

12.

That whenever the volume of water in said river, its springs, tributaries, and percolating and seepage waters exceed in volume a flow of three hundred and twenty three and ten seventieths cubic feet per second during the high water season of each and every year the defendant, the Deseret & Salt Lake Agricultural and Manufacturing Canal Company, is the owner of the right to the use of such excess to the extent of a continuous flow of such excess to fill its reservoir having a capacity of ten thousand acre feet once full during the high water season of each and every year; and that it is the owner of the right, and said right is prior to the rights of any other party to this action, to sufficient of the waters of said river during the non-irrigation season of each year to fill its said reservoir with a capacity of ten thousand acre feet once full; and said defendant holds the title to four seventh of said right or ownership of the waters of said river in trust for the use and benefit of the plaintiff, the Deseret Irrigation Company.

13.

That whenever the waters of said Sevier River, its springs, tributaries, percolating and seepage waters exceed in volume a flow of three hundred and twenty three and ten seventieths cubic feet per second and after the defendant the Deseret and Salt Lake Agricultural (Manufacturing) Canal Company, shall have filled its reservoir of the capacity of ten thousand acre feet once full during the high water season of each year, the defendant, Elizabeth Roberts is the owner of the right to the use of such excess to the extent of five and fifty seventieths cubic feet per second of the waters of said river during the irrigation season of each and every year.

14.

That whenever the waters of said river, its springs tributaries, percolating and seepage waters exceed in volume a flow of three hundred and twenty eight, and sixty-seventieths per second the said defendant, the Deseret and Salt Lake Agricultural and Manufacturing Canal Company, shall have filled its reservoir, having a capacity of ten thousand acre feet once full during the high water season, the Fayette Canal Company is the owner of the right to the use of twenty eight and forty-seventieths cubic feet per second of the waters of said river during the irrigation season of each and every year, and said ownership is equal in time and right with the right of the defendant West View Irrigation Company to the use of twenty eight and forty seventieths cubic feet per second of the waters of said Sevier River, during the irrigation season of each and every year.

16.

That whenever the waters of said river, its springs, tributaries, and percolating and seepage waters exceed in volume a flow of three hundred and twenty eight and sixty seventieths cubic feet per second and the said defendant the Deseret and Salt Lake Agricultural and Manufacturing Canal Company shall have filled its reservoir having a capacity of ten thousand acre feet once full during the high water season in each year, the said defendant, the West View Irrigation Company is the owner of the right to the use of twenty eight and forty seventieths cubic feet per second of the waters of said river during the irrigation season of each and every year and said ownership is equal in time and right to the right of the defendant, the Fayette Canal Company to the use of twenty eight and forty seventieths cubic feet per second of the waters of said river during the irrigation season of each and every year.

16.

The rights of said defendant, the Fayette Canal Company and the West View Irrigation Company, being equal in time and right, if the volume of water in said Sevier River, its springs, tributaries and percolating and seepage waters, in excess of the volume of three hundred and twenty eight and sixty seventieths cubic feet per second and sufficient to fill the reservoir of the defendant, the Deseret and Salt Lake Agricultural and Manufacturing Canal Company, of the capacity of ten thousand acre feet once full during the high water season, does not exceed in volume fifty seven and ten seventieths cubic feet per second, the defendant, the Fayette Canal Company and the West View Irrigation Company are entitled to the use of such excess, whatever it may be, not exceeding fifty seven and ten seventieths cubic feet per second pro rata in equal amounts.

17.

That no party to this action herein decreed to be the owner of a secondary right is entitled to the use or is the owner of the right to the use of the waters of said Sevier River, its springs, tributaries, or percolating or seepage waters until after the appropriators of the ordinary flow of the waters of said river and having primary rights to the use of the waters of said river as hereinbefore decreed, and the appropriators prior in point of time as hereinbefore decreed have received the amount of water of which they are decreed to be the owners, and as the waters of said river recede in volume so as to be insufficient to supply all of the parties during the irrigation season of each year, such later appropriators shall not have the right to use or divert any of the said waters until all of the appropriators having a primary right to the ordinary flow of the waters of said river and the other appropriators who are prior in time as decreed herein shall have received the quantity and the use of the waters as herein decreed.

18.

That the high water season is that period in each year and every year between April first and July first and the irrigation season is that period in each and every

year between March first and October first.

19.

That in order to determine during the irrigation season the volume of water flowing in said river for the purpose of regulating and distributing the same among the parties to this action according to the quantities and the priorities decreed herein, the same shall be measured in second feet, over weir dams of uniform construction, located in the ditches of the respective parties hereto as near the headgates thereof as practicable, and said headgates shall be situated as near as practicable to the point where said respective ditches intersect the points of diversion of the respective parties; and in order to properly distribute the regulation of said waters, the headgates of the respective parties to this action at the head of their respective canals shall be so regulated that no greater quantity of water can flow through said headgates than the quantity of which they are herein decreed to be the owners of the rights to the use.

20.

For the purpose of establishing weirs and headgates in the respective ditches of the parties hereto as heretofore required and decreed, R. E. L. Collier of Salt Lake City, Utah, is appointed commissioner for such purpose.

21

That unless the parties hereto shall otherwise agree upon and elect a person annually to regulate and distribute the waters of said river among the persons and parties entitled thereto, as provided herein, the court shall annually appoint a commissioner whose duty it shall be from time to time whenever requested by any of the parties hereto to measure and determine the quantity of water flowing in said canals or any of them, and regulate the flow thereof so that the parties hereto and each of them may at all times receive the quantity of water to which they are entitled. The compensation of said commissioner and the expenses incident to said measurements and the performance of his duties herein shall be paid by the parties hereto according to their respective rights in and to said waters, and the same to be adjusted and determined by the Court, provided that if any person shall without cause apply to said commissioner to make said or any measurements of said water as herein provided whereby costs and expenses are incurred, the court may, in its discretion, tax said costs and expenses against the party and all of said costs and expenses, including said compensation for said commissioner when incurred, adjusted or taxed as herein provided shall be taxed as costs in the action, and the same may be collected as provided by law.

22.

That each of the parties to this action, their successors and assigns be and they and each of them are hereby perpetually enjoined and restrained from claiming or asserting any right, title, or interest of in or to the waters of said Sevier River, its springs, tributaries,

percolating and seepage waters, other than to the interest of which they are respectively herein decreed to be the owners.

23.

That each of the parties to this action be and they and each of them, their agents, servants and employees, and all persons acting for them or in their interest are hereby perpetually enjoined and restrained from in any manner interfering or diverting any of the waters of said Sevier River, its springs, tributaries, percolating or seepage waters, except such portion thereof as they are herein respectively decreed to be the owners of, and said parties and each of them, their agents, servants and employees and all persons acting in their interest are hereby perpetually enjoined and restrained from in any manner or at all interfering with the other parties to this action in their use of such portion of the waters of the Sevier River, its springs, tributaries and percolating and seepage waters as they are herein decreed to be the owners of the right to use.

24.

That each of the parties to this action shall pay the costs of the witnesses testifying in its behalf.

That the costs of this action taxed at _____ dollars incurred in Millard County should be paid by the following parties hereto in equal proportions, to wit: the Wellington Irrigation Company, the Deseret Irrigation Company, the Fayette Canal Company, the Leamington Irrigation Company, the Robbins Kearns Dam and Canal Company, Samuel and William McIntyre, Henry Robbins and Alfred J. Robbins, the Deseret and Salt Lake Agricultural and Manufacturing Canal Company, Elizabeth Roberts, the Fayette Irrigation District and the West View Irrigation Company.

That the costs incurred in the execution of this order of this court made and entered at Nephi, June 29th 1900 taxed at \$_____ dollars be apportioned and paid in equal proportions by the following parties hereto, to-wit: Henry Robbins and Alfred J. Robbins, Robbins and Kearns Dam and Canal Company, Fayette Irrigation District, and Samuel and William McIntyre, the Leamington Irrigation Company, the Deseret Irrigation Company and the Wellington Irrigation Company.

Done at Nephi, Utah. Jan. 5th, 1901.

(Signed) E. V. Higgins.

Judge.

SUPPLEMENTAL OR ADDITIONAL ANSWER TO Subdivision 4 on Page
one of Water Claimant Blank:

The Gunnison Fayette Canal Company owns the right to the use of the water decreed to the Fayette Canal Company in the decree referred to in the Statement known as the Higgins Decree; and also to the right to the use of all water decreed to the Robbins and Keays dam and Canal Company in said decree amounting to ~~30~~^{30.50} second feet; also by purchase to the right to the use of water from Sanpitch River as decreed to Elizabeth Roberts; Benjamin Christensen and Reuben Christensen in the decree generally known as the Higgins Decree to the amount as therein decreed to fill a ditch of a capacity of seven feet wide by two feet deep having a fall of 2 feet to the mile, and the said right to the use of said water in said Sanpitch River is a primary right, and amounts in second feet to fifteen second feet, and as awarded and confirmed in the Fifth Judicial District Court of the state of Utah, to Reuben Christensen, Benjamin Christensen, Howard Roberts, Irwin Roberts and Lillian Roberts Madsen in the case of the Millard County Land and Water Company, a Corporation vs. Abraham Irrigation Company, a Corporation et.al. commonly known as the Greenwood Decree, amounting to Fifteen Second Feet;

Also to 40 second feet of water from Sanpitch River during the highwater period commencing about May first and ending about July first, diverted into its canal at the dam commonly known as the Fayette Canal Dam across Sanpitch River, situate North 10° W 400 feet from the Southeast corner of Section 13, Township 19 South R 1. West, when, during said above named period, there is water in said Sanpitch River available at said point. Said last above named claim to water is based upon a necessary and beneficial use thereof diverted at the above mentioned point, and used for a period of more than twenty five years, and has been applied to irrigate the lands under said Fayette Canal during said period by the stockholders of the Gunnison Fayette Canal Company and their predecessors in interest, and has been used in connection with and supplemental to the decreed rights above mentioned; and the same is not more than sufficient, in addition to said decreed rights, for the proper and beneficial irrigation of the lands under said during said period.

Answer to Paragraph 6, Subdivision (a)

Part of the 30.50 second feet, now belongs to the Sevier River Land and Water Company, as we are informed, the Fayette Canal company, was reincorporated about a year ago, and now is the Gunnison Fayette Canal Company, and the stock owned in the former company and the water represented by it, have not been transferred to the new company, and part of that water above mentioned now is owned these reservoir people, amounting to about 5 second feet.

And further there is also owned by the Gunnison Fayette Canal Company, as decreed to it in the case of Millard County Land and Water Company, a corporation, vs Abraham Irr. Co., et al. 30 second feet from the Sevier River to be used during the winter, which is supplemental to the other rights, but we have been unable to secure a copy of said decree to file herewith, but the same is referred to and made part hereof.

In further explanation: In 1909 the Robbins and Kearns Dam and Canal Company deeded all of the water decreed to it in the Higgins Decree to the Fayette Canal Company, and the Fayette in turn deeded to the Spaulding and Livingston Investment Co. 1/2 of the waters decreed to it by the Higgins Decree, and one-half of the waters deeded to it by the Spaulding and Livingston Robbins and Kearns Dam and Canal Company, being 16.30/70 primary right, and 14 20/70 second feet secondary right, and this has in turn been transferred to various parties, and a portion of whom use the water through the upper part of the Fayette Canal, to-wit H.A. Kearns, W.J. Winch and Ray P. Dyreng, Madors Hickenlooper and others.

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IN THE FIFTH JUDICIAL DISTRICT COURT WITHIN AND FOR MILLARD COUNTY,
STATE OF UTAH.

In the Matter of the Adjudication of the
Water Rights of FAYETTE CANAL COMPANY,
a corporation on the
SEVIER RIVER SYSTEM.

RICHLAND IRRIGATION COMPANY, a corporation vs. WESTVIEW IRR. COMPANY,
a corporation, et. al.

ORDER EXTENDING TIME TO FILE WRITTEN STATEMENT.

Upon good and due cause being shown therefor, it is hereby ordered
that the Fayette Canal Company, a corporation, may have upto and in-
cluding the 25th day of February, 1922, in which to file with the clerk
of this court State of Claim of Water Rights within the said SEVIER
RIVER SYSTEM.

Done at Nephi, Utah, the 17th day of January, 1922.

William F. Stewart
Judge.

W.D. Miller
COUNTY CLERK
FILED
FEB 25 1922
FILED
MILLARD COUNTY

Exhibit C

Manufactured by
JULIUS BLUMBERG, INC.
NYC 10013

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF MILLARD

STATE OF UTAH

RICHLANDS IRRIGATION CO., Inc.,	:	
Plaintiff	:	
-vs-	:	OBJECTION.
WESTVIEW IRRIGATION CO., Inc.,	:	
et al.,	:	
Defendants	:	

Comes now the Gunnison-Fayette Canal Co., defendant in this case, and objects to the "Proposed Determination of Water Rights on the Sevier River System," filed herein by the State Engineer, and shows the court:

I.

That the proposed rights of the defendant are listed under Paragraph #317, Page 100, Claim #367 of said determination.

II.

That under said paragraph #317 the defendant is determined to have 3,115.5 acres of land irrigated, where as a matter of fact they are irrigating and have irrigated for many years 4,489.5 acres of land. The discrepancy in acreage is shown in the following table:

State Engineer Survey Plat No.	Location	Acres Determined by State Engineer	Acres actually irrigated	Increase
502	:Sec. 36-T19 SR 1 W:	50.1	56.7	6.6(a)
506	:Sec. 24-T19 SR 1 W:	363.6	424.5	60.9
513	:Sec. 13-T19 SR 1 W:	3061.6	309.0	.2(b)
514	:Sec. 12-T19 SR 1 W:	319.7	337.7	18.0

IN THE DISTRICT COURT OF MILLARD COUNTY STATE OF
UTAH.

Richlands Irrigation Company,
a corporation, et al.,

Plaintiff,

vs.

WEST VIEW IRRIGATION COMPANY,
a corporation, et al.,

Defendants.)

SATURDAY, DECEMBER 16TH, 1933 - 10:00 A.M.

Re: Claim No. 673, Objections of New Field Canal
Company. Also Claim No. 663 Mayfield Irrigation
Company.

Mr. Lewis Larson appeared as counsel for New Field
Canal Company.

RICHARD A. FJELSTAD, being first duly sworn, testi-
fied as follows:

CROSS EXAMINATION by Mr. Melville:

Q You are also an officer of the Gunnison Irrigation Company,
are you not?

A Yes sir, a board member.

Q A board member. Now, you say that this water stock which
represents twenty-four cubic feet of waters of the Gunnison
Irrigation Company, that is, the water which that stock repre-
sents has been used from April 1st, in each and every year?

A Yes sir.

Q How many shares, if you know, are there that represents this
twenty-four cubic feet?

A 4000.

Q So that the New Field Canal Company owns 4000 shares of stock.

Q In the Gunnison Irrigation Company?

A Yes.

Q Is it owned by the Canal Company?

A Yes, sir.

Q Well, is the title to it in the Canal Company or in the stockholders of the Gunnison Irrigation Company?

A In the stockholders of the Gunnison Irrigation Company.

Q How many shares are there in the Gunnison Irrigation Company?

A 25,000.

Q So that they have all been issued for that?

A Yes.

Q So that there is about four-twenty-fifths of the waters owned by the Gunnison Irrigation Company that goes on to lands under the New Field Canal Company?

A Yes sir.

Q How long is that been used there?

A Well, I guess ever since the canal was made, as long as I can remember.

Q Since prior to 1900?

A Yes.

Q So the New Field Canal Company is really one of the canals of the Gunnison Irrigation Company?

A Well, we clean our own canal. Outside of that it is in the system.

Q You are incorporated, are you?

A Yes sir.

Q And the Gunnison Irrigation Company owns fifty-eight per cent of all the waters of Twelve Mile Creek?

A Yes sir.

Q Of course the Mayfield Irrigation Company owns the other forty-two per cent?

A Yes sir.

Q So that any waters that you have taken from Twelve Mile Creek has been a part of the waters of that stream owned by the Gunnison Irrigation Company?

A Yes, sir.

Q And represented by stock in that company?

A Yes.

Q In other words, you don't claim any water not represented by stock in the Gunnison Irrigation Company, do you?

A Only in high water.

Q Well, the Gunnison Irrigation Company, you contend they own fifty-eight per cent of all the high water, as well as the low water?

A Yes, up to a certain point.

Q What?

A Up to a certain point.

Q To what point? Tell us what point.

A Well, by the State Engineer's decision here, they are allowed so many second feet in twenty-four hours.

Q That is up to a--

MR. LARSON: From that source of supply to the Gunnison Irrigation Company?

A Yes.

MR. LARSON: If you will get that into your mind it will clear up a lot of difficulty.

Q The State Engineer gave the Gunnison Irrigation Company a continuous flow from that source of 145 cubic feet from April 1st to June 15th. From all sources?

A Yes.

Q Whenever the Gunnison Irrigation Company has received that quantity from that source of supply, it doesn't claim any rights in the Twelve Mile Creek, does it?

A No, I think not.

Q So then there would be some water in Twelve Mile Creek at

certain times of the year that wouldn't be claimed by the Gunnison Irrigation Company?

A Yes, I think in certain years.

Q As a matter of fact you never have had any filings on the waters of Twelve Mile Creek?

A No.

Q How?

A No sir, I don't think so.

Q Your company doesn't hold title to any water?

A No.

Q You are only organized for the purpose of cleaning and repairing your canals?

A Yes.

Q And distributing the water?

A Yes.

Q You are a distributing corporation for the waters owned by the corporation?

A Yes.

Q Your company doesn't claim title to any water of any kind?

A Not unless it is--

Q You haven't claimed any?

A We have used it.

Q The water that you have used has been part of the water in Twelve Mile Creek that the Gunnison Irrigation Company is entitled to?

A No, I don't think so.

Q You don't think so?

A When the Gunnison Irrigation Company uses their water, they take all they are entitled to, and if there is any left we can have it.

Q Do you know how much they are entitled to?

A Only by the State Engineer's decision.

Q He gave them title to a flow of 145 second feet from all sources?

A Yes.

Q Do you know what part of that 145 second feet comes from Twelve Mile Creek?

A No sir.

Q You don't have any record of it?

A It would vary a great deal one year with another.

Q Does the Gunnison Irrigation Company have any record of that?

A I guess they have their measurements from year to year.

Q You are an officer of the Gunnison Irrigation Company?

A Yes.

Q Will you produce the records on that?

A No, I couldn't produce the records of that.

Q Who could?

A I don't know, unless Mr. Erickson has got something like that.

Q Mr. Erickson would be the only one that would have that?

A Yes, unless our president has some information on that.

Q Who is secretary of your company?

A E. H. Bardsley.

Q Who?

A Bardsley.

Q Is he at Gunnison?

A Centerfield.

Q Now, if the New Field Canal Company has ever taken any waters from Twelve Mile Creek other than that represented by stock in the Gunnison Irrigation Company, you can't tell the court how much, can you?

A No sir.

Q Nor what years?

A No sir.

Q Nor can you name any year that it has taken any?

A I don't know as I could name any year. I know a case, incidentally, we could take all we wanted.

Q That is an excessively high year.

A Yes.

Q And you did take it. As far as you know they haven't taken any water in any other year.

A Yes, we have taken waters, I couldn't say the year.

Q You never measured it in the New Field Canal Ditch?

A No.

Q You have never distributed it?

A No.

Q As a matter of fact, you never relied upon that for the production of crops, have you?

A No.

Q You rely entirely upon the water which your stock in the Gunnison Irrigation Company represents for the irrigation of all your lands in the New Field Canal?

A Yes.

Q You couldn't produce any crops without that water, could you?

A No sir, not the transferred water, that is a cinch.

Q And the Gunnison Irrigation Company has always claimed this land under the New Field Canal Company as part of the land irrigated by their water supply?

A Well, I don't know as to that.

Q Well, it is a part of the land that is irrigated by the waters of the Gunnison Irrigation Company?

A Yes.

Q Yes.

A That is true.

Q And this land was included in the acreage which the court allowed water for in the suit by the Gunnison Irrigation Company versus the Gunnison-Highland Canal Company, wasn't it?

A Yes sir.

Q Now, who owns this Bear Hole Reservoir?

A Well, some of these Mayfield companies, I couldn't say.

Q In other words, the New Field Canal Company doesn't own it?

A No.

Q Nor the Gunnison Irrigation Company?

A No.

Q You make no claim to the waters of Bear Hole Reservoir?

A No sir.

Q Do you claim any waters-- that is the New Field Canal Company-- in the Bear Hole Reservoir?

A No sir.

MR. MELVILLE: That is all.

FURTHER CROSS EXAMINATION by Mr. Melville:

Q How much land will a share of stock in the Gunnison Irrigation Company irrigate?

A Oh, I think most of them in the New Field got around, some of them has a share per acre, maybe two shares, others three.

Q To the acre?

A I think three pretty much all through the field.

Q Takes from two to four of the Gunnison Irrigation Company water stock--

A Two to four.

Q Two to four, takes from two to four shares of water stock in the Gunnison Irrigation Company to irrigate one acre of land in the New Field Canal Company?

A That is what they have, and should have six or seven.

Q You don't know how much water a share represents?

A No.

Q They have used from two to four?

A Yes.

Q That would be true under the Gunnison Irrigation Company, would it?

A I think so, practically the same.

Q Practically the same, depending of course on the kind of crop?

A Depends on the man, if he has got plenty of water he is

lucky, if he ain't, he ain't.

Q With two to four shares, you produce about three crops of alfalfa?

A Some years, not the last years.

Q Normal years you produce three crops of hay?

A Yes.

Q You could produce a good crop of grain, wheat, barley?

A Two to four.

MR. MELVILLE: I think that is all.

FURTHER CROSS EXAMINATION by Mr. Melville:

Q If it takes, say, if you have 25,000 shares of water stock, and if it takes four shares of water stock to properly irrigate one acre of land, then with that you could only irrigate, with the 25,000 shares, about one-fourth of the 25,000 shares, couldn't you?

A Yes.

Q In other words, your 25,000 shares will only irrigate about 6250 acres of land, is that correct, if you applied four shares to the acre?

A Yes, I think so.

Q If you applied two shares to the acre, it would only irrigate 12,500 acres of land?

A Yes.

Q That is about all they have been irrigating, isn't it?

A Yes.

Q So in applying four shares, you would only irrigate 6250 acres.

A Yes.

Q There was 7250 acres claimed in the suit of the Gunnison Irrigation Company vs. Gunnison-Highland Canal Company?

A I don't remember the amount.

Q But whatever it was, it was all included in the amount that you submitted to the court, and that is what— I think that is

what the court found, that you included all the land that you were irrigating at that time, didn't you?

A I guess it would, I couldn't say.

Q Some of the waters of the Gunnison Irrigation Company have been used in the Highland Canal Company, haven't they?

A Yes, I think so.

Q Was that represented by stock in the Gunnison Irrigation Company?

A Yes sir.

Q How many shares have been used in the Gunnison Highland Canal, Co., by the Highland Canal Company?

A No, I couldn't say

Q 1220 shares, is it not?

A I couldn't say, I have no recollection.

Q Don't know?

A No.

Q Has that been used each and every year for the last ten or fifteen years?

A I couldn't say that.

Q How long has water been used through the Highland Canal Company owned by the Gunnison Irrigation Company stockholders, to your knowledge?

A Well, of my own knowledge, it wouldn't be only the last few years.

Q The last few years?

A Yes sir.

Q That about the water that has been turned to the Manti Reservoir and Irrigation Company, have they acquired some stock in the Gunnison Irrigation Company?

A I couldn't say.

Q They have been using some water, you know that.

A Yes, I think so, from what I can learn.

Q You are a director?

A Yes, but we left it up to our president and water master.

Q We would have to get that information from the President?

A Yes.

Q As a director, you don't pay much attention to it?

A We are satisfied, we don't want to pry into it.

Q I want to congratulate you and the president for getting hold of the water, thank you.

A Yes sir.

Q This 4000 shares that you spoke about that was used in the New Field Canal by the Stockholders of the Gunnison Irrigation Company, is that a uniform amount used each and every year, or does it vary from year to year?

A No, it is uniform.

MR. MELVILLE: I think that is all.

FURTHER CROSS EXAMINATION by Mr. Melville:

Q I think, if I understand you, you say the New Field Canal Company doesn't own any water any place.

A No.

Q Doesn't claim any water in Twelve Mile Creek as a corporation?

AA No sir.

Q Now, if you had 100 per cent of all the water filings, water rights you claim in the Gunnison Irrigation Company, it wouldn't be sufficient, would it, to irrigate-- it would be sufficient to irrigate your 7250 acres of land?

A If we what?

Q If you had 100 per cent, it would be sufficient to irrigate your 7250 acres?

A Yes, I think we would get along fairly well.

Q That is the quantity you claim water for?

A Yes, under the Gunnison system, Gunnison Irrigation Company.

Q You know the land under the New Field Canal?

A I couldn't say that is the right figures.

Q Whatever was awarded in that case, it was the correct acreage?

A Yes sir.

MR. MELVILLE: That is all.

MR. LARSON: That is all.

JOHN M. KNIGHTON, called as a witness on behalf of the New Field Canal Company, having been first duly sworn, testified as follows:

Q DIRECT EXAMINATION by Mr. Melville:

Q Knighton, was this cubic foot of water in the Morrison Tunnel, was it included in the total water supply decreed to the Gunnison Irrigation Company in the case of the Gunnison Irrigation Company versus Highland Canal Company?

A Was it included in that?

Q Yes.

A Well, I just disremember about that. That has always been considered an independent right.

Q Can't it, didn't you set it up in the case and make a claim to this cubic foot in the Morrison Tunnel?

A I couldn't answer that, I don't remember.

Q You were claiming the water prior to that litigation, were you not?

A Yes sir.

Q Why didn't you set it up in that claim?

A As I say, I don't remember anything about that.

Q Now, your total acreage under the Gunnison Irrigation Company is 7250 acres, isn't it?

A Under the State Engineer's determination it is over 10,000.

Q According to that?

A That is in the decision rendered in this case.

Q In the decision in the case of Gunnison Irrigation Company versus the Gunnison Highland Canal Company, the court awarded you water for 7250 acres of land?

A Yes.

Q When that decision was rendered, I assume you included all the land irrigated by the Gunnison Irrigation Company?

A We had a great deal more land than that. That is what the court found we were entitled to irrigate.

THE COURT: How much?

A 7250 acres.

Q That included the land under the New Field Canal Company
reservoirs irrigated by Gunnison Irrigation Company water stock?

A Yes.

Q And also in the New Field Canal Company.

A You are speaking of the old field and new field.

Q Was there any in the New Field Canal Company?

A Yes.

Q That is land that is irrigated by the Gunnison Irrigation
Company water stock in the New Field Canal Company, is

7250 acres?

A Yes sir.

Q Now, I take it that since this decree was rendered in the
case of Gunnison Irrigation Company versus Gunnison Highland
Canal Company, you have observed the decree?

A Yes.

Q You haven't violated the decree, have you?

A No sir.

Q This limits your flow to 145 second feet from the opening
of the irrigation season until the 15th of June?

A Yes sir.

Q Have you ever used any water in excess of 145 second feet
to refill your reservoir?

A We don't claim any in excess of that.

Q Of 145?

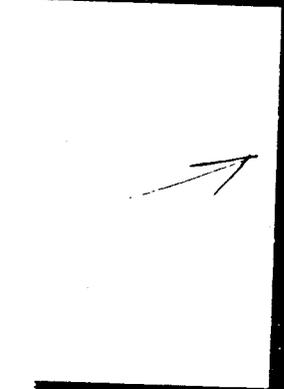
A Yes.

Q Well, if you refilled your reservoir, would it in any way
interfere with any flow in excess of 145 second feet?

A No sir.

Q So that you would not claim any right to refill your reservoir
if by doing so it would increase the flow that you were claiming
in excess of 145 second feet?

A We would not.



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Q Or in excess of 111.35 second feet after June 15th until the next irrigation season?

A The first of October.

Q The first of October?

A Yes. That is approximately 30 feet during October, including two and a half feet for stock watering purposes.

Q In other words, you don't claim any water right other than or any different to that decreed in the case of the Gunnison Irrigation Company versus the Gunnison Highland Canal Company?

A No sir.

MR. LARSON: That is expressly stated here, Mr. Melville, we only claim that when it is within the decreed amounts here.

Q So if the total volume of water flowing to the Gunnison Irrigation Company from all sources of supply exceeded at any time 145 second feet between the opening of the irrigation season and the 15th day of June, you don't make any claim to that?

A Plus the two and a half second feet.

Q What is the two and a half?

A You will notice if you read down farther, for stock watering purposes.

Q I mean irrigating purposes, that is, whenever there is an excess over and above 145 second feet during that period, in excess of that and for your stock watering purposes, it belongs to the people below?

A We don't claim that.

Q You don't claim that?

A No.

Q So as far as you are concerned, that can run down to satisfy the rights of Judge Christenson, the rights of the Sevier Bridge Reservoir and Piute?

A As far as we are concerned, we only claim as I have stated.

Q And if you had that, you would have an ample supply of water for all the land under your system, would you not?

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Melville vs
Plu 255

A No sir.

Q And you wouldn't claim any right to fill your reservoir if in doing so it required, or in any way changed or reduced the flow of water in excess of 145 second feet?

A That is all we claim. I would like to make a statement with respect to the operation of the reservoir that the Judge may fully understand the conditions. As I stated, any years we could tell by the snow fall in the valley, or our watershed whether we are going to fill our reservoir or not by the time our storms come from the mountains, after we have drained it for the first irrigation season, you can tell how much we are going to have to store, and if the waters run short, in order to store it, we may have to hold up a little water to mature our crops, but not to exceed 145 feet, and the two and a half we are allowed, we try to protect ourselves that way.

MR. LARSON: In addition thereto the 111. to October 1st?

A Yes.

MR. LARSON: And thirty feet during October?

A Yes. As set out in the State Engineer's proposed determination, we are satisfied with that.

MR. MELVILLE: That is all.

FURTHER CROSS EXAMINATION by Mr. Melville.

Q Your irrigation season opens there, I understand, April 1st?

A Yes sir.

Q So you claim 145 second feet from April 1st to June 15th?

A Yes.

Q A total of 75 days?

A Yes.

Q And 111.35/85 second feet from the 15th of June until the 1st of October?

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111.35/85
or goods

A Yes sir.

Q And during the month of November, it is 27 second feet.

A Plus the two and a half.

Q Two and a half.

THE COURT: During the month of November or October?

MR. MELVILLE: October. That is all.

FURTHER CROSS EXAMINATION by Mr. Melville:

Q You wouldn't claim the right to carry other water in the reservoir from year to year?

A No sir.

Q This water would be measured to you at the point of diversion from the streams, I take it?

A Yes.

Q That would be entirely satisfactory?

A That would be entirely satisfactory.

MR. MELVILLE: That is all.

I, J. H. KELLER, do hereby certify that the above and foregoing, 15 pages, constitute a full, true and correct transcript of all the cross examination by Mr. J. A. Melville of the witnesses Richard A. Fjelstead and John M. Knighton, in the hearing on objections of New Field Canal Company, at Manti, Utah, on the above date, in the above entitled case.

Official Reporter,
5th District Court of Utah.

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR MILLARD COUNTY

STATE OF UTAH

RICHLANDS IRRIGATION COMPANY :
 (a corporation) :
 Plaintiff, :
 vs. :
 WEST VIEW IRRIGATION COMPANY, :
 (a corporation) et-al., :
 Defendants. :

Comes now the Gunnison, Fayette Canal Company, defendant in the above entitled case, and files its amended objections to the proposed determination of its water rights on the Sevier River System, filed herein by the State Engineer under claim number 387 of said determination, paragraph 317, page 100, and in particulars as follows:-

1. This claimant and defendant objects to the said proposed determination wherein it is determined that this defendant has 3115.8 acres of land irrigated under its system, whereas, as a matter of fact, the stock-holders of the said Gunnison, Fayette Canal Company are irrigating and have for a great number of years irrigated 4489.5 acres of land. The discrepancy in acreage is shown in the following table:-

State Engineer Survey, Plat No.	Location	Acreage Determined by State Engineer	Acreage actually in	Increase
502	Sec. 36-T 19 SR 1W	50.1	58.7	8.6 (a)
508	Sec. 24-T 19 SR 1W	363.6	424.5	60.9
513	Sec. 13-T 19 SR 1W	308.8	309.0	.2 (b)
514	Sec. 12-T 19 SR 1W	319.7	337.7	18.0
518	Sec. 2-T 19 SR 1W	69.4	149.4	80.0
519	Sec. 6-T 19 SR 1E	10.7	180.7	170.0
520	Sec. 36-T 18 SR 1W	196.5	211.5	15.0
525	Sec. 25-T 18 SR 1W	168.5	193.5	25.0
528	Sec. 25-T 18 SR 1W	334.5	413.5	79.0
532	Sec. 13-T 18 SR 1W	149.5	329.5	180.0
534	Sec. 12-T 18 SR 1W	91.7	155.7	64.0
536	Sec. 1-T 18 SR 1W	25.3	28.3	3.0
	Sec. 2-T 18 SR 1W	19.9	259.9	240.0
537	Sec. 35-T 17 SR 1W	45.2	325.2	280.0
None	Sec. 26-T 17 SR 1W	None	80.0	80.0
None	Sec. 27-T 17 SR 1W	None	80.0	80.0

Total 1,373.7

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2 This claimant and defendant further objects to the said proposed determination for the reason that it fails to award to this claimant and defendant 15 second feet of water decreed to Elizabeth Roberts, Benjamin Christenson, and Reuben Christenson in what is known as the Higgins Decree, and as awarded and confirmed in the District Court within and for Millard County to Benjamin and Reuben Christenson et al in the case of Millard County Land and Water Company vs Abraham Irrigation Company et al, the decree in 113

which case is generally known as the Greenwood Decree, and the interests of the said above named Benjamin and Reuben Christenson have been acquired by this claimant and defendant through purchase.

Also 40 second feet of water from Sanpitch River during the highwater period commencing about May 1st and ending about July 1st, which water this claimant and defendant diverts and is entitled to divert into its canal at the dam commonly known as the Fayette Canal Dam across Sanpitch River which is located North 10° West 400 feet from the Southeast corner of Section 13, Twp. 19 South Range 1 West, when during the above period there is water available at said point. The claim to this water is based upon a diligence right acquired by this defendant and claimant and its predecessors in interest by the beneficial use thereof for more than 30 years, and such water has been used in connection with and supplemental to all of the decreed rights of this defendant and claimant and its stock-holders.

3 This claimant and defendant further makes objection to the said proposed determination wherein it awards to this defendant and claimant 4 second feet of water for stock-watering purposes and non for irrigation from October 15th to April 1st, for the reason that such award is wholly insufficient and for the further reason that such award does not satisfy the rights of this defendant as decreed to it and its predecessors in interest in the case of Millard County Land and Water Company vs Abraham Irrigation Company et al, which Decree is generally known as the Greenwood Decree, and by which there was awarded to this claimant and defendant 30 second feet of water from Sevier River to be diverted into their said canal to be used by the stock-holders of this defendant for irrigation and stock-watering purposes during the period from October 15th to April 1st, which amount has been used by the stock-holders of the said defendant for a great many years both before and after the rendition of said decree and up to the present time, and said water is necessary for the uses and purposes for which it was awarded, and not more than necessary for that purpose.

4 With respect to that portion of the said proposed determination of the State Engineer wherein it awards to this claimant and defendant 11,000 acre feet as a maximum and 9000 acre feet as a minimum allowance in lieu of all the other water rights of this defendant and claimant, excepting the water from the Sanpitch River above mentioned, and the right to the 30 second feet of water from the Sevier River from October 15th to April 1st, under the Greenwood Decree, this defendant and claimant objects to the insertion of the 9000 acre feet as a minimum, and insists that the amount awarded should be 11,000 acres feet; and further that this defendant should be granted the right to draw and receive that amount at the head of its canal during the period of use from April 1st to October 15th, as the needs of its stock-holders may require and as this defendant may decide whenever the amount of water desired is available at that point, and at no time during such period should it be required to prorate with any other rights or claims on said Sevier River, excepting with the rights of what is known as the center unit, and comprising in addition to the rights of this defendant and claimant, the rights of the West View Irrigation Company, and the Dover Irrigation and Canal Company, and such other intermediate recognized rights within such unit, but with no rights lower down the river than the head of the Dover Canal, or above the head of the Westview Canal.

Wherefore this defendant and claimant prays that this honorable court modify the said proposed Determination of the state engineer with respect to the rights of this defendant and claimant so that there will be granted to it its rights as above set out, to-wit:

That this defendant and claimant be awarded 11,000 acre feet from Sevier River at the head of its canal for the period from April 1st to October 15, to be drawn at such time and in such amounts as the needs of the stock-holders of the defendant may require and as decided by this defendant.

That in addition thereto this defendant and claimant be awarded ~~15~~ 15 Second feet of water from Sanpitch River as the successor to the rights of Elizabeth Roberts, Benjamin Christenson and Reuben Christenson as defined in the Higgins Decree, and as confirmed to Benjamin Christenson and Reuben Christenson et al in what is known as the Greenwood Decree, also, 40 second feet from Sanpitch River as a highwater right from about May first to July 1st, as herein set out;

and that in addition thereto this defendant and claimant be awarded 30 second feet of water from the Sevier River to be diverted at the head of its canal, and used by its stock-holders for the period from October 15th to April 1st, for domestic, stock-watering, and irrigation purposes as decreed to the ~~xxxx~~ predecessor in interest of this defendant, the Fayette Canal Company, in that certain decree in the case of Millard Land and Water Company vs Abraham Irrigation Company et al, made and entered in Millard County, State of Utah.

That the court further find that this defendant and claimant and its stock-holders have irrigated under its said irrigation system from the above sources, and are entitled to irrigate therefrom 4,489.5 acres of land, instead of 3,115.5 acres as found in the proposed determination of the State Engineer.

This defendant prays for such other and further relief as to the court may seem just and equitable.

A. J. Christenson
Attorney for Defendant and
Claimant.

State of Utah, |
County of Utah. | SS.

Archie M. Mellor, who being first duly sworn deposes and says:

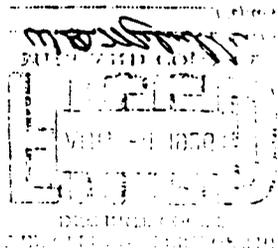
That he is an officer of the Gunnison Fayette Canal Company, to-wit; its president, and that he makes this verification for and on behalf of the said company; that he has read the foregoing objections to the proposed ~~xxx~~ determination of the state engineer in the above entitled case, and knows the contents thereof, and that the same and the statements therein made are true to his best knowledge, information and belief.

Archie M. Mellor

Subscribed and sworn to before me this 31st day of July, 1926.

My commission expires Nov. 23, 1929.

A. J. Christenson
Notary Public, Provo, Utah.



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CERTIFICATE
FOURTH DISTRICT COURT, FOURTH
CIRCUIT COURT, STATE OF UTAH
COUNTY OF MILLARD

Marlene Whicker, Clerk of the above named Courts, certify that the foregoing is a full, true and correct copy of the original as filed and now of record in this office. Consisting of _____

pages. Dated this _____ day
of _____, 19 _____

Signed _____ Clerk

by _____ Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF UTAH, WITHIN AND FOR MILLARD COUNTY.

Richlands Irrigation Company, Inc.,
Plaintiff,

-vs-

West View Irrigation, Inc., et al.,
Defendants.

:
: Objection to proposed
: determination of water
: rights on the Sevier River
: System by the state
: engineer.

Comes now the Gunnison Irrigation Company, a corporation,
one of the defendants in the above entitled case, and hereby objects
to the proposed determination of its water rights on the Sevier
River System by the state engineer as filed in this case by said
state engineer, and for objection shows the court;

1. That under number 575, page 204 of proposed determination
of water rights on the Sevier River System by the state engineer,
claim number 675, the state engineer has failed to mention or award
to the said Gunnison Irrigation Company ~~one~~ cubic feet of water
per second from what is known as the Morrison Tunnel waters flowing
from the Morrison Tunnel at the mouth of Six-Mile Creek in Benpete
County, State of Utah, into what is known as Six Mile Creek, this,
notwithstanding the fact that the Gunnison Irrigation Company is the
owner of the said water and has been the owner of the said water
by purchase for many years last past.

2. The state engineer has failed and neglected to recommend
that this defendant have the privilege of re-filling the Gunnison
Reservoir in the springtime after drawing off water for early
irrigation so long as the said company does not exceed the quantity
of water which it is recommended should be awarded to it. The fact
is that it has been the practice of the Gunnison Irrigation Company
to re-fill its reservoir annually when there has been water available
during the spring flush of high waters for such purpose and it has
been necessary almost annually to draw from the said reservoir on
or about the 1st day of April and through the month of April until
the high waters begin to flow from the canyon streams, after which,
and while the water has been available for such purpose, the said
reservoir has been re-filled each and every year when the water has
been available for such purpose, and this has been the uniform
practice of the said company for a period of about 40 years con-
tinuously next prior hereto, all of which this defendant is ready
and prepared to show.

3. Under number 575 page 205, claim No. 672, Petrus Bjerregaard
is awarded by the state engineer 24 cubic feet per second of water
covered by stock in the Gunnison Irrigation Company as supplemental
water. This is erroneous and should be stricken from the said
recommendation for the reason that the said Petrus Bjerregaard owns
no water or any stock whatsoever in the said Gunnison Irrigation

State Engineer Survey Plat No.	Location	Acres Determined by State Engineer	Acres Actually in	Increase
518	:Sec. 2-T 19 SR 1 W	69.4	149.4	80.0
519	:Sec. 6-T 19 SR 1 E	10.7	180.7	170.0
520	:Sec. 36-T 16 SR 1 W	196.5	211.5	15.0
525	:Sec. 25-T 16 SR 1 W	168.5	183.5	15.0
528	:Sec. 24-T 16 SR 1 W	334.5	413.5	79.0
532	:Sec. 13-T 16 SR 1 W	149.5	329.5	180.0
534	:Sec. 12-T 16 SR 1 W	91.7	155.7	64.0
536	:Sec. 1-T 16 SR 1 W	25.3	28.3	3.0
536	:Sec. 2-T 16 SR 1 W	19.9	259.9	240.0
537	:Sec. 35-T 17 SR 1 W	45.2	325.2	280.0
None	:Sec. 26-T 17 SR 1 W	None	50.0	50.0
None	:Sec. 27-T 17 SR 1 W	None	50.0	50.0
			TOTAL	1,373.7

(a) Credited to Gunnison Valley Land & Livestock Company.

(b) Error in addition on plat. 3,115.8 plus 1373.7 = 4,489.5

III.

That under NOTE in said par. #317 the words, by virtue of the Morse Decree, should be, by virtue of the Higgins Decree.

IV.

That in addition to the rights set forth in said paragraph #317 out of the Sevier River, the defendant claims a diligence right of 30 seoft. out of the San Pitch river at a point where the defendant's canal crosses the said San Pitch river.

V.

That in said paragraph 317 it has been determined that the defendant has the right to use 4.00 seoft. of water for Stock Water from October 15 to April 1. That 4 seoft. of water is insufficient to supply Stock Water during this period and that 20 seoft. is necessary.

Wherefore, the defendant prays that said Determination be changed and that the defendant be decreed the right to irrigate 4.459.5 acres of land, that they be decreed the right to the use of an additional 30 secft. of water out of San Pitch river at the point where the Gunnison-Fayette Canal crosses the San Pitch River, that they be decreed the right to the use of 20 secft. of water for Stock Water from October 15 to April 1.

GUNNISON-FAYETTE CANAL COMPANY

By Howard Roberts
Secretary

STATE OF UTAH)
) SS
County of San Pete)

Howard Roberts, being first duly sworn
deposes and says that he is the secretary of the Gunnison-Fayette Canal
Company, the defendant mentioned in the above and foregoing Objection;
that he has read the said Objection and knows the contents thereof; that
the same is true of his own knowledge excepting as to those matters
therein stated on information and belief and as to them he verily
believes it to be true.

Howard Roberts

Subscribed and sworn to before me this 12th day
of June, A. D. 1926.

Paula Christensen
Notary Public

Residing at: Gunnison, Utah

My commission expires: May 16, 1927.

Picino v. Utah Apex Mining Co. et al., 52 Utah 338

will sustain, by reason of such injuries, his loss of time and service, and inability to work and earn money for himself, resulting from such injuries, and should find for him such sum as in the judgment of the jury under all the evidence will be just."

In principle we are unable to find any material distinction between that instruction and the one in the case at bar. After all, it is merely a question of belief, founded on substantial evidence, and not on conjecture. That, it seems to us, is all that should be required. Respondent cites many cases in support of his contention that the court did not err in the instruction complained of. *Johnson v. Connecticut Co.*, 85 Conn. 438, 83 Atl. 530; *Ill. Cent. R. Co. v. Davidson*, 76 Fed. 517, 22 C. C. A. 306; *Hamilton v. Great Falls St. R. Co.*, 17 Mont. 334, 43 Pac. 713; same case in 17 Mont. 334, 42 Pac. 864; *St. Louis, S. F. & T. R. Co. v. Taylor* (Tex. Civ. App.) 134 S. W. 819; *Wallace v. Pa. Ry. Co.*, 222 Pa. 556, 71 Atl. 1086, 128 Am. St. Rep. 817; *Gulf, C. & S. F. R. Co. v. Harriott*, 80 Tex. 73, 15 S. W. 556; 1 Sutherland on Damages (4th Ed.), section 121. 8 R. C. L. at page 544, says:

"It is a well-settled general rule that, in assessing the amount of damages in an action for a personal injury, the jury may make an allowance for the pain and suffering which the person injured is reasonably certain to undergo in the future in consequence of the injury, including also an allowance for mental suffering. Pain and suffering which are merely possible and speculative are, of course, not to be considered. All that is required under this rule is that there be sufficient evidence from which the jury may fairly derive the conclusion that the chances that the plaintiff will endure future pain and suffering preponderate over those that he will not. Such preponderance denotes probability or likelihood and that is sufficient."

These authorities sustain the position of respondent. The doctrine they enunciate is in harmony with our own views and with the practice generally which prevails in the trial of civil cases. If jurors are made to understand that their conclusions must be based upon substantial evidence actually introduced (and they generally are so instructed), we see no reason why a distinction should be made as to the degree of certainty between a case of this kind and any other ordinary civil case. Appellant's exception to the instruction is not sustained.

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This disposes of all the assignments of error relied on in the argument.

The judgment of the trial court is affirmed, at appellants' cost.

FRICK, C. J., and McCARTY, CORFMAN, and GIDEON, JJ., concur.

GUNNISON IRR. CO. v. GUNNISON HIGHLAND CANAL CO.

No. 2821. Decided June 12, 1918. (174 Pac. 852.)

1. APPEAL AND ERROR—NECESSARY PARTIES—SEVERAL OR JOINT AWARD. Although under Comp. Laws 1907, section 1288x40, all parties who have diverted water from a stream may be made parties to an action concerning water rights, the same is not required, and where, in a judgment, several and not joint awards of water rights were made, and no joint interests were alleged or found, any party may appeal independently. (Page 352.)
2. WATERS AND WATER COURSES—APPROPRIATION AND PRESCRIPTION—PRIORITIES. Prior appropriation for beneficial use is, and has always been, the basis of acquisition of water rights under Comp. Laws 1907, section 1288x20, and previous irrigation statutes. (Page 354.)
3. WATERS AND WATER COURSES—RESERVOIRS. TITLE TO WATER AS PERSONALTY. Notwithstanding it has been held that under certain circumstances title is acquired to the corpus of confined water as personally, the doctrine of ownership by storage cannot be relied on to invade vested rights. (Page 355.)

Stowell v. Johnson, 7 Utah, 215, 26 Pac. 290; *Becker v. Marble Creek Irrigation Co.*, 15 Utah, 225, 49 Pac. 802, modified on rehearing, 49 Pac. 1119; *Haque v. Nephs Irrigation Co.*, 16 Utah, 421, 52 Pac. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634; *Salt Lake City et al. v. Salt Lake City Water & Electrical Power Co.*, 24 Utah, 249, 67 Pac. 672, affirmed on rehearing, 25 Utah, 456, 71 Pac. 1069; *Salt Lake City v. Gardner*, 39 Utah, 30, 114 Pac. 147.

Bear Lake & River Waterworks & Irrigation Co. v. Ogden City, 8 Utah, 491, 33 Pac. 135; *Salt Lake City et al. v. Salt Lake City Water & Electrical Power Co.*, 24 Utah, 249, 266, 67 Pac. 672, 677, affirmed on rehearing, 25 Utah, 456, 71 Pac. 1069.

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4. WATERS AND WATER COURSES—APPROPRIATION—EXTENT—MEASURE. The rights of a prior appropriator are measured and limited by the extent of his appropriation to beneficial use, and if he diverts more water than he is entitled to for seasonal use, he must return such surplus to the stream for the use of subsequent appropriators. (Page 353.)
5. APPEAL AND ERROR. REVIEW—CHANGE OF THEORY. Where a case was tried to quiet title to the use of waters upon the theory of acquisition by appropriation for beneficial use by direct irrigation, it cannot be contended on appeal that it was for the right to store for use from time to time as crops require. (Page 353.)
6. JUDGMENT—LEGAL EFFECT—LIMITED BY PLEADINGS. The legal effect of a court decree must be limited to the issues raised by the pleadings. (Page 357.)
7. WATERS AND WATER COURSES—RESERVOIRS—WRONGFUL IMPOUNDING—SALES. A prior appropriator of water cannot store in its reservoir water legally belonging to subsequent appropriators against their will, and insist upon payment from them for such stored waters, under a decree for payment by them for prior appropriator's excess water. (Page 358.)
8. EMINENT DOMAIN—WATERS AND WATER COURSES—APPROPRIATION—FORM OF REMEDY. A prior appropriator cannot, in an action to quiet title to the use of water for irrigation, be compelled to submit its reservoir to the common storage of its and subsequent appropriator's water, that being a matter of eminent domain to be exercised under provision therefor in Comp. Laws 1907, section 3590, and section 3588, as amended by Laws 1909, c. 47. (Page 359.)
9. WATERS AND WATER COURSES—STORED WATERS—COMMON USE OF RESERVOIR—AGREEMENT—RETENTION OF JURISDICTION—APPOINTMENT—COMMISSIONER TO MEASURE WATER. In an action to quiet title to right to use of water, if an agreement can be reached by plaintiff and defendant, as to sharing the expense of storing waters, the court may, under our practice, retain jurisdiction, appoint a commissioner to supervise the release of waters, and apportion expense as per stipulation made, the commissioner to be appointed annually. (Page 360.)

^a *Hague v. Nephi Irrigation Co.*, 16 Utah, 421, 52 Pac. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634; *Becker v. Marble Creek Irrigation Company*, 15 Utah, 225, 49 Pac. 892, modified on rehearing, 49 Pac. 1119.

^b *Salt Lake City Water & Electrical Power Co. v. Salt Lake City*, 25 Utah, 411, 71 Pac. 1067; *Monclair Mining Co. v. Columbus Kroll Consolidated Mines Co.*, 53 Utah, 413, 173 Pac. 172.

^c *Salt Lake City v. Gardner*, 39 Utah, 30, 114 Pac. 147.

Appeal from Seventh District.

Appeal from the District Court of Sanpete County, Seventh District; *Hon. J. E. Booth*, Judge.

Action by the Gunnison Irrigation Company against the Gunnison Highland Canal Company and others.

From a judgment rendered, the Gunnison Highland Canal Company appeals.

AFFIRMED in part and remanded in part.

Thurman, Wedgwood & Irvine for appellant.

Jacob Johnson and Lewis Larson for respondent.

STEPHENS, District Judge.

In this case the Gunnison Irrigation Company, a corporation of Utah, plaintiff below and respondent herein, brought an action in the district court of Sanpete County, to quiet title to the right to use the waters of the Sanpitch river and its tributaries. Certain defendants in addition to the defendant and appellant, Gunnison Highland Canal Company, a corporation of Utah, were joined in the action below, all of the defendants, including the appellant, being joined because of adverse claims alleged. From the decision by the trial judge, after a full hearing upon the issues raised by the pleadings, this appeal is taken by the Gunnison Highland Canal Company. No appeal was taken by the other defendants. The appeal was once decided, and a written opinion filed December 1, 1916, prior to the enlargement of this court by chapter 54, Laws of Utah 1917. Since that date, however, a motion for a rehearing has been submitted and granted, and the case reheard before the court as now constituted. Therefore the former opinion, which was not published, is superseded by this opinion, which will stand as the final action of the court.

As they appear from the evidence and findings, the facts in this case are as follows: Over a long period of years next

Gunnison Irr. Co. v. Gunnison II. C. Co., 52 Utah 347.

preceding 1888, certain land-owning farmers of Sanpete County, by appropriation and application to a beneficial use upon their lands of the waters of the Sanpitch river and its tributaries, acquired primary rights to the use of such waters for irrigation. In 1888 these primary rights were assigned by the owners to the respondent company in exchange for shares of stock entitling the holders to the use of water. The Sanpitch river, in common with most of the small streams of the arid regions, has excessively high waters in the early part of the irrigation season, much more than sufficient in volume to satisfy the needs of the respondent at such time; but the flow of the river later in the season is insufficient to supply the respondent's later needs. Therefore in 1888 the respondent constructed a reservoir across the channel of the Sanpitch river for the purpose of storing from the excessive flow of the early season an amount of water in excess of its needs for that time, but to be used during the low-water period to follow. After the construction of this reservoir the defendants below and the appellant also acquired by appropriation and application to a beneficial use upon their lands, respectively, secondary and tertiary rights to the use of such waters of the streams in question as were in excess of the amount appropriated and beneficially applied by the respondent. The court below found from the evidence that respondent had a primary right to the use of sufficient water to irrigate 7,250 acres of land at a duty of fifty acres to the second foot from the beginning of the irrigation season to the 15th day of June of each year, and at a duty of sixty-five acres to the second foot from the 15th day of June to the close of the irrigation season of each year; or, in terms of second feet only, as determined by acreage and duty, to a flow of 145 second feet of water from the 1st of January of each year to the 15th of June following, and to a flow of 111 35/65 second feet of water from the 15th of June to the end of the irrigation season. Such rights were declared prior to the rights of defendants and appellant. The rights of the defendants other than the appellant were then determined by the court in certain amounts and order, as a class of secondary rights to certain

Appeal from Seventh District.

second foot quantities after the satisfaction of the respondent's rights; and, finally, the court found that the appellant, after the satisfaction of the primary rights of the respondent and the secondary rights of the defendants other than the appellant, was entitled to a tertiary right to the use of all of the remaining waters of the streams in question. These findings and awards, so far as amounts and priorities are concerned, are in no way disputed. The evidence also shows that at least from time to time, if not during every season (the possible distinction here suggested is not material to the question presented on this appeal), the amount of water flowing in the Sanpitch river and its tributaries, including the amount that can be stored in the reservoir, totals in excess of the respondent's award of primary rights as above set forth, and in excess of the amount of water that respondent has at any time during the acquisition of its rights applied to a beneficial use upon the land. Such a conclusion is not only justified by the evidence, but, as will be seen, is the *raison d'être* of the position taken by the respondent in this appeal. That is to say, unless such excess existed, no dispute of the nature set out below could arise.

After an informal decision had been rendered by the trial judge, and after proposed findings of fact, conclusions of law, and decrees, differing in certain particulars, had been submitted by the plaintiff and the defendants below, the trial court rendered the following "Decision":

"(On the 20th day of December, 1912, by stipulation of the attorneys for all the parties in this matter, this matter came on for hearing at Provo on the objections of the defendants to the signing of the proposed findings of fact, conclusions of law, and decree presented for the court's approval by the attorneys for the plaintiff. After hearing said objection and arguments thereon, the court now finds that the proposed findings of fact, conclusions of law, and decree, as submitted by the attorneys for the plaintiff, should be amended in the following particulars:

"(1) There should be a commissioner appointed by this court on or before the 15th day of February, annually.

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"(2) That whenever in the opinion or judgment of the said commissioner the annual flow of the waters of Saupitch river and the tributaries, together with the water stored in the reservoir of the plaintiff, will be more than sufficient to supply the claims of the plaintiff, together with other rights that are not disputed in this case, the excess may be measured out by the plaintiff, under the direction of said commissioner, to the defendants on the defendants paying or guaranteeing to the plaintiff such price as the parties hereto may agree upon; or, if agreement by them cannot be reached, then to be fixed by the commissioner.

"With these modifications, the said proposed findings of fact, conclusions of law, and decree, as prepared by the plaintiff's attorney, will become final in this case."

So far as amounts and priorities are concerned the findings, conclusions, and decree of the plaintiff, referred to in the decision just quoted, reflect the figures set forth above in this opinion.

A question of jurisdiction, preliminary to the main contention in the case, though raised only in argument, rather than properly, by a motion to dismiss the appeal, will be considered and disposed of first. As pointed out above, certain parties defendant to the action below are not parties to this appeal. Respondent contends that, since they were not made parties to the appeal, the court is without power to consider the appeal. The contention is not meritorious. In actions to adjudicate the rights of appropriators from a stream all appropriators are proper parties; they may be joined, and the court may in one judgment settle the relative priorities and rights of all the parties to such action. Section 1288x40, (Compiled Laws of Utah 1907. But it is not necessary to join every appropriator in order to render effective a judgment respecting the rights of actual parties. *Prost v. Idaho Irrigation Company*, 19 Idaho, 372, 114 Pac. 38, at 41. Moreover, as appears from the statement above, the interests of the various defendants were separate, not joint, and the court below made several, not joint, awards of water rights to the parties. No union of interest between the parties was

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alleged or found. Under these circumstances it is settled that any party may, independently, appeal. *Orleans-Kenner Electric Ry. Co. v. Dunbar*, 218 Fed. 344, 134 C. C. A. 152; *Winters v. United States*, 207 U. S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340; *Gilfillan v. McKee*, 159 U. S. 303, 16 Sup. Ct. 6, 40 L. Ed. 161.

The sole question raised by the appeal, save the point just disposed of, is as to the disposition between respondent and appellant of any excess that may exist in respondent's reservoir above the rights of the respondent as above set forth. The question is raised by dispute as to the meaning of the paragraph marked "2" of the "decision" just quoted. Stated in the terms of interpretation placed upon that paragraph by respondent and appellant, respectively, the point raised is as follows: The ~~appellant~~ **contends** that the paragraphs referred to must be interpreted to mean that whenever it can be estimated by the commissioner to be appointed by the court that from the amount stored in the reservoir, plus the amount flowing in the stream, the respondent has or will have sufficient water to satisfy the awards above set out, then any excess in the reservoir over that amount must be measured out by respondent to the defendants and the appellant in the amounts and according to the priorities established by the court below, but upon payment to the respondent for the use and upkeep of the reservoir of such sum as may be determined by the commissioner to be equitably commensurate with the benefit received from the storage of such excess, which, it is admitted, would, except for such storage, flow to waste in the early part of the season. On the other hand, the respondent contends that the paragraph in question is to be construed to mean that the rights of defendants and appellant commence only when, the reservoir of the respondent having first been filled, the sum of the overflow of the filled reservoir and the streams in suit exceeds the quantity awarded respondent. It is from such excess, and from such excess only, that the respondent, under its interpretation of the court's decision, contends the secondary and tertiary rights of the defendants and the appellant, respectively, are to be satisfied. The water in the filled

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reservoir itself is thus to belong to respondent outright, and need not be devoted to the requirements of the defendants and appellant, but may be used or sold or held over until the following season in the reservoir as respondent sees fit.

Assuming, without deciding, that the paragraph under consideration is verbally susceptible of the construction placed upon it by the respondent, it is impossible to uphold such a construction for the reason that it is against law.

In Utah the doctrine of prior appropriation for beneficial use is, and has always been, the basis of acquisition of water rights. Revised Statutes of Utah 1898, sections 1261, 1262; Laws of Utah 1903, c. 100, section 49; Laws of Utah 1905, c. 108, section 49; Compiled Laws of Utah 1907, section 1288x20; *Stowell v. Johnson*, 7 Utah, 215, 26 2
 Pac. 290; *Becker v. Marble Creek Irrigation Co.*, 15 Utah, 225, 49 Pac. 892, and (modification on rehearing) 1119; *Hague v. Nephi Irrigation Co.*, 16 Utah, 421, 52 Pac. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634; *Salt Lake City et al. v. Salt Lake City Water & Electrical Power Co.*, 24 Utah, 249, 67 Pac. 672, 61 L. R. A. 648, affirmed on rehearing, 25 Utah, 456, 71 Pac. 1069; *Salt Lake City v. Gardner*, 39 Utah, 30, 114 Pac. 147. Section 1288x20 of the Compiled Laws of Utah 1907, above referred to, provides:

"Beneficial use shall be the basis, the measure, and the limit of all rights to the use of water in this state."

And such has been the doctrine of every decision of this court touching water rights. It was under this doctrine that the respondent brought its action in the district court, and under such doctrine the various defendants and the appellant presented their respective answers and counterclaims. Under the evidence presented it was shown to the court that each party had appropriated water from the streams in suit and applied the same to a beneficial use upon farm lands. Under the showing made below, the trial court found, with respect to the respondent, that it and its predecessors in interest had made prior appropriation of and had beneficially used water from the streams in question upon 7,250 acres of land. Pursuant to such finding, and under the doctrine of beneficial use,

the court awarded the respondent a primary right to the use of sufficient water to irrigate 7,250 acres of land at certain duties of water. It is obvious that the contention of respondent on this appeal would have the effect of enlarging that award, and without any showing of an enlarged appropriation and application to beneficial use upon additional lands.

For such an invasion of the doctrine of beneficial use, the respondent attempts to rely upon two theories: One that title to the corpus of the water in the reservoir is acquired by reduction of the water to possession; the other, that where a right to the use of water for irrigation of land 3
 has been acquired, the use need not be immediate; i. e.,

the water may be withdrawn from its source and stored to be used throughout the season as crops require. Respecting the first theory, it is undoubtedly the law that under certain circumstances title is acquired to the corpus of water as personally. *Bear Lake & River Water Works & Irrigation Co. v. Ogden City*, 8 Utah, 494, 33 Pac. 135, a case applying to water confined in pipes in a distributing system; *Hegeman v. Blake*, 19 Cal. 579, at 595, a case applying to water confined in reservoirs and pipes in a distributing system; and see the remark of Field, J., in his dissenting opinion in the case of *Spring Valley Waterworks v. Schotter*, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173, at 183, a case involving water collected from rainfall into a distributing system. The learned justice there relied upon the doctrine that things belonging to the "negative community" become the property of those who first reduce them to possession. See, also, *Hagerman Irrigation Co. v. McMurry*, 16 N. M. 172, 113 Pac. 823; *Salt Lake City et al. v. Salt Lake City Water & Electrical Power Co.*, cited supra, where at page 266 of 24 Utah, and page 677 of 67 Pac., the court held that title to the corpus of appropriated water was not acquired until the water had been inducted into the canal of the appropriator, but implied that thereafter such title was acquired. It is to be remarked that in *California Irrigation v. Blake*, cit. supra, has, so far as water in irrigating systems is concerned, been distinguished in *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, at 725 et seq., 93 Pac. 858, at 862 et

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seq., 15 L. R. A. (N. S.) 359, at 365 et seq., where it is held that water flowing in an irrigation ditch is not personally. To the same effect, see *Copland v. Fairview Land & Water Co.*, 165 Cal. 148, 131 Pac. 119.

No decision in Utah passes expressly on the question whether title to the corpus of irrigating water is acquired by storage thereof in a reservoir. And it is unnecessary for this court to decide that question at this time. For even accepting the affirmative of such a proposition at its face value, it has never been relied on by any court to invade vested rights. The very basis of the doctrine, suggested by Field, J., in *Spring Valley Waterworks v. Schottler*, cited supra, that things belonging to the "negative community" may be reduced to possession, and thus become the property of the captor, by very definition excludes such acquisition of title to waters already appropriated by others; i. e., waters not belonging to the "negative community." All of the waters in the streams in suit were awarded by the court, as above pointed out; primary rights to the respondent, secondary rights to certain defendants below, and the remainder, as tertiary rights, to appellant. To permit respondent to acquire title to more than the award of the court would thus be to deprive appellant of rights.

With respect to the second theory advanced by respondent, it is undoubtedly true that a distinction may be drawn between direct irrigation or immediate use, on the one hand, and storage for future use, on the other. Kinney on Irrigation and Water Rights (2d Ed.), section 844. And the right of the owner of a priority for direct irrigation to store his water for later seasonal use has been sustained. *Seven Lakes Reservoir Co. v. New Loveland & Greeley Irrigation & Land Company*, 40 Colo. 382, 93 Pac. 485, 17 L. R. A. (N. S.) 329, and note; and see note to *Water Supply & Storage Company v. Larimer & Weld Irrigation Company* (Colo.) 46 L. R. A. 322. Such right to change the purpose of use is to be sustained, as is the right to change the means of use, place of use, and point of diversion, upon the theory that the right of enjoyment is independent of the mode. But it is well settled and entirely elementary that all changes in the mode of enjoy-

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ment must in no event violate the maxim, "Sic utere tuo ut alienum non laedas." That qualification is plainly set forth in *Seven Lakes Reservoir Company v. New Loveland & Greeley Irrigation & Land Company*, cited supra, where, at page 385 of 40 Colo., at page 486 of 93 Pac., and page 331 of 17 L. R. A. (N. S.), Gabbert, J., in delivering the opinion of the court said:

"A priority to the use of water is a property right, which is the subject of purchase and sale, and its character and method of use may be changed, provided such change does not injuriously affect the rights of others." (Italics the writer's.)

And see: *United States v. Union Gap Irr. Co. (D. C.)*, 209 Fed. 274; *Greeley & Loveland Irr. Co. v. Farmers' Paucere Ditch Co.*, 58 Colo. 462, 146 Pac. 247; *Hague v. Nephi Irrigation Co.*, cited supra; chapter 62, section 1 (section 1288x24), Laws of Utah 1909.

In short, the rights of a prior appropriator are measured and limited by the extent of his appropriation and application to a beneficial use. If he diverts more water than under this doctrine he is entitled to, he must return such surplus to the stream for the use of subsequent appropriators. No extension or enlargement of his rights as determined by the doctrine of beneficial use can be made so as to interfere with the vested rights of others. *Union Mill & Mining Co. v. Daugherty (C. C.)* 81 Fed. 73, at 105 and 106; *Becker v. Marble Creek Irrigation Company*, cited supra. The second position taken by the respondent invades this rule.

There is another and even more elementary reason why the respondent's contention cannot prevail. This case was tried to the court below under pleadings drawn, evidence heard, and findings, conclusions, and decree made solely under the theory of acquisition of rights to the use of water 5, 6 under the doctrine of appropriation for beneficial use.

Upon the part of all parties the suit was a simple suit to quiet title to the usufruct under such theory. In no way whatever did the case as pleaded and tried involve any element either of title to the corpus of water, or right to change the mode of

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enjoyment from that of direct irrigation to that of storage for use from time to time as crops require. To sustain the position of respondent upon this appeal, it would be necessary to hold that the trial court in its decision departed from the path marked out by the pleadings. The record does not justify such a conclusion. But even if the trial court had so departed from the issues, the legal effect of its decree would be limited to the 259, 34 Sup. Ct. 95, 58 L. Ed. 209, at 216.

It being thus adjudged that respondent has no title or right to the use of waters stored in excess of the amount awarded by the trial court, it follows that respondent cannot retain such waters in its reservoir, nor can it require appellant to purchase the same. It remains, however, to discuss the matter of compensation for storage beneficial to appellant.

As stated above, appellant is admittedly benefited by storage of an excess over respondent's primary right and defendants' secondary rights, in that waters to serve its tertiary right may, by such storage, be saved from flowing to waste in the early part of the season. Appellant takes the position, as set forth in the statement of its interpretation of the paragraph marked "2" of the decision of the trial court, that the excess that appellant is, under the award of the trial court, entitled to, must, in proper priority order, be measured out to appellant by respondent upon payment for use and upkeep of the reservoir of such sum as may be determined by a court water commissioner to be equitably commensurate with the benefit received from the storage. But this contention respecting compensation cannot be determined here. It was made noteworthy respecting the question of title, and now with respect to this matter of compensation it is again to be emphasized, that the action tried below was a suit to quiet title to the usufruct of waters, and that it involved no other issue. No question of the right of appellant to the use of respondent's reservoir, as distinguished from the right to the use of appellant's water if stored therein, was presented or tried below. Three situations are conceivable, and three propositions therefore follow with respect to the matter of compensation for the

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use of respondent's reservoir: (1) For storage of waters against the will of appellant, assuming the possibility of appellant's nonconsent, respondent can obtain no compensation as a matter of right; for, under the decision herein, respondent would be dealing with waters not its own, and could not lawfully insist upon payment for an act legally wrongful. Thus, if by lack of exactness in calculating amounts stored, or if by lack of nicety in the management of reservoir gates, or if intentionally, respondent should hold in its reservoir waters awarded appellant, and this without the consent of appellant, appellant could not be compelled to pay for such storage. On demand of appellant for its own waters, respondent would be compelled to release them. (2) On the other hand, respondent cannot, in this action, be compelled to submit its reservoir to the common storage of its own and appellant's waters. If by nicety of management of its water gates and exactness of calculation as to water content, respondent should retain in its reservoir only the precise amount awarded it by the court, it might then with impunity allow all other waters to flow down stream. That is to say, it might leave the stream in its natural condition so far as waters other than its own are concerned.

Therefore if no agreement can be reached by appellant and respondent as to sharing storage expense in some manner commensurate with benefits, appellant is put to another action, to wit, an action to condemn a right to common use of the reservoir, the statutes of this state providing that the right of eminent domain may be exercised in behalf of the use of reservoirs for irrigating purposes (Compiled Laws of Utah 1907, section 3588, amended by Laws of Utah 1909, c. 47), and providing for a use in common (Compiled Laws of Utah 1907, section 3590), and, this court having sustained a right to condemn for a common use. *Salt Lake City Water & Electrical Power Co. v. Salt Lake City*, 25 Utah, 441, 71 Pac. 1067; *Monetaire Mining Co. v. Columbus Rexall Consolidated Mines Co.*, 53 Utah, 413, 173 Pac. 172 (decided March 11, 1918).

3) If an agreement can be reached by appellant and respondent as to sharing the expense of storage, then under our practice the trial court may retain jurisdiction, and may appoint a com-

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missioner to supervise release of the waters in the proper amounts and priorities and to apportion expense according to the stipulation of the parties, if such is entered into. He should be appointed to serve annually, under the usual restrictions and with the powers customary under local decisions, as exemplified by the directions of the court respecting a commissioner in *Salt Lake City v. Gardner*, cited, supra.

In any event, the case is remanded for such further hearing as may be necessary to a more specific and complete adjudication of the waters in suit, in the following particulars: (a) The precise time up to which, after June 15th, respondent shall have the right to use a flow of 111 35/65 second feet for live stock and domestic or other purposes, if any such rights exist, should be ascertained and fixed. In these particulars the findings of fact and conclusions of law and decree should be made specific.

The findings, conclusions, and decree should also be recast to conform without ambiguity to the decision herein respecting title to the excess discussed.

In all other respects the action of the court below is affirmed. We expressly affirm the conclusion of the trial court to the effect that respondent is entitled to a primary right to the use of sufficient water from the streams in suit to irrigate 7,250 acres of land at a duty of fifty acres to the second foot from the beginning of the irrigation season to the 15th of June of each year, and at a duty of 65 acres to the second foot from the 15th day of June to the close of the irrigation season, or, in terms of second feet only, to a flow of 145 second feet of water from the 1st of January of each year to the 15th of June following, and to a flow of 111 35/65 second feet of water from the 15th of June to the end of the irrigation season. (This date, as above directed, is to be made definite.) We further expressly affirm the conclusion of the trial court that after the satisfaction of the primary right of respondent and the secondary rights of the nonappealing defendants the appellant is entitled to a tertiary right to the use of all of the remaining waters of the streams in question.

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It is ordered that the costs on this appeal be equally divided between appellant and respondent.

FRICK, J. C., and GIDEON, J., concur. THURMAN, J., being disqualified, did not participate.

McCAFFTY, J.

I fully concur with Judge STEPHENS in his able, lucid, and somewhat elaborate discussion of the legal propositions presented by this appeal; but I cannot fully subscribe to the conclusions announced by him regarding plaintiff's reservoir and the waters therein impounded. I am of the opinion that the right of the defendant, Highland Canal Company, to divert water from Saupitch river and its tributaries should be limited to an amount sufficient to irrigate the 6,000 acres of land under its reservoir and canal.

It seems that Judge STEPHENS' opinion was prepared and is based on the theory that after the high water subsides and the flow of the Saupitch river and its tributaries reaches the normal or low water mark, the water impounded in the reservoir and the current or natural flow of Saupitch river and its tributaries is in excess of the amount to which plaintiff is entitled. The record, as I read it, does not support or justify any such theory or conclusion. The evidence, without conflict, shows: (1) That much, if not practically all, of the lands irrigated with water from the Gunnison Irrigation Company's system of canals and ditches are of such dry and arid character that they require irrigation in the early spring of each and every year to sprout and bring up the grain planted thereon, and that the natural or current flow of water in Saupitch river has been, and is, insufficient to thus properly irrigate the lands in the early spring; (2) that the irrigation company, in order to furnish its stockholders with an adequate supply of water for the early spring irrigation, has, during the nonirrigation season—the fall and winter months—of practically every year since 1888 until the trial of this case in 1911, stored and retained in its reservoir the waters flowing therein from San-

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pitch river and its tributaries; (3) that the water thus stored during the nonirrigation season was, and is, used together with the natural or current flow of water in the river by the company's stockholders for the first or early spring watering of their crops, and that the water from the two sources of supply is not more than sufficient for that purpose; (4) that it is necessary for the company to begin drawing water from its reservoir about March 15th to April 1st of each and every year for this early irrigation. The record also shows that the Highland Canal Company's reservoir is so situated that it cannot be supplied with water from the Saupitch river. The only sources from which water can be obtained for this reservoir are Nine Mile and Twelve Mile creeks. These streams, when not diverted, flow into Saupitch river below the dam of the Gunnison Irrigation Company's reservoir. The defendants, therefore, have no interest whatever in the waters flowing in Saupitch river above plaintiff's reservoir dam during the nonirrigation season. If plaintiff should permit this water, or any part of it, to flow past its reservoir and down the channel of the river during the nonirrigation season, defendants have no means of impounding or otherwise using it. The evidence, without conflict, further shows that the high-water period in that locality begins, ordinarily, about the last of May, and usually ends from about the 15th to the last of June, and that the quantity of high water varies. In some years the high water is more than sufficient to supply all demands, and in other years it is not sufficient to supply the amount to which plaintiff is entitled. The reservoir is therefore in some years filled with water that could be utilized by defendants if it were permitted by plaintiff to flow on down the river channel. The evidence further shows that during the twenty-two years next preceding the trial of this case there was but one season in which it was unnecessary for plaintiff to draw all of the water from its reservoir to enable its stockholders to properly irrigate their crops, and that water impounded therein during the high-water season was held over until the following spring. Therefore, as I view the record, the chances that the Gunnison Irrigation Company may some

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time in the future store more water in its reservoir than will be necessary to meet the requirements of its stockholders after June 15th and during the low-water period are so remote and improbable that it is unnecessary for this court to make any order or suggestion in relation thereto. The evidence shows conclusively that unless the duty of water on the 7,250 acres of land irrigated from the company's canals, as fixed by the court, is too great or high—and plaintiff concedes that it is not—the reservoir, when filled to its full capacity and the natural or current flow of Saupitch river, is not more than sufficient after June 15th to supply the amount of water to which plaintiff is entitled.

The parties to the action stipulated during the progress of the trial "that whatever plaintiff's rights are determined to be they are superior to the rights of defendants" to the waters of Saupitch river. And defendants concede that "plaintiff is entitled to water from the winter flow and high-water flow to fill its reservoir to its present capacity." The trial court found, and the finding is not assailed, "that plaintiff is entitled to water from the winter flow and high-water flow to fill its reservoir to its present safe capacity; that the stockholders of the plaintiff have under cultivation and entitled to irrigate, and a primary right to the use of water for irrigation thereof, 7,250 acres; that the duty of water thereon from the beginning of the irrigation season to the 15th day of June of each and every year is hereby fixed at fifty acres to the second foot; and from June 15th of each and every year to the close of the irrigation season is hereby fixed at sixty-five acres to the second foot."

Referring to the foregoing finding of fact counsel for respondent, Gunnison Irrigation Company, in their discussion of the case in their printed brief, say:

"The court found, and we think that such finding is fully supported by the evidence in this case, that we were entitled to water for 7,250 acres of land."

And again:

"The court found, and such finding is fully supported by the evidence, that the duty of water on said land from the

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beginning of the irrigation season to the 15th day of June of each and every year is one second foot of water for fifty acres of land; and from June 15th of each and every year to the close of the irrigation season one second foot of water for each sixty-five acres of land."

Appellant in its printed brief concedes that it is "not entitled to any of the waters in dispute until the right of respondent to the quantity above mentioned [referring to the amount of water awarded respondent by the court] has been fully supplied or adequately provided for." And again respondent says:

"Defendants have no desire to participate in the benefits of plaintiff's reservoir. Their only desire is that plaintiff be limited to the quantity it appropriated prior to the initiation of defendants' rights."

Appellant further says:

"If there is any other way by which such distribution can be made than by using the reservoir as a factor in the problem defendants will readily accept the alternative."

The extent of defendant's rights to impound, divert, and use water from Sanpitch river and its tributaries is clearly defined and fixed in the court's decision, and the decision in that regard is not assailed. In fact respondent, the Gunnison Irrigation Company, not only approves of the decision on that point, but is in this court vigorously defending it. In other words, under the decision, which respondent concedes correctly reflects its rights as established by the evidence, the company's right to store water in its reservoir and to take from Sanpitch river and its tributaries is limited to an amount that will furnish it a continuous stream, flowing 145 second feet from the beginning of the irrigation season, which the evidence shows is about the 15th of March or 1st of April, until June 15th, and from June 15th until the close of the irrigation season a continuous stream, flowing 111.54 second feet. Therefore, when the water from the two sources of supply, namely, the reservoir and the natural or current flow of the river and its tributaries, exceeds the amount awarded to respondent by the court for the irrigation of 7,250 acres heretofore irrigated by

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its stockholders, the defendants are entitled to divert and take from the natural or current flow of the river as much of such excess as they may require for the irrigation of their lands.

The record, as I view it, clearly shows that defendants are not entitled to have distributed to them any of the reservoir water. In fact, as heretofore pointed out, they disclaim having any property right or interest whatever in or to the reservoir or to the water stored therein. In the printed brief of respondent, referring to the court's decision set forth in the foregoing opinion prepared by Judge STEPHENS where-in the trial court holds that the excess water, if any, in the reservoir "may be measured out to the defendants," etc., it is said:

"We agree with plaintiff that the judge had no authority to make such an order or provision and that as it stands it is wholly outside of the issues. We agree that the provision referred to is void and should be set aside or modified to conform to his manifest intention."

What defendants do claim is—and I think the claim, under the court's decision which the Gunnison Irrigation Company concedes to be just and sound, is meritorious and well founded—that whenever during the irrigation season after the high water commences to flow, it is made to appear that the water stored in the reservoir and the natural or current flow of the river and its tributaries combined is more than sufficient to supply respondent during the remainder of the irrigation season with a continuous flow equal to the volume awarded it by the court, the defendants are entitled to have an amount equal to the excess, or so much thereof as their necessities require, distributed to them when it can be done without depriving certain of respondent's stockholders of water who use water from the tributaries of the river on lands so situated that they cannot be supplied with water from the reservoir.

There is a sharp conflict in the evidence respecting the duty of water on the lands irrigated from respondent's canals and ditches. Respondent's witnesses, one a civil engineer who was, and for more than ten years had been, familiar with the irrigation of these lands, and others who were practical farm-

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ers who for many years have owned and irrigated land under respondent's canals, testified that the duty of water on these lands is from thirty to fifty acres to the second foot; the amount of water required varying according to the difference in the character of the soil. Two witnesses for defendants, one a civil engineer, but neither of them farmers, testified that the duty of water is from sixty-five to ninety acres to the second foot. The trial court in arriving at its decision may or may not have made deductions from the evidence on this point that substantially reflect the vested rights of the Gunnison Irrigation Company. In view of the far-reaching effect of the decision and the impossibility of correcting the error in case one has been made by the court in fixing the duty of water, I would be in favor of remanding the cause, with directions to the trial court to set aside the decision in that regard and enter a temporary decree, continuing the same in force for two or more years, and to appoint a commissioner to make measurements, with the assistance of a competent civil engineer, of the waters used in the irrigation of the lands, and thus ascertain to a reasonable degree of certainty the duty of the water, were it not for the fact that counsel for respondent vigorously support and defend the decision and counsel for appellant approve, though somewhat reluctantly, of it. Under these circumstances this court is precluded from making such order.

CORREMAN, J.

In view of the stipulation entered into by the parties to this action relative to the duty of water and the acreage for which a primary right to the use of the waters involved is awarded to the respondent, I concur in the prevailing opinion of my Associates in that regard. However, I concur in the conclusions reached by Mr. Justice McCARTY that, inasmuch as the respondent's right to store water in its reservoir for future use was not involved in the action, the finding made in the prevailing opinion, to the effect that, if it should be ascertained at any time that respondent's storage of water is

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in excess of the quantity of water awarded the respondent under the decree, the excess belongs to appellant, and, on its demand, shall be released for its use, is wrong, and is not justified by the record before this court.

There may be times—in fact, the record shows there are times—when a storage of water in respondent's reservoir will not conflict with any right of appellant to use water beneficially. In other words, when if not stored it will otherwise run to waste. At such times at least, if not always, I think the respondent has a vested right to store water to secure for itself sufficient storage to meet the exigencies of the varying seasons from year to year so as to reasonably assure for itself sufficient water for the irrigation of the 7,250 acres it is conceded respondent is entitled to under the stipulation of the parties and the finding of the trial court. Furthermore, I am unable to conceive of a right in the appellant to require respondent to release at any time water stored by respondent in its reservoir when it will otherwise run to waste and it cannot be used beneficially by appellant except by storage in respondent's reservoir.

Adhering to the doctrine that "beneficial use shall be the basis, the measure, and the limit of all rights to use of water in this state," the storage of water in respondent's reservoir to meet the exigencies of the seasons ought not to be held as conflicting therewith in the slightest degree. Again, storage by respondent at a time when the water would otherwise run to waste and could not be beneficially used by appellant does not conflict with the right to a beneficial use provided for by the statutes and adhered to by all the decisions of this court. Storage of water under these circumstances gives rise to a question not involved in this action, and, if I correctly read the prevailing opinion with respect to such waters, it is to the effect that water stored by respondent under these circumstances may not be held in its reservoir, but shall be released for the appellant's use. The opinion holds:

"It being adjudged that respondent has no title or right to the use of waters stored in excess of the amount awarded by the trial court, it follows that respondent cannot retain such

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waters in its reservoir, nor can it require appellant to purchase the same."

I am unable to discover by what process of reasoning my Associates arrive at the conclusion that, after respondents have, at great labor and expense, constructed a reservoir in which it may be able to impound water that would otherwise run to waste, it may not rightfully retain it in its reservoir and require the appellant, or any other seeking its use, to compensate for it. It would seem that under such conditions there can be no interference or conflict with the doctrine of beneficial use as the foundation of right, and that the decree here should not require any water thus stored to be released by respondent for appellant's benefit.

MONTAGUE v. SALT LAKE & U. R. CO.

No. 3098. Decided July 10, 1918. (174 Pac. 871.)

1. TRIAL.—INSTRUCTIONS.—INVADING PROVINCE OF JURY. In an action for damages sustained in a railroad crossing accident, instruction held to leave to the jury the question whether the railroad company was negligent in failing to put up cross-arms at a highway crossing, and not objectionable as declaring that such failure constituted negligence per se. (Page 370.)
2. NEGLIGENCE.—IMPROVED NEGLIGENCE.—DRIVER OF VEHICLE.—INJURY TO INVITEE OR GUEST. The negligence of the driver of a vehicle is not imputable to the passenger, or to the invitee or guest of the driver. (Page 371.)
3. RAILROADS.—CROSSING ACCIDENT.—CONTRIBUTORY NEGLIGENCE.—GUEST OR DRIVER OF VEHICLE. The invitee or guest of the driver of a vehicle is not charged with the same strict legal duty of keeping a lookout as the driver, and where the driver was experienced and competent, and the plaintiff was a guest and an inexperienced minor, and the circumstances would not cause all reasonable men to

* *Shortino v. Salt Lake & Utah R. Co.*, 52 Utah, 476, 174 Pac. 860.

* *Loohoad v. Jensen*, 42 Utah, 99, 129 Pac. 347; *Atwood v. Utah, L. & R. Co.*, 44 Utah, 366, 140 Pac. 137; *Martindale v. O. S. L. R. Co.*, 48 Utah, 469, 160 Pac. 275.

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conclude that plaintiff was negligent, plaintiff was not guilty of contributory negligence as a matter of law." (Page 371.)

4. TRIAL.—REVERSAL OF INSTRUCTIONS.—MATTERS COVERED BY OTHER INSTRUCTIONS. It was not error to refuse requested instructions where every proposition which could be submitted to the jury was sufficiently covered by instructions given. (Page 372.)

Appeal from the District Court of Salt Lake County, Third District; *Hon. P. C. Evans*, Judge.

Action by Isadora Montague, by her guardian ad litem, Lavina Montague, against the Salt Lake & Utah Railroad Company.

Judgment for plaintiff. Defendant appeals.

APPEARED.

Moore, Mitchell & Maginnis for appellant.

Hancock & Barnes for respondent.

FRICK, C. J.

Plaintiff, a young girl seventeen years of age at the time of trial, recovered judgment against the defendant for damages for personal injuries which she alleged were sustained, by reason of the defendant's negligence, in a collision between an automobile in which she was riding and one of defendant's interurban trains at a public crossing.

The facts and circumstances of this case are essentially the same as those of the preceding case of *Shortino v. Salt Lake & Utah R. Co.*, 52 Utah, 476, 174 Pac. 860 (just decided).

While, perhaps, the evidence in this case differs somewhat from the evidence produced in the *Shortino* case, yet, in view that the action is based upon the same collision that that action

* *Shortino v. Salt Lake & Utah R. Co.*, 52 Utah, 476, 174 Pac. 860; *Atwood v. Utah, L. & R. Co.*, 44 Utah, 366, 140 Pac. 137.



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CHERRY, C. J., and STRAUP, ELIAS HANSEN, and FOLLAND, JJ., concur.

EPHRAIM HANSON, J., being disqualified, did not participate herein.

GUNNISON IRR. CO. v. PETERSON.

No. 4718. Decided May 9, 1929. (280 P. 715.)

Rehearing Denied October 1, 1929.

1. PLEADING—CONCLUSIONS OF LAW ARE NOT TO BE CONSIDERED IN DETERMINING WHETHER PLEADING STATES CAUSE OF ACTION. Conclusions of law ought not to be considered in determining whether or not a pleading sets forth a sufficient cause of action.
2. INJUNCTION—AFFIDAVIT AVERRING DEFENDANT TO BE IN CONTEMPT FOR VIOLATION OF WATER RIGHT DECREE HELD NOT DEMURRABLE. Affidavit, averring defendant to be in contempt of court for taking portion of irrigating waters and using them for irrigation in disregard of rights of plaintiff and in violation of decree of court, held sufficient as against demurrer.
3. INJUNCTION—VIOLATION OF WATER RIGHT DECREE IS NOT EXCUSSED BY COURT'S FAILURE TO APPOINT COMMISSIONER TO DISTRIBUTE WATERS, OR BY PLAINTIFF TAKING FULL CONTROL OF WATER AND REFUSING TO CONSENT TO APPOINTMENT OF COMMISSIONER. Violation of water right decree is not excused by failure of court to appoint a water commissioner to make proper distribution, or by fact that plaintiff took full control of water and refused to consent to appointment of commissioner as provided in decree, since either party had right to apply in court for appointment of such commissioner.
4. INJUNCTION—GOOD-FAITH BELIEF THAT DEFENDANT HAD RIGHT TO TAKE WATER IS NO DEFENSE, IN CONTEMPT PROCEEDING FOR VIOLATING WATER RIGHT DECREE. The fact that water user believed he had a right to take water which he took is no defense, in contempt proceeding against him for violation of court's decree apportioning waters.

Corpus Juris-Oyc. References:

Injunctions 32 C. J., § 870, p. 499, n. 23; § 883, p. 505, n. 20; § 885, p. 507, n. 71.

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5. INJUNCTION—USERS ACT AT PERIL IN TAKING ADJUDICATED WATERS IN FACE OF RESTRAINING ORDERS ISSUED WITHOUT APPOINTMENT OF COMMISSIONER. The parties to a water right decree act at their peril, when they proceed to use waters adjudicated in fact of restraining orders issued without appointment of commissioner.
6. INJUNCTION—ADJUDICATION OF CONTEMPT FOR TAKING WATER IN VIOLATION OF DECREE HELD NOT SUSTAINED, EVIDENCE SHOWING THAT STREAM AT TIMES CONTAINED MORE THAN NUMBER OF INCHES ALLOTTED TO PLAINTIFF. Evidence that water user diverted portion of waters before plaintiff had diverted its allotment under water right decree for entire season, and that stream at times contained more than number of inches representing plaintiff's allotment, held not to sustain decree adjudging defendant in contempt for diverting water belonging to plaintiff; the water right decree not being susceptible of construction authorizing plaintiff to take all water in stream until his season's allotment had been taken.
7. INJUNCTION—CONTEMPT ADJUDICATION FOR VIOLATION OF WATER DECREE HELD NOT SUSTAINED BY FINDING THAT DEFENDANT DIVERTED SOME WATER BEFORE PLAINTIFF HAD DIVERTED ENTIRE ALLOTMENT FOR SEASON. Adjudication of contempt for diverting water belonging to plaintiff in violation of decree held not sustained by finding that defendant diverted some of water before plaintiff had diverted its allotment for entire season.

Appeal from District Court, Seventh District, Sanpete County; *Dibworth Woolley*, Judge.

Charles P. Peterson was adjudged in contempt of court on an affidavit and application of the Gunnison Irrigation Company, a corporation, and he appeals.

REVERSED AND REMANDED, with directions.

A. H. Christenson, of Provo, for appellant.

Lewis Larson, of Mantli, for respondent.

BATES, District Judge.

This is an appeal from a judgment of the district court of Sanpete county convicting the defendant of contempt of court.

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The affidavit upon which the order directing defendant to appear and show cause why he should not be punished for contempt of court has attached to it and made a part of it a copy of a decree of the court entered December 29, 1920. The defendant admits that the decree was rendered and that it was a valid and existing judgment of the court. The following provisions of the decree are material to this proceeding:

"1. That the source of water involved in this action, and affected by this decree, are described as follows:

"The waters of Sanpitch river, flowing between the intake of plaintiff's reservoir, and the point of diversion of any party hereto situated on said river;

"The waters of Six-Mile creek, except fifty per cent thereof, diverted and claimed at Sterling, Utah, by persons not parties to this action;

"Two and fifteen hundred eighteen-ten thousandths (2.1518) cubic feet per second of time, of the waters of Nine-Mile Creek. (The remainder of the waters of said creek being owned absolutely by High-land Canal Company.)

"The waters of Twelve-Mile creek, except forty-two per cent thereof, diverted and claimed at Mayfield, Utah, by persons not parties to this action.

"The waters stored in plaintiff's reservoir, in Sanpitch River situated between Manti City and Gunnison City.

"All in the County of Sanpete, State of Utah.

"2. That the plaintiff, the Gunnison Irrigation Company, is the owner of and entitled to divert and use, from the combined sources and supply of water involved in this action, and hereinbefore described, the following described quantities of water, during the times and for the uses, to wit:

"A flow of water equal to one hundred forty-five (145) cubic feet per second of time, for irrigation of its said seven thousand two hundred fifty acres of land, from the first day of April, until the 15th day of June, of each year.

"A flow of water equal to one hundred eleven and 35-65 (111, 35-65) cubic feet per second of time, for irrigation of its said seven thousand two hundred fifty acres of land, from the 15th day of June, until the 1st day of October of each year.

"A flow of water equal to twenty-seven and 84-100 (27.84) cubic feet per second of time, for the irrigation of one-fourth of their said seven thousand two hundred fifty acres of land, (or eighteen

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hundred twelve and one-half acres thereof), from the first day of October, until the 1st day of November, of each year.

"A flow of water equal to two and one-half (2½) cubic feet per second of time for culinary, domestic and stock-watering purposes, by the plaintiff's stockholders, from the first day of April, until the 1st day of November of each year;

"A flow of water equal to ten (10) cubic feet per second of time, for culinary, domestic and stock-watering purposes, by the plaintiff's stockholders, from the 1st day of November, until the first day of April, of the succeeding year;

"That for the purpose of providing and insuring an adequate quantity of water to supply the plaintiff's uses as above set forth, the said plaintiff has the right to impound and store waters from all available sources in its said reservoir, each year, preferring such available periods and times for such storage when the defendants herein are unable to use any of said waters decreed to them, for irrigation purposes.

"That the aforesaid rights of said plaintiff are superior and paramount to any right of the defendants, or either of them, to the use of the said waters, or any part thereof.

"3. That subsequent and secondary to the said rights of the plaintiff the defendant is the owner of the right to divert and use from said sources during that period from the first day of April, until the 1st day of October, of each year, for the irrigation of his lands described in his amended answer, a volume of water equal to three-fourths cubic foot per second of time. * * *

"6. That the respective titles to the parties hereto, to the use of said waters as herein defined, is hereby quieted and confirmed, and the said parties to this action, and each of them, and each of their officers, agents, and employees, are hereby perpetually enjoined, restrained and forbidden to in any manner interfere with the rights of any other party hereto, or with his or its free use and enjoyment of said right, as herein decreed."

The decree also provides for the appointment of a commissioner to supervise and distribute the waters according to the terms of the decree and directs him to measure all allotments of water to the parties at the point of diversion from the stream from whence the water is diverted into a canal or ditch.

The affidavit further recites that the defendant had full knowledge of the contents of the said decree, and that on

numerous occasions beginning with May 19, 1927, and until June 30, 1927, he, in willful disregard of said decree and injunction and in contempt of the same and wrongfully and in disregard to the rights of the plaintiff, diverted and used for the purpose of irrigation a large quantity of waters so decreed to the plaintiff, and that he in open and flagrant contempt of such decree threatened to continue to divert such waters in disregard of the decree and the terms thereof.

Defendant demurred to the affidavit upon the ground that it does not state facts sufficient to constitute a cause of action against the defendant, and upon the ground that it is ambiguous, uncertain, and unintelligible, and that it cannot be ascertained therefrom what amount of water, under the decree mentioned in the application or affidavit, was contained in the water sources affected by the decree to which the plaintiff claims it was entitled when the defendant is alleged to have taken water belonging to the plaintiff; and that it cannot be ascertained from the affidavit what amount of water it is claimed by the plaintiff that defendant took belonging to the plaintiff. The demurrer was overruled, and the defendant answered.

In his answer defendant admits the entering of the decree and denies all other allegations. The defendant then, by way of further reason why the order to show cause should be dismissed, alleges in substance that the plaintiff corporation has assumed to take control of the water included in the decree and to determine when the defendant should receive water; and has always refused the defendant permission to take any water when he was entitled to it. Defendant also alleges that the plaintiff has never consented to have a commissioner appointed to distribute the water under the decree as provided therein, and has assumed by its superior ability and financial power to control the water and to keep defendant from receiving his rightful share.

Appellant urges that the demurrer should have been sustained for the reason that the facts pleaded do not amount to a contempt of court. It seems to be his position that the

allegations in the affidavit that the defendant took waters decreed to the Gunnison Irrigation Company 1, 2 is a conclusion of law, and that conclusions of law ought not to be considered in determining whether or not a pleading sets forth a sufficient cause of action. The rule of law contended for by appellant is undoubtedly correct, and should at all times be recognized by the court; but it is not so clear that it is applicable to the present case. The copy of the decree attached to and made a part of the affidavit specifically describes the waters awarded to the plaintiff and petitioner. The affidavit recites that the defendant took a portion of those waters and used them for irrigation in willful disregard of the decree and injunction, and in contempt of the same, and wrongfully and in disregard of the rights of the plaintiff; that he threatens to continue to divert such waters in disregard of the decree and the terms thereof. We think the recitals are statements of fact. The allegations were sufficient, and the demurrer was properly denied and overruled.

Appellant also insists that because plaintiff did not consent to the appointment of a commissioner to measure and distribute the water, and because plaintiff assumed to take control of the water and determine whether defendant should receive any water, plaintiff ought not to prevail in this proceeding. He has not called the attention of the court to any authority in support of this position, and we have been unable to find any. The right to the use of the waters awarded was not made dependent upon the appointment of a commissioner. Each of the parties to the action was entitled to the use of the water awarded him, and either of the parties had the right to apply to the court for the appointment of a commissioner to make proper distribution. If the defendant violated the terms of the decree, he cannot purge himself of the contempt by showing that no commissioner was appointed.

Neither is it of any avail to the appellant that the plaintiff did not consent to the appointment of a commissioner,

nor that it took full control. The court retained jurisdiction, authority, and power to appoint a commissioner. No doubt it would have performed this duty had its attention been called to the matter. The consent or nonconsent of the plaintiff was not material.

The entire question to be determined in this proceeding is whether the defendant in fact took or diverted water decreed to plaintiff as alleged in the affidavit, without plaintiff's consent and to its injury. The pleadings and proofs suggest that the defendant believed he had a right to take the water. But that cannot be a defense to the charge. It has frequently been said by the courts that good faith, ignorance of law, or acting upon the advice of counsel, is not a defense. In *Rodgers v. Pitt* (C. C.) 89 F. 424, 429, the court used the following language:

"The defendant in this case was bound to obey the injunction, and when he interfered with the court's order, he was acting at his peril. He certainly ought not to have acted upon his own judgment as to what his rights were, when it was manifest that his acts would, at least, amount to a technical violation of the terms of the injunction. It was not for him to set up his own opinion as to the meaning and effect of the injunction. If he entertained any doubt as to what he might do without violating the injunction, he should have applied to the court for a modification of the injunction, or for the privilege of doing certain acts which, by the advice of counsel, he claims he had the right to do."

See also *Weston v. Roper Lumber Co.*, 158 N. C. 270, 73 S. E. 799, Ann. Cas. 1913D, 373.

Each of these parties undoubtedly acted at his peril when he proceeded to use the waters so adjudicated in the face of the restraining orders issued without the appointment of a commissioner. If either took water belonging to the other against his will, whether in good faith, under a misapprehension of the terms of the decree, or under mistake of law, such party thereby came into contempt of the court.

The court found as a fact that the decree was rendered in form as pleaded; that the defendant had full knowledge of the terms of the decree; and that on May 19, 1927, defendant, in willful disregard of the decree and the injunction embodied in paragraph 6 of the decree, and in contempt of the same, and wrongfully and in disregard of the rights of the plaintiff, diverted and used a large quantity of the waters decreed to plaintiff, and that he so continued to wrongfully divert and use such waters until June 30, 1927.

The following facts are fairly established by the testimony: For several years the flow of water in the Sanpitch river has been below normal. Since 1920 there has been no commissioner appointed by the court for the measurement of the waters and neither party to the action has ever made request for such appointment. During all those years plaintiff has used the entire flow and prevented the defendant Peterson from using any, claiming, under its construction of the decree, that it was its right so to do. During that entire period of time defendant has insisted that there was water available at different times to supply his secondary right, but he has not received it. From May 19 to June 30, 1927, defendant repeatedly, and almost constantly, took water from the sources of supply, claiming there was sufficient in the stream to supply his right. The plaintiff resisted his taking it and insisted that there was none there for him. The stream flow of Sanpitch river and its tributaries during the months of May and June, 1927, fluctuated considerably. The streams were larger during the night than they were in the daytime. There were several diversions of water made by plaintiff at different points along the river. The water so diverted was conducted onto lands within the Sanpitch river basin and used for purposes of irrigation. The return flow from the irrigation of these lands and seeps and springs along the river channel augmented the natural flow of the river available to supply the requirements of plaintiff. At no time since the decree was entered in December, 1920, has the water supply been meas-

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ured where the waters are diverted from the stream, as required by the decree. During the months of April, May, June, and July of 1927, measurements were made about once a week by an engineer under the employ of plaintiff at two places. One place of measurement was 75 feet below the State Road Bridge at Christianburg, and the other place of measurement was on Twelve-Mile creek about 40 feet above the intake of the Highland Canal. Measurements at these two places gave the amount of available water at the time of measurement, less the return flow and the seeps and springs which were along the channel of the streams below the point of measurement. There is no evidence in the record from which the amount of water in these seeps and springs and in the return flow can be determined.

The measurements as made show the following amounts of water in the streams on the dates indicated:

April 24, 125.58 cubic feet per second.
 May 15, 162.67 cubic feet per second.
 May 22, 118.90 cubic feet per second.
 May 29, 95.80 cubic feet per second.
 June 12, 172.24 cubic feet per second.
 June 19, 147.61 cubic feet per second.
 June 26, 139.56 cubic feet per second.

It will be observed that three of the measurements exceed the 147.50 cubic feet per second awarded in the decree to plaintiff. The remaining four are under the amount of the award. Whether the unmeasured waters were sufficient to increase the streams to the amount of the award on either or all of the remaining four days cannot be determined from the record. Neither do these measurements determine whether on any day between May 19, 1927, and June 30, 1927, there was less than 147.50 cubic feet per second diverted by plaintiff into its canals, or whether the water taken by defendant on any day was necessary to make up the amount of water awarded to plaintiff.

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The engineer employed by plaintiff made an estimate based on the aforesaid measurements of the amount of water flowing in the stream between April 1 and June 15, 1927. This estimate is 16,537.44 acre feet. Had the plaintiff received 147.50 cubic feet per second of time flowing constantly during the period from April 1st to June 15th, it would have amounted to 22,420 acre feet, or 5,882.56 acre feet more than the estimate of the engineer shows flowed in the system during the period. But if there is any value in this testimony it is, to say the least, greatly weakened by the testimony of the engineer making the estimate that it eliminates the seepage, springs, and return flow, and that he would not be able to say that plaintiff did not receive double that amount during the period.

The writer of this opinion has been unable to find any facts testified to by any of the witnesses which would justify the inference that on any day between May 19, 1927, and June 30, 1927, there was less than 147.50 cubic feet per second diverted by the plaintiff into its canals for irrigation, or that any water taken by the defendant prevented the plaintiff from diverting its 147.50 cubic feet of water per second on any day. Counsel for plaintiff has not called attention to any such evidence, but has contented himself with the suggestion that we read the record. That we have done. On the other hand, the record is replete with evidence to the effect that during the nighttime, when the streams were high, and frequently during the daytime, plaintiff diverted much more than the measurements show between May 19th and June 15th.

But plaintiff does not base its right to prevail in this proceeding upon a showing that the defendant, by taking water between the dates in question, prevented plaintiff from diverting 147.50 cubic feet per second of time. No attempt was made to establish that fact. Plaintiff's claim is that it can take all of the water of the system until it has diverted the total amount decreed to it for the entire irri-

gation season. Or, in other words, that it can take all the water decreed to it for the irrigation season during the first period or during the first and second periods. Plaintiff claims that it is its right to defer the defendant in the enjoyment of his rights until fall if it so desires, and that it can take all the available supply regardless of time until it has diverted its allotment for the entire season. That is the construction of the decree adopted by the learned trial court. This does not appear from the findings, conclusions, or judgment of conviction, but it does so appear in the court's comments at the conclusion of the trial which is part of the record before us. In its oral decision the court said:

"The court will be guided by the interpretation of the decree which has been adopted by the plaintiff and assume it means what they contend it does mean respecting the use of the high waters. The court is of the opinion that the plaintiff is not limited from the period of April 1st to June 15th to the use of only 147.50 cubic feet per second continuous flow, and from June 15th to October 1st, the plaintiff is not limited to 111 35/85 plus the culinary water, but the plaintiff may take all the flow even though it exceeds the amount until there is enough water in the reservoir to satisfy plaintiff's allotment. * * * I think possibly there were times, under the evidence here, when the combined flow of the streams exceeded 147.50 cubic feet per second, but under the theory which the court has adopted, that would not make any difference, because the evidence all goes to show that even so, there is not and has not been—there probably will not be—enough water in the system to satisfy the allotment to plaintiff. * * * The findings of fact therefore may be made in accordance with the allegations of the petition."

There is not in the findings of fact any finding of the amount of water available for use on any given day the defendant is alleged to have violated the terms of the decree. The court found the decree to have been signed and entered awarding to plaintiff the waters as described in the copy of the decree attached to the affidavit and hereinbefore set out, and that defendant in disregard of the rights of the plaintiff diverted and used, for the purposes of irrigation, a large quantity of the waters decreed to the plaintiff.

We think the findings in this proceeding must be construed in the light of the interpretation placed by the learned trial court upon the award to plaintiff in the decree. So measured, the trial court did not find that defendant took any of the waters of these streams when there was less than 147.50 cubic feet per second in addition to what defendant diverted, available for the use of plaintiff. Neither did the court find that the defendant diverted any of the waters of these streams between May 19 and June 30, 1927, when the flow of water, in addition to what defendant diverted, and available for the use of the plaintiff, was less than a flow of water equal to 147.50 cubic feet per second of time flowing constantly from April 1st to June 30th.

The court's finding that the defendant diverted and used for the purpose of irrigation a large quantity of the waters decreed to the Gunnison Irrigation Company, when considered in the light of the language of the decree and the interpretation placed thereon by the court in this proceeding, means neither more nor less than that the defendant diverted some of the waters before the plaintiff 6, 7 had diverted its allotment for the entire season, or before it could be determined that there was more than sufficient to supply plaintiff's award for the entire irrigation season. If the court's findings of fact so interpreted and limited constitute a violation of the decree, the judgment should be affirmed. The decree divides the irrigation season into three periods, the first period being from April 1st to June 15th; the second period being from June 15th to October 1st, and the third period from October 1st to November 1st of each year. It then makes a definite award of water that plaintiff is entitled to use during each of these periods. There is no language in the decree inferring that more water can be used in either of these periods than the amount specified for them respectively.

The findings of fact which support the decree alleged to have been violated contain the following recitals:

"That the quantity and area of land upon which the said plaintiff its stockholders and predecessors in interest have beneficially used the said waters from said river, creeks, and reservoir amounts in the aggregate to the total sum of seven thousand two hundred and fifty (7250) acres.

"That the quantity of water necessary for the proper and beneficial irrigation of the said lands of plaintiff's stockholders is as follows: From the 1st day of April until the 15th day of June of each year a volume of water equal to one hundred forty five (145) cubic feet per second of time flowing constantly; from the 15th day of June until the 1st day of November of each year, a volume of water equal to one hundred eleven and 35/65 cubic feet per second of the time, flowing constantly; from the 1st day of October to the 1st day of November of each year, a volume of water equal to twenty-seven and 84/100 cubic feet per second of time."

The court found the amount of water that could be beneficially used on the lands of plaintiff's stockholders during the first period and made the allowance accordingly. It has thus been judicially determined what amount of water can be beneficially used by plaintiff during the first period. That is a stream of water equal to 145 cubic feet per second flowing constantly. That is the amount decreed by the court. Any water in addition to that applied during the first period would not be a beneficial use. Beneficial use should be the basis, the measure, and the limit of all rights to the use of water in this state.

As heretofore indicated, there is no language in the decree inferring that the water allotted for the respective periods can be used by the plaintiff during any other period, and we think the court did not so intend. Whenever the plaintiff has used for irrigation a volume of water equal to 145 cubic feet per second of time flowing constantly between the 1st day of April and the 30th day of June of any year, the defendant is entitled to divert from any surplus there may be in the stream during that period the quantity of water decreed to him. Even though the plaintiff has not used for irrigation during a given period the amount of water for that period if it can reasonably be determined

that there will be flowing in the stream an amount of water available for the use of the parties in excess of the amount plaintiff is or will be entitled to divert during the particular term, the defendant is entitled to use the amount decreed to him out of the excess. This he should be permitted to do just as early in the season as such determination can be reasonably made.

In view of the conclusion reached relative to the proper interpretation of the decree alleged to have been violated, it follows, from what has been said heretofore, that there is no finding by the court that the defendant took or threatened to take water he was not entitled to take. Whether the court would have so found, had he construed the decree in harmony with the conclusions arrived at by this court, we are unable to determine.

The order is that the judgment be, and the same hereby is, reversed, and the cause remanded to the district court of Sanpete county with directions to that court to take such further proceedings therein as to it may seem proper, not inconsistent with the views herein expressed. Appellant to recover costs.

STRAUP, ELIAS HANSEN, EPHRAIM HANSON, and FOLLAND, JJ., concur.

CHERRY, C. J., being disqualified, did not participate herein.

SPENCER v. J. W. SUMMERHAYS & SONS.

No. 4774. Decided September 4, 1929. (280 P. 720.)

- 1. REPLEVIN—EVIDENCE IN ACTION TO RECOVER WOOL, OR ITS VALUE, HELD SUFFICIENT TO PRESENT QUESTION ON VALUE OF WOOL, WARRANTING DENIAL OF NONSUIT. In action to recover possession of wool claimed to have been stolen and sold to defendants, or,

Corpus Juris-Cyc. References: Replevin 34 Cyc. p. 1507, n. 59; p. 1512, n. 97.

Exhibit I

Manufactured by
JULIUS BLUMBERG, INC.
NYC 10013

Filed Dec. 31, 1920

W. B. Lamb, Clerk
By Eunice Stevenson, Deputy.

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT, IN AND FOR
KANE COUNTY, STATE OF UTAH

IRRIGATION COMPANY, |
Plaintiff |
-vs- |
CHARLES P. PETERSON, PARLEY CHILD, |
JOSEPH CHRISTENSEN, W. H. GRIBBLE, |
and THE HIGHLAND CANAL COMPANY, a |
Corporation, |
Defendant. |

FINDINGS OF FACT
and
CONCLUSIONS OF LAW

This cause came on regularly to be heard at Monticello, in said County, before Hon. Justin B. Call, acting Judge of said Court, on the 20th day of March, 1919, upon the mandate and remittance of the Supreme Court of the State of Utah, filed herein.

The Plaintiff appeared by its attorneys, Jacob Johnson, Esq., and Lewis Larsen, Esq., and the Defendant, The Highland Canal Company, appeared by its attorneys W. A. Wedgwood Esq., and J. W. Cherry Esq., the other defendants made no appearance.

The court heard the proofs offered by the respective parties and the arguments of counsel, from day to day, until the 24th day of March, 1919, and it appearing to the court that the facts required to be found by the judgment of the Supreme Court rendered herein, could not be satisfactorily ascertained or adjudged without additional investigation, experiment and observation, and the parties having in open court, stipulated and agreed that a Commissioner be appointed to supervise, control and distribute the waters involved in this action, pending the final determination hereof, and to make observations and measurements and report the same to the court, the court on the 9th day of April, 1919, made its interlocutory and temporary decree and order, filed herein and to which reference is hereby made, and postponed the further hearing of this action to a time to be fixed by the court on its own motion or on application of any party hereto;

And the said cause again came on regularly to be heard at Monticello, in said County, pursuant to the order of said court, before Hon. Justin B. Call, acting Judge of said court, on the 10th day of December, 1920, for final hearing and determination.

The Plaintiff appeared by its attorneys, Jacob Johnson, Esq., and Lewis Larsen, Esq., the defendants, Charles P. Peterson, Parley Child, Joseph Christensen, and W. H. Gribble appeared by their attorney A. H. Christensen Esq., and the defendant, The Highland Canal Company, appeared by its attorney, J. W. Cherry Esq.,

The Court heard the proofs offered by the respective parties, the report and evidence of the Commissioner heretofore appointed herein, and the arguments of counsel and considered the same, and the course having been submitted to the court for its decision, the court now

hereby finds and decides as follows, to-wit:

FINDINGS OF FACT

1. That the stockholders of the Plaintiff corporation, the stockholders of the defendant corporation, and the other defendants, are the owners in severalty, of the lands described and referred to in the complaint and answers filed herein, respectively and that the said lands are arid, and require irrigation to make them productive.

2. That Sanpitch River, Six-mile Creek, Nine-mile Creek, and Twelve-mile Creek, are natural streams of water, as described in Plaintiff's complaint, and are situated as described in Plaintiff's complaint.

3. That the sources and supply water involved in this action, and affected by these findings and decree, are described as follows.

The waters of Sanpitch River, flowing between the intake of Plaintiff's reservoir, and the point of diversion of any party hereto situated lowest on said river.

The waters of Six-mile Creek, except fifty per cent thereof, diverted and claimed at Sterling, Utah, by persons not parties to this action.

Two and fifteen hundred eighteen-ten thousandths (2.1518) cubic feet per second of time, of the waters of Nine-mile Creek. (The remainder of the waters of said creek owned absolutely by Highland Canal Company.)

The waters of Twelve-mile Creek, except forty-two per cent thereof, diverted and claimed at Mayfield, Utah, by persons not parties to this action.

The waters stored in the Plaintiff's reservoir, in Sanpitch river, situated between Manti City and Gunnison City.

4. That prior to the year 1888, the stockholders of the Plaintiff, their grantors and predecessors in interest, entered upon said river and creeks, at various points in Sanpete County, Utah, and constructed ditches and canals leading from said river and creeks to and upon their said lands respectively, and constructed and placed dams in the channels of said river and creeks, and diverted the waters flowing therein, and conducted said waters in said ditches and canals to and upon their said lands and there used the same for the purpose of irrigating a large portion of said lands and the crops growing thereon, and for domestic and stock-watering purposes, and have ever since so used said waters for said purposes;

5. That in the year 1888, the original appropriators of said waters, and their successors in interest, for the purpose of better maintaining, managing, controlling and distributing the waters to which they were entitled, as aforesaid, ~~xx~~ formed themselves into a corporation, according to law, called the Gunnison Irrigation Company, which is the Plaintiff herein, and conveyed in due form of law to the said Plaintiff, each of their rights, titles and interest in and to the said waters, appropriated and used as aforesaid, and the dams, ditches and canals, by which the same were diverted and conducted to said lands, and that the said Plaintiff is now the owner thereof.

6. That in the year 1888, the Plaintiff commenced the construction of a reservoir at a point immediately above the junction of the said

Benpitch river and the said Six-mile Creek and continued said construction with reasonable diligence to completion, by constructing a dam across the bed of said Benpitch river, for the purpose of storing and impounding the waters of said river at said point and the waters of said Six-mile Creek, during the winter, spring and high water seasons of each year, by which means the Plaintiff did and ever since has impounded and stored a large quantity of water and which it did and ever since has used, together with the waters diverted from the river and streams mentioned in paragraph three hereof, for the irrigation of the said lands of Plaintiff's said stockholders and for culinary, domestic and stock-watering purposes.

7. That the quantity and area of land, upon which the said Plaintiff, its stockholders, ~~executors~~ and predecessors in interest, have beneficially used the said waters from said river, creeks and reservoir, amounts in the aggregate to the total sum of SEVEN THOUSAND TWO HUNDRED FIFTY (7,250) acres.

8. That the time or season of each year, during which it is beneficial or necessary to use waters for irrigation upon the lands described herein, is that period or season beginning on the first day of April, and ending on the 1st day of October, of each year, except as herein after found.

That said period of time is now denominated and is hereinafter referred to as the "Irrigation Season".

The Court further finds as a fact, that the said Plaintiff's stockholders have applied and used, and that it is beneficial and necessary for them to apply and use, waters from the said sources hereinbefore described, upon and for the irrigation of one-fourth of their said seven thousand two hundred fifty acres (or eighteen hundred twelve and one-half acres thereof, for the purposes of enabling them to plow the same, and to promote the growth of fall pasture and hay, and other similar purposes, during that period of time from the 1st day of October until the 1st day of November, of each year.

9. That the quantity of water necessary for the proper and beneficial irrigation of the said lands of Plaintiff's stockholders, is as follows:

From the first day of April, until the 15th day of June, of each year, a volume of water equal to one hundred forty-five (145) cubic feet per second of time, flowing constantly;

From the 15th day of June, until the 1st day of October of each year, a volume of water equal to one hundred eleven and $35/65$ ($111-35/65$) cubic feet per second of time, flowing constantly.

From the 1st day of October to the 1st day of November, of each year, a volume of water equal to Twenty-seven and $84/100$ (27.84) cubic feet per second of time, flowing constantly.

10. That the quantity of water diverted and used by Plaintiff's said stockholders and reasonably necessary for their culinary, domestic and stock-watering purposes, from the sources involved in this action, is as follows:

From the first day of April, until the 1st day of November, of each year, a volume of water equal to two and one-half (2 $\frac{1}{2}$) cubic feet per

second of time.

From the 1st day of November until the first day of April, of the succeeding year, a volume of water equal to Ten (10) cubic feet per second of time.

10. That subsequent to the diversion, appropriation, and use of said waters by the Plaintiff, as aforesaid, the defendant, Charles P. Peterson, entered upon said Kanpitch river, at a point about sixty rods West of his lands described in his amended answer filed herein, and by means of a dam constructed in said river, and a ditch leading therefrom, diverted from said river three-fourths of a second foot of water per second of time, and conducted the same to his said lands, and ever since has used and applied the same, whenever available, to the necessary irrigation of his lands, that said quantity of water is reasonably necessary for said purpose.

11. That subsequent to the diversion, appropriation and use of said water by the Plaintiff, and the defendant, Charles P. Peterson, as aforesaid, the Defendants, Joseph Christensen, W. H. Gribble, and Parley Child, entered upon said Kanpitch river at a point below the point of diversion of said defendant, Charles P. Peterson, above described, and by means of dams constructed in said river, and ditches leading therefrom, diverted from said river, two and one-half (2½) cubic feet of water per second of time, and conducted the same to their said lands described in their answer filed herein, and ever since have used and applied the same, whenever available, for the necessary and beneficial irrigation of their said lands. The said quantity of water is reasonably necessary for said purpose.

12. That subsequent to the diversion, appropriation and use of said water by the Plaintiff, and by the defendant, Charles Peterson, and by the Defendants, Joseph Christensen, W. H. Gribble and Parley Child, as aforesaid, the defendant, Highland Canal Company, entered upon said river and creeks, at various points, and commenced the construction of dams, ditches and canals, and made the appropriate filings in due form of law, for the purpose of diverting from said river, creeks and sources, sufficient water for the necessary and beneficial irrigation of its said lands described in its answer filed herein, aggregating six thousand acres, and prosecuted said work with reasonable diligence to completion, for the purpose of appropriating and using said water for the irrigation of said lands, and for the culinary, domestic and stock-watering purposes of said stockholders. That said defendant has used large portions of said waters, whenever available, for said purposes.

13. That the quantity of water necessary for the proper and beneficial irrigation of the said lands of the stockholders of the said Highland Canal Company, is as follows:

From the first day of April, until the 15th day of June, of each year, a volume of water equal to one hundred twenty (120) cubic feet per second of time, flowing constantly:

From the 15th day of June, until the end of the Irrigation Season, as hereinbefore set forth, a volume of water equal to ninety-two and 20/65 (92.20/65) cubic feet per second of time, flowing constantly.

That the quantity of water diverted and used by the stockholders of the said Highland Canal Company, and reasonably necessary for their culinary, domestic and stock-watering purposes, is as follows:

From the end of the Irrigation Season to the beginning of the Irrigation season (during the Non-irrigating period) of each year, a volume of water equal to Ten (10) cubic feet per second of time.

That the diversion, used and claim of the said Highland Canal Company, to all of the waters herein mentioned, is subsequent to the claims and rights of the Plaintiff and the other defendants hereinbefore mentioned.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts, the court now hereby finds and decides:

1. That the Plaintiff, the Gunnison Irrigation Company, is the owner of and entitled to divert and use, from the combined sources and supply of water involved in this action, and hereinbefore described, the following described quantities of water, to-wit:

A flow of water equal to one hundred forty five (145) cubic feet per second of time, for the irrigation of its said seven thousand two hundred fifty acres of land, from the first day of April, until the 15th day of June, of each year;

A flow of water equal to one hundred eleven and $35/65$ (111- $35/65$) cubic feet per second of time, for the irrigation of its said seven thousand two hundred fifty acres of land from the 15th day of June, until the 1st day of October of each year.

A flow of water equal to Twenty seven and $84/100$ (27.84) cubic feet per second of time for the irrigation of one-fourth of their said seven thousand two hundred fifty acres of land, (or eighteen hundred twelve and one-half acres thereof) from the 1st day of October, until the 1st day of November, of each year;

A flow of water equal to two and one-half (2 $1/2$) cubic feet per second of time, for culinary, domestic and stockwatering purposes, by the Plaintiff's stockholders from the first day of April, until the 1st day of November, of each year;

A flow of water equal to ten (10) cubic feet per second of time, for culinary, domestic and stock-watering purposes, by the Plaintiff's stockholders, from the 1st day of October until the first day of April of the succeeding year;

2. For the purpose of providing and insuring an adequate quantity of water to supply the Plaintiff's uses, as above set forth, the said Plaintiff has the right to impound and store waters from all available sources in its said reservoir, each year preferring such available periods for storing, when the defendants herein are unable to use any of said waters herein decreed to them for irrigation purposes.

3. That the rights of the said Plaintiff, as herein described, are superior and paramount to any right of the defendants to the use of said waters, or any part thereof.

4. Subsequent and secondary to the said rights of the Plaintiff, the defendant, Charles P. Peterson, is the owner of the right to divert and use from said sources, during the said irrigation Season, for the irrigation of his said lands, a volume of water equal to three-fourths ($3/4$) of

a cubic foot per second of time.

5. Subsequent and secondary to the said rights of the Plaintiff, and of the defendant, Charles P. Peterson, as above defined, the defendant, Parley Child, Joseph Christensen, and W. H. Gribble, are the owners of the right to divert and use from said sources, during the said irrigation season, for the irrigation of their said lands a volume of water equal to two and one-half (2½) cubic feet per second of time.

6. Subsequent and secondary to the rights of the said Plaintiff, and of the defendant, Charles P. Peterson, and of the defendants, Parley Child, Joseph Christensen, and W. H. Gribble, as above defined, the defendant, The Highland Canal Company, is the owner of the right to divert and use from the said sources, the following described quantities of water, to-wit:

A flow of water equal to one hundred twenty (120) cubic feet per second of time, for the irrigation of his said six thousand acres of land, from the first day of April, until the 15th day of June, of each year.

A flow of water equal to ninety-two and 20/65 (92.20/65) cubic feet per second of time, for the irrigation of its said six thousand acres of land, from the 15th day of June, until the 1st day of October, of each year.

A flow of water equal to ten (10) cubic feet per second of time, for culinary, domestic and stock-watering purposes by said defendant's stockholders, during the non-irrigating period, viz; from the 1st day of November until the first day of April, of the succeeding year.

7. That each of the parties to this action should be perpetually enjoined and restrained from in any manner interfering with the rights of any other party hereto, as defined herein.

8. That a Commissioner should be appointed according to law, to measure and divide the waters involved in this action, in accordance with the decree herein, to the respective parties entitled to the same, as defined herein, and in accordance with the terms and conditions thereof.

9. That the said parties hereto are each entitled to the decree and judgment of this court quieting and confirming their respective titles to the use of said waters, and to a Decree containing such general directions, restrictions, and limitations concerning the exercise of their respective rights, as will result in the protection of every party hereto in the full enjoyment of its rights, as well as prevent all avoidable waste, and accomplish the greatest beneficial use of said waters, consistent with the adjudicated rights of the said parties hereto.

Dated this 29th day of December, A. D. 1920.

Attest: (Clerk Seal)
F. B. Lamb, Clerk

Justus E. Call
Acting Judge.

STATE OF UTAH, | SS.
COUNTY OF KANE, |

I, G. L. Fjeldsted, County Clerk and Ex-officio Clerk of the Seventh Judicial District Court in and for Kane County, State of Utah, hereby certify that the above and foregoing is a full, true and correct copy of the original "FINDINGS OF FACT AND CONCLUSIONS OF LAW" Case No. 308 and now on file and of record in my office.

IN WITNESS my hand and the seal of my office in Hanti City, Kane County, State of Utah, this 15th day of December, A. D. 1953.

G. L. Fjeldsted, Clerk

By Anna S. Nilsson
Deputy Clerk