

FOR INTEROFFICE USE ONLY

TO: HUBERT C. LAMBERT
THRU: DONALD C. NORSETH
FROM: S. BRYCE MONTGOMERY

RE: Delivery of water to Provo City as
per Provo River Decree, Paragraph
4c, Page 13.

Mr. Hugh McKellar, our Provo River Commissioner, had contacted me by telephone relative to how he should distribute the water under Paragraph 4c, Page 13 of the Provo River Decree, in the name of Provo City. After consultation with Mr. Donald Norseth, I sent a letter to Mr. McKellar, dated September 19, 1969, which directed him to deliver the 16½ cfs of water outlined in Paragraph 4c to Provo City upon their call. It was further stated in the letter to Mr. McKellar that the 16½ cfs under Paragraph 4c was separate and distinct, and additional water aside from the water outlined in Paragraph 4 a and 4b. A copy of this letter is attached.

Subsequent to this letter to Mr. McKellar, Mr. Joseph Novak, attorney for Provo Reservoir Water Users Company, contacted me by telephone and stated that Provo Reservoir Water Users Company objected to our office directing Mr. McKellar to allow Provo City to divert the additional 16½ cfs of water, under Paragraph 4c. This verbal protest was followed by letters from Mr. Novak to the State Engineer. As outlined in my letter to Mr. McKellar, I told Mr. Novak that if anyone objected to this directive, the State Engineer would be willing to hold a hearing to review the matter. This hearing has now been set for 10:00 a.m., Monday, October 27, 1969, in the Water Conference Room in the State Capitol Building.

To give you some background concerning the past diversion of water to Provo City under their Class A rights stated in Paragraph 4, Page 13, of the Provo River Decree, the following information is submitted:

In Paragraph 3, Page 13 of the Decree, it outlines that under the Provo Diversion, Class A rights were to be distributed for irrigation, domestic, municipal, and generation of power purposes in the quantities and for the periods hereinafter set forth. In Paragraph 4, which follows, Provo City was allowed under sub-paragraph (a) the following flow rates for the irrigation of 2058.6 acres of farm land:

From May 10 to June 20, duty 63, 32.68 cfs.

From July 20 to May 10, duty 70, 29.41 cfs.

Then under sub-paragraph (b), Provo City was awarded the following rates for the irrigation of 499.91 acres of city lots:

From May 10 to September 1, duty 50, 10 cfs.

From September 1 to May 10, duty 70, 7.14 cfs.

Then in sub-paragraph (c) Provo City was awarded $16\frac{1}{2}$ cfs during the irrigation season of each year for irrigation and generation of power purposes. Please see the attached copy of Page 13 from the Provo River Decree.

Mr. Novak maintains that the $16\frac{1}{2}$ cfs awarded under the separate sub-paragraph 4c is a part of the same flow of water awarded to Provo City under Paragraph 4a, and 4b. There is no place in the Decree that so states that this is the same water. It does state in Paragraph 4c that the $16\frac{1}{2}$ cfs is awarded to the City because it "has heretofore been used for irrigation purposes by said City and for the generation of power by the Provo Ice and Cold Storage Company a corporation, E. J. Ward & Sons Company a corporation, Knight Woolen Mills, Smoot Investment Company a corporation, and Upton-Hoover, W. E. Hoover, Webster Hoover, and Frank Hoover, as partners doing business under the name of Excelsior Roller Mills. And the said use for power purposes has been under license and grant from said Provo City and at such times and in such manner as has been made by mutual arrangements therefore." It is obvious that the court would never have decreed the $16\frac{1}{2}$ cfs to the City unless they had previously obtained a beneficial use of the water for both the irrigation and power purposes.

It is pertinent to note that on Page 27, Paragraph 32 of the Provo River Decree the court granted a power right to Provo Pressed Brick Company, under Application No. 1221 dated February 28, 1907, and Certificate No. 109B, which entitles Provo Brick Company to divert 100 cfs of water through their canal from the Provo River. The Decree states "the waters not to exceed 100 cfs herein awarded to and used by the defendant Provo City and Mill owners using water under lease and grant from said City and which is used through and from the distributing channels known as the Factory Race, City Race, and Tanner Race. After such use by the said defendant, Provo Pressed Brick Company the same (100 cfs) is to be returned to the distributing channels afore said, and must be so used as to not substantially interfere with the natural flow of such water and thus cause substantial fluctuation in the flow thereof, and said defendant (Provo Pressed Brick Company), must utilize and use such waters without substantial diminution in quantity or any deterioration in quality, and said use is an additional use of waters herein before denominated in Paragraph 3, and awarded in Paragraph 4, and that such use by said defendant is subject to and shall not interfere with the use of said waters by Provo City." It is interesting to note that in this particular case where the water was to be the same flow as that under another right the court made specific reference to this. It further stated in Paragraph 32, that the City was to have available up to 100 cfs of water without diminishing the flow, and furthermore that the water outlined in Paragraphs 3 & 4 of Provo City was the same water as outlined in Paragraph 32 by Provo Pressed Brick Company - up to 100 cfs.

A check of the Provo River Commissioner's reports shows that we have on hand detailed reports from 1945 to the present, the diversions of water to Provo City under Paragraph 4 through the Lower East Union Canal, Factory Mill Race, and the Tanner Mill Race from the Provo River. Prior to the year 1945, report figures in the Commissioner's report for Provo River diversions are not broken down in detail for each head gate or canal. The reports from 1945 to the present show that the total flow diverted under the Provo City Class A rights ranged from a very small flow up to 61.9 cfs. Please see the attached copy of Page 27 of the Provo River Decree, and copies of the Provo River Commissioner's reports for Class A diversions to Provo City.

Mr. Novak maintains that whatever is shown in the Provo River Commissioner's reports in the later years, is the limitation of Provo City's Class A water rights. I maintain that all that this shows is what Provo City has taken under these rights since the year 1945, and that at one time as stated in Paragraph 32, Page 27 of the Decree, the City had available to them as much as 100 cfs under these same rights.
