

IN THE DISTRICT COURT OF UTAH COUNTY, UTAH.

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PROVO RESERVOIR COMPANY

Plaintiff,

v.

PROVO CITY, et al,

Defendants.

**FILED**

NOV 26 1921

~~Clerk of District Court, Utah~~

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February 19, 1921.

THE COURT: I take it, gentlemen, that the matter of suggestions as to errors and corrections in the proposed decree are properly to be heard this morning. I will hear any matters.

MR. HATCH: If the court please, the Provo Reservoir Company has filed some proposed amendments; does your honor have a copy?

THE COURT: Yes, I have it. I take it everything that has been filed is before me on the desk here.

MR. HATCH: On the 24th page of the proposals, as prepared by Mr. Wentz--

MR. MCDONALD: If the court please, Mr. Wentz has prepared and served the several attorneys copies of all the proposed amendments and alterations proposed for this hearing.

THE COURT: Yes.

MR. HATCH: We had him prepare one for us. I understand Mr. Wentz provided a copy for all.

MR. MCDONALD: Mr. Coleman received a letter from

Mr. Wentz saying he had provided Mr. Coleman with a copy, we could use them in conjunction. I have not seen them except I have a synopsis of one proposal of the Provo Reservoir Company.

MR. HATCH: Comes now the Provo Reservoir Company and moves the court to substitute amendmend to findings, substitute for paragraph 15, the following:

"That Abram Hatch died at Heber City, Wasatch County, State of Utah, on the 2nd day of December, A. D. 1911, and that thereafter, Ruth Hatch and A. C. Hatch, were, by order of the Fourth District Court of the State of Utah in and for Wasatch County, duly appointed as executors of the last will and testament of Abram Hatch, deceased, and they ever since have been and now are the duly appointed, qualified and acting executors of the last will and testament of the said Abram Hatch, deceased, and that Joseph Hatch, A. C. Hatch, Jane H. Turner, Minnesota A. Dodds and Lacy H. Farnsworth became successors to and were substituted for the said executors as to all of the power rights claimed by said executors for said estate, and that Edwin D. Hatch and Vermont Hatch became successors to and were substituted for said executors as to all of the irrigation rights claimed by them for said estate."

The first five names were substituted for the executors for claimed power rights, The other two were substituted for claimed irrigation rights, thereby making substitution for all of the parties, which would make it more definite if the proposed substitute were adopted for paragraph 15.

THE COURT: Any objection to this substitution being made? I take it no one propably would be interested except the parties.

MR. HATCH: The decree awards the rights severally,

but the findings are not in accordance with the decree.

THE COURT: This amendment then may be made.

MR. HATCH: Now 38, substitute for Section 38 of the findings-- 38 recites what the subject matter of the litigation of the action is, and it excludes Round Valley creek and the territory lying east of Heber in the vicinity of Daniels Creek, Center Creek and Lake Creek. Now, there is certain other waters that are not included, and the parties using them were not made parties to this action, and in order to make it plain and definite, we have offered this substitute:

"That the subject matter of the litigation in this action is the right to the use of the waters of the Provo River including its tributaries, springs, seepage and percolating waters, and waters issuing from the Ontario Drain Tunnel and flowing to the Provo River, water diverted from the Weber River to the Provo River; and embraces a portion of the Weber River water shed in Summit County, all of the water shed of the Provo River in Utah County and Summit County, and all of the water shed of the Provo River in Wasatch County, excepting a portion of Round Valley Creek, and all of Daniels Creek, Center Creek, Lake Creek and Bench Creek, and certain springs north of Heber City, viz.: Hatch Springs, McDonald Spring, London Spring and Sessions Spring."

There was some objection to the mention of the Hatch Springs in this exclusion, and I will strike that.

THE COURT: From your--

MR. HATCH: Exclusion, yes. As to the others, I think they should be excluded, because the parties who are using the water, with the exception of John Burrows, are none of them made parties to this action, for the reason, that, as I understood the matter at the time and do now, they used all

the water of these springs during the irrigation season. In the winter time they reached Provo River, and that is except the Sessions Spring. It is my understanding no part of the water of the Sessions Spring ever reaches the waters of the river at any time. It is a small spring owned by Mr. Burrows and used wholly by him.

THE COURT: Your substitution would read, striking out the "Hatch"?

MR. HATCH: And making it specifically Daniels Creek, Lake Creek and Center Creek and Hatch Creek, that the users of the water from Bench Creek were not made parties to the suit resulting in the Fulton Decree.

THE COURT: Are any parties interested, any of these other parties interested in this change, any objection to it?

MR. HATCH: I think Mr. McDonald knows of these matters as to the springs.

MR. McDONALD: I will talk it over<sup>d</sup> with the people of Charleston relative to the McDonald Springs and Session Springs. I have talked with them about it, and I do not think they have any objection to the exclusion of those springs. They suggested to me the Hatch Springs ought not to be excluded, because they are properly adjudicated in this case, so I will talk to them further about it, and if we have anything, we will present it.

MR. HATCH: In any event, in the Hatch Springs the letter "s" should be stricken, because there is one spring of the Hatch system of springs that is used at all, and it goes into Spring Creek, and is appropriated and used by the Spring Creek, Sage Brush and Charleston Irrigation Companies.

THE COURT: Mr. McDonald, how soon can you announce what your position will be?

MR. MCDONALD: I was looking for the people, I saw them at the foot of the stairs.

THE COURT: You may proceed, and we will refer back to this.

MR. HATCH: I will say that as to the McDonald Spring, it is a spring that has arisen upon the farm of Mr. William McDonald long since he patented the property, and is principally produced from the seepage and percolating waters from the canals above, and such part of it as he can use, and he is the only user of it, he and his successor in interest, has been used by him ever since the water first commenced to spring out there, but still there are portions of it that flow on down into the Spring Creek at all seasons of the year.

Now, we move to substitute for paragraph 40, page 23 of the findings, the following:-- our change in that paragraph, proposed change, will read as follows:

"The Provo River is a natural stream of water flowing through mountainous country and irrigated valleys. It is dependent upon precipitation. Its volume varies from year to year and from day to day. The diversion of large quantities of its waters for the irrigation of lands along its course and the return of a portion of such waters in the form of seepage and springs has produced a more uniform discharge volume than formerly. For a number of years last past there has been an average flow to the Utah Valley in the months of July, August and September greatly in excess of the quantity of flow to Utah Valley at the time of former adjudications. This flow for July, August and September is found to be the normal flow of said river in Utah Valley."

Now, the original of 40 is the word "normal flow" is used, "and for a number of years last past, has maintained an average normal flow".

THE COURT: I will say, Judge Hatch, I observed the original draft as you were reading and noted what changes you read. It might be of advantage for you to state, for the information of other counsel, however.

MR. HATCH: The original-- our proposed substitute follows the intent wholly, I think, of the original, but the original goes further. The original says, "Greatly in excess of the quantity flowing in this season in the period preceding the development along its upper stretches. This average normal flow for a number of years last past is in excess of the quantities found in the former adjudications of this stream by this court as <sup>to</sup> the extent of the rights of the appropriators then on the stream."

We think the substitute covers all that is necessary to be found, and does not bring into the question the question of former adjudications in any way, and simply leaves the matter as found by this court, the present rights, and that there is an excess of water over what there was at the time of former adjudication.

MR. RAY: You do not contend it changes in any <sup>manner</sup> the decision of the court, but merely clarifies it.

MR. HATCH: That is all, and eliminates matter that I think is not necessary to be found, and might raise questions hereafter.

THE COURT: Any suggestions with referencd to this proposed change? This section as proposed will be adopted then.

MR. MCDONALD: I can now report to the court relative to the spring.

THE COURT: That is, relative to 38?

MR. MCDONALD: I have talked with one of the members

of the settlement from Charleston who has been using this water in a secondary way from the spring mentioned in this paragraph, and he says they are opposed to eliminating any of the springs mentioned. I think Judge Hatch probably is right in what he has stated to the court, however, there is nothing in the original decision as to whether or not these springs are tributary, or what use there has been made of them, particular use, and, for that reason, it becomes practically immaterial whether they remain in or stricken out, and we object to their being eliminated at this time.

THE COURT: Was there any evidence introduced in relation to them?

MR. MCDONALD: Not at all.

THE COURT: Then they will be stricken out. The court will not attempt to adjudicate the rights which are not in the pleadings, and about which there was no evidence.

MR. MCDONALD: There was no evidence I know about.

THE COURT: The parties you represent, do they take water from those springs?

MR. MCDONALD: They have a secondary right. Judge Hatch states it right, the Hatch Spring has probably been used up there forty or fifty years.

MR. HATCH: I have stricken that.

MR. MCDONALD: As to the others, they are used on the land on which they rise, and the water then percolates and finds its way into Spring Creek, and used by Charleston people, and in that way Charleston has acquired a right, no doubt, to the use of the water from the springs, but the first use is by the parties who own the land.

THE COURT: In your pleading you did not refer to these springs.

MR. MCDONALD: In our pleading we did not refer to these springs.

THE COURT: And did not introduce any evidence?

MR. MCDONALD: And did not introduce any evidence.

THE COURT: Why do you desire to have them remain in the decree?

MR. MCDONALD: I have spoken to the people of Charleston, it doesn't make any difference whether they come in or out.

THE COURT: I think it would be to their interest to have them out, because it would not be good to have a record made here calling attention to those springs when there was no pleading in reference to them.

MR. MCDONALD: I have so advised these people.

THE COURT: Upon the statement there was no evidence introduced and no pleading with reference to them, they may be stricken out, that is, this exclusion may, so that it is plain the court is not attempting to adjudicate any rights in relation to those springs.

MR. BROCKBANK: The Charleston people, the water from which they have obtained their supply, is obtained from those springs, and it seems to me this is stricken out, being adjudicated at this time, I cannot see but what their rights are prejudiced, inasmuch as they are granted only a certain quantity of water, and if they are not permitted to use the water of these springs, certainly their rights are prejudiced by striking out the sources.

THE COURT: The court is not going to make any decree, or have any provision in the decree, that prevents them from the use of these springs.

MR. BROCKBANK: If these springs are not included and adjudicated this time-- they are the sources of supply of some of the litigants-- I cannot understand why the rights are not prejudiced.

MR. HATCH: Doesn't counsel understand the matter may not be adjudicated unless the parties are before the court? Suppose this court would decree that Charleston was entitled to the use of all of these springs as against every other party to this action, it would not affect the present owners of the right to use them because they are not parties.

MR. BROCKBANK: That is true.

MR. HATCH: And the commissioner could not go up there and interfere with the use of these people without a lawsuit, and, if you understand, or, if the Charleston people understand-- if the court will pardon me, the condition there no matter what use is made of these springs upon the lands where they are now used, Charleston will always get all it has ever had from all these springs, because they cannot be applied elsewhere than where they are now without first going into Spring Creek.

MR. BROCKBANK: That is all right, that is all we ask.

MR. HATCH: Immediately above the Spring Creek Ditch, irrigation company's dam, all of them, the excess or overflow of what is called waste water goes right into the creek within a mile of the dam. The farther spring is more than a mile from their dam on Spring Creek.

Now, we move to strike out the word "extraordinary"--

THE COURT: With reference to 38, this proposed change may be adopted. I do not think it affects you people at all.

MR. HATCH: We move to substitute for paragraph 42

the following:

"That as to the quantities of water to which the parties plaintiff and defendant are entitled, as hereinafter found by the court, the water used upon the lands of plaintiff and defendants for irrigation, the water used by the defendants for the generation of power and the water used by the defendants for municipal and domestic purposes has been used for a beneficial purpose and is necessary, and that the said use has been necessary and beneficial from year to year ever since the same was first diverted and appropriated."

It should be "beneficial purposes" instead of "a beneficial purpose".

THE COURT: Are there any suggestions with reference to this proposal?

MR. RICHARDS: "Uses have been necessary" should be put in in place of "use has been necessary."

MR. STORY: Your Honor, the Power Company rather objects to the additional words that have been added to the paragraph, for the reason that we believe it accentuates a defect in the decree in that the decree at the present time does not definitely fix any irrigation season, but on the contrary-- that is, except perhaps inferentially when the periods within which certain amounts of water are allowed for irrigation purposes are fixed, the first period from May 10th to a certain day, then up to September 10th another.

THE COURT: Duty of water?

MR. STORY: And then from September 10th throughout the winter season, and to the 10th of May of the following year a certain additional duty. In other words, it would rather contemplate that the irrigation period existed throughout the entire calendar year. We do not believe there is any

evidence introduced in the case to sustain such a finding in the first place. Of course, it does not make any particular difference to the Power Company except as to those rights which divert the water between our headgate and our tail race, but here is a finding that as to these particular quantities that are therein mentioned in the decree, there is a beneficial use throughout the annual period.

THE COURT: I do not understand it changes the periods in any way, it is merely a general statement, as I read it, that the uses of the Power Company and all of those generating power from this water, and the irrigators, that these uses have been necessary and beneficial. That is the substance of this.

MR. STORY: The only part to which we object is the first sentence, that as to the quantities of water as herein-after found by the court. It may not make a great deal of difference, your honor, I call attention to it at this time, because I think it does accentuate this other defect I have mentioned in the decree. I believe the decree should definitely ~~definitely~~ fix the limits of the irrigation season.

MR. HATCH: We will fix that probably when we come to it, but this paragraph, if the court please, the proposed amendment, or the original paragraph does not meet the same objections offered.

MR. STORY: That may be true.

MR. HATCH: We propose the amendment as making it more definite and clearer, the paragraph.

MR. STORY: Then there is the further objection, your honor, possibly, in that the decree attempts to cover of course certain filings in the State Engineer's office, and it seems to me that this might be held to include the adjudication of all the claims made by the defendants. I

do not think it is the intention of the court to adjudicate that particular matter, or attempt to.

MR. HATCH: Your objection is to paragraph 42, as originally drawn, as well as to the amendment?

MR. STORY: I think the argument applies, yes.

MR. HATCH: The amendment makes it more clear and specific.

MR. STORY: I think it accentuates it is all.

THE COURT: If I understand the purport of 42, as originally drawn, and as this proposed substitution merely accentuates the fact that the water that has been proven to have been used by the plaintiff and the several defendants, has been put to a beneficial use, that is the substance of this finding.

MR. STORY: If that is the intention, of course, there can be no objection to it.

THE COURT: The court certainly ought to make that finding, or the court would have no basis to make the award.

MR. STORY: I agree with you there.

THE COURT: If there is anything in this language that the court does not just see, that means anything in addition to that, I would like to have it called to my attention, because I do not want to put it in if it contains anything of that kind, but it seems to me the substance of it is merely that the awards that are made in the decree are based upon beneficial use and necessity, reasonable necessity of the parties.

MR. STORY: I think your honor is absolutely right, unless it be that the words "as hereinafter found by the court" should be coupled with the duty of water fixed between

the 10th of September or 20th, and the 10th of the following May, might be regarded as during that period there was a beneficial use of the water for irrigation purposes. That is all I have in mind.

THE COURT: Was the water used?

MR. STORY: I do not understand there is any evidence in the case.

THE COURT: This is limited to the water used by the plaintiffs and defendants.

MR. STORY: There is no finding limiting the irrigation season.

THE COURT: If you propose a finding of that character, the court is disposed to make one, if the evidence is sufficient to sustain it. I think it ought to be in the decree.

MR. STORY: I have not made any specific request for that, because I thought that your order limited us so that we could not make objections of that nature. In other words, I regarded your findings as to the duty of water during the winter period as the finding that was used in that period, and so that I thought we were limited in the objection. I think myself there should be a limitation.

MR. RAY: The decree fixes the time of the irrigation season in the different districts, 165, 130 and 90-- I cannot remember the page, but I think it fixes the days in the three districts.

MR. STORY: Yes, but that is only for the purpose of fixing the amount each one shall pay toward the expense of administration of the waters of the stream.

MR. RAY? Wouldn't you think that would be applicable to all purposes?

MR. STORY: I think it is to a certain extent inconsistent with the other, but I do not regard it as a finding limiting the irrigation season. That is merely for the purpose of determining the expense each one shall pay.

THE COURT: What paragraph did you say?

MR. RAY: I remember the paragraph, but I don't locate it.

MR. HATCH: 130 of the decree.

MR. STORY: It is 130 of the decree. I don't recall the paragraph in the findings. "The length of the season of use to serve the purpose of the foregoing computation is fixed as follows", and each appropriator is presumed to pay according to the length of time that he actually uses the water, but I don't regard that as a limitation upon the irrigation season.

MR. HATCH: I think Mr. Story is right as to there being nothing in the findings or decree that fixes the irrigation period in any of the districts.

MR. BOOTH: The period is 169 in the findings.

MR. STORY: The only place where the non-irrigation season is mentioned, as I recall the matter, after reading the decree two or three times, is with reference to the storage rights in the reservoirs in Wasatch County, when they speak of the non-irrigating season.

MR. RICHARDS: That is Section 161 of the findings, and it is my recollection that the Provo Reservoir Company, the plaintiff, has moved to strike out the words "non-irrigation season" in that paragraph.

MR. HATCH: I cannot tell until I come to it.

MR. STORY: The decree--

MR. HATCH: Let us pass that one temporarily.

MR. STORY: Perhaps we had better pass it for the time being so as not to delay.

THE COURT: You may proceed, Judge Hatch.

MR. HATCH: The question is the substitute for 42. Now, if Mr. Story is not ready to pass upon that proposed substitute at this time, take that up later.

MR. STORY: The only thing it seems to me we should consider this particular paragraph in connection with this general question that has been raised, that is all.

MR. EVANS: It seems to me the proper way to reach that-- this substitute is merely a general statement-- to adopt this, and when we come to the other matter, let us make a finding what constitutes the irrigation season, if it is not in the decree.

THE COURT: This may be adopted with the understanding you may refer back to it, and if it is not made certain by some other amendment, you may refer to it again.

MR. HATCH: Our next proposed amendment is to paragraph 43, strike out the word "extraordinary" in the last line of the paragraph, leaving it read, "except in the high water seasons of the year". I take it extraordinary high water seasons are practically every high water season when water is flowing into Utah Lake and Provo River.

MR. RAY: It seems to me, your honor, that paragraph itself is totally meaningless whether "extraordinary" is in or out. Amount of water appropriated is shown by the decree itself and as long as there is that much water in the river, it is appropriated, and when it exceeds that it is unappropriated.

MR. HATCH: I only went into it to the extent of

the word "extraordinary".

MR. RAY: What does "high Water" mean?

THE COURT: Relative term is all. It cannot have any meaning unless what it relates to is also stated.

MR. RAY: This cannot decrease or increase the specific amounts awarded, and it seems to me we should all be interested in striking out that section.

MR. HATCH: We have no objection to striking it out, but if it shall remain, we think the word "extraordinary" ought to be stricken.

MR. RICHARDS: It seems to be covered in a number of other sections anyway.

THE COURT: It seems to be the consensus of opinion of counsel it should go out, and I hear no objection to it. The whole paragraph 43 may be stricken out.

MR. STORY: That is of the findings.

THE COURT: On page 24.

MR. HATCH: Now, we move to amend paragraph 44: "On the third line, strike out the first two words "they were" and insert "it was and is", and on the sixth and seventh lines, strike out the words "are diverted and conveyed" and insert in their place the words "a part". On the third line after the word "entitled" insert ";" instead of ",".

MR. RAY: Do you contend that is a finding of fact, or conclusion of law, "That the plaintiff each and every year since the year 1909 has been diverting portions of the water of said river to which they were entitled," I don't understand that could be the basis for anything.

MR. HATCH: That part of it is not the material part

of the paragraph in any sense, and down to there it is simply introductory to where they diverted the water. It is simply telling where the water is diverted by plaintiff, that paragraph, and fixing the points of diversion of the plaintiff, and which it was and is entitled to. Does not attempt to fix what they are entitled to, but attempts to fix the points of diversion.

MR. RAY: If you are merely introducing that as a recital to fix a point of diversion, why do you want to inject in it a finding as to duty?

MR. HATCH: I didn't do it, This was prepared and submitted, and we were asked to suggest changes.

MR. RAY: I am not criticising the language of the proposal of the court, but the further suggestion, to which it was and is entitled.

MR. HATCH: They were entitled, it was entitled, strike out "is", I don't care.

MR. RAY: I have no objection.

MR. RICHARDS: Do you suggest an insertion after the word "entitled"?

MR. HATCH: Yes, but I don't get the sense of it now. I have been over that four or five times, and suggested the amendment, in stating it. It is insert a semi-colon instead of a comma, anybody have any objection?

THE COURT: Then you have stricken out of your proposal the words "and is", so that your first amendment would be "they were"--

MR. HATCH: Strike out "they were" and insert "it was", and the word "and is"-- that is its point of diversion for all the water to which it is entitled.

THE COURT: This may be adopted, I understand, no objection.

MR. HATCH: And then there is a further amendment that on the sixth and seventh lines strike out the words "are diverted and conveyed", and insert in their place the words "a part". It reads now, "Plaintiff has diverted at a point on said river seven miles north of Provo City, Utah County, Utah, by means of a dam constructed in said river known as the Heiselt dam and the canal leading therefrom known as the Provo Reservoir Canal, and are diverted and conveyed through the canal of the Provo Bench Canal & Irrigation Company, which heads near the mouth of Provo Canyon"-- strike out the words "are diverted and conveyed".

THE COURT: That amendment may be made, if there is no objection.

MR. HATCH: The next proposed amendment is to paragraph 46, page 25, on the sixth and seventh lines strike out the words "during the high water period and the non-irrigating season", because the stipulation gives us a right to store during a part of the irrigation season.

MR. RAY: Who are parties to that stipulation?

MR. HATCH: It is the Heber stipulation.

MR. STORY: Then I think they ought to fix the time granted by the stipulation.

MR. HATCH: The stipulation is a part of the findings, and fixes in itself the time, and this seems to conflict with the stipulation which is made a part of the finding.

MR. STORY: What is the part, Mr. Tanner, it conflicts with? The stipulation starts on page 55 of the findings, where is the part it conflicts with? I have never understood before there was any storage right granted by stipula-

tion or otherwise during the irrigation season. We are sorry enough we stipulated they might store it in the winter season. We are worse off than we thought we were.

MR. HATCH: During the high or flood water season, the waters are in excess of the quantity awarded, we may store. Now, that high or flood water season is the irrigation season always. It is usually during the month of June, latter part of May and month of June, that is irrigation season, conceded by all, and if there are excess waters, we may store it, even in the irrigation season.

MR. RAY: Judge Hatch, may I interrupt a minute. It seems to me the language used there by the court is the language which meets both the situation and the stipulation. They may store during two periods, no matter when they come, One is the fixed period, the irrigation season, and the next is the high and excess water. They do not have to be concurrent, that is not what the language means. The language means they may store during the non-irrigation season. There is another time they may store, that is during the flood water season.

MR. HATCH: The language is a fixed period from September 15th to April 15th.

MR. RICHARDS: Do you contend you have the right to store when they are irrigating, after September 15th?

MR. HATCH: Yes.

MR. RAY: I think my clients are not parties to that stipulation.

MR. RICHARDS: That would seem to be the worst time.

MR. HATCH: Let me answer that. So far as your clients are concerned, they are not affected in any way, shape or form, because under all the evidence, the water of Provo

River is shut off dry half a dozen places in Wasatch county from about the 1st day of July to the balance of the irrigation season, and all the water that Utah county gets is what comes in the river below the tight dams. I do not see they are in any way affected or interested in what we may take up there after September 15th.

MR. RAY: I do not know that is true, Judge, but I know what the evidence showed relative to the dams. The evidence here is that the irrigation period in Wasatch county is very short period, and it may be possible we will be irrigating down here long after they quit irrigating and let their dams go. It is 90 days there and 165 here.

MR. HATCH: The irrigation period is not fixed in this decree, or in these findings anywhere. As a matter of evidence though, it is in the record here they irrigate there and use the water up into November, and that is as far as the evidence goes as to the use of water in Utah County.

THE COURT: If it be a fact that there is no fixing of the irrigation season or period, then certainly we ought not to have in other places in the findings or decree the expression "irrigation season" and "non-irrigation season", because they would not <sup>be</sup> intelligible, but that finding if we do fix in this decree a non-irrigating and irrigating season, my view is the language used in this original draft is proper language. I think it expresses your right.

MR. HATCH: If the irrigation season was fixed and should cover any period of time that the stipulation allows us to store water, then the word "non-irrigation" should go out.

THE COURT: You understand the stipulation allows you to store water during irrigation season when the other users of water are not supplied, and there is not sufficient to supply them?

MR. HATCH: I take it not.

THE COURT: Then it would be high water you would be entitled to, during the period of high water and also during the period of non-irrigation.

MR. STORY: May we make a suggestion?

THE COURT: Certainly.

MR. STORY: I must confess I cannot see the reason for including this particular paragraph in the decree at all, for the reason that at another point a finding is made of what their rights are so far as these storage reservoirs are concerned, and they are supposed to conform to the stipulation. Now, the stipulation, if your honor will turn to pages 58 and 59 of the findings, paragraphs 21 and 22, you will find:

"That the plaintiff and the defendants in the above entitled cause, having reservoirs in Wasatch or Summit County, that appropriate and store water under applications approved by the State Engineer of the State of Utah, have the right to store quantities of water in the high or flood water season that are in excess of the quantities herein awarded; said reservoirs are also entitled to store all the waters that can be stored in them between September 15 and April 15 of each and every year."

"It is further stipulated and agreed that the parties hereto and the several corporations to the above entitled cause in Wasatch and Summit counties that are above the upper Midway dam may at any time exchange water one with another when such exchange does not conflict with or impair the rights of the other parties to this stipulation"

THE COURT: I think, Judge Hatch, this language in this section remains at all, I see no objection to its remaining, I think this language is essential and should remain in

definitely fixing the right. If the non-irrigation season is an indefinite expression and there is no provision in the decree making it definite, then probably it ought to go out, but if it is made definite, it merely conforms to the stipulation, 15th of September to the 15th of April.

MR. HATCH: Our next proposed amendment is to substitute for paragraph 57, page 30, the following:

MR. STORY: Before we get over the other, may I call Judge Hatch's attention to paragraph 91 of the findings. There is a paragraph there apparently that limits definitely the right between September 15th and April 15th.

MR. HATCH: There is no limit to our right to store such as we can store by that finding between September 15th and April 15th.

MR. STORY: No, but does not include anything beyond that. It seems to me paragraph 91 should definitely fix just what the right is.

MR. HATCH: We have a proposed amendment to paragraph 91 when we get to it. Our next--

MR. RICHARDS: Judge, on page 28, just a word there.

MR. STORY: I think if they would amend paragraph 91 to conform exactly to the language of the stipulation, then perhaps add the last four lines of this paragraph of 46, viz.:

"And during the low water period of each year release the same and commingle it with the waters of Provo River and recapture and use said stored water to a necessary and beneficial purpose",  
I think it would accomplish the purpose. We would then eliminate paragraph 46 entirely.

MR. HATCH: Except, if the court please, the paragraph referred to does not state who the defendants are. It refers to them generally, but paragraph 46 names them, who they are.

THE COURT: It would seem that probably those two paragraphs ought to be combined. You can amend 91 by inserting the names of those defendants, and adding the last three or four lines of 46, so as to make one finding that would cover the two.

MR. HATCH: And make it conform exactly to the stipulation. It should, I take it. The stipulation is, after the words "Engineer of the State of Utah", "have the right to store quantities of water in the high or flood water season that are in excess of the quantities herein awarded. Said reservoirs are also entitled to store all the waters that can be stored in them between September 15th and April 15th of each and every year". That is fixed definitely and positively, and the court has in the proposed decree so awarded, and that is why I was objecting to this non-irrigation season, because to my mind, September 15th to some period in October is irrigation season in all of the districts.

THE COURT: I think a finding had better be prepared embodying both 91 and 46, and it ~~now~~<sup>should</sup> follow practically the language of the stipulation.

MR. EVANS: If that were done it would make a perfect decree.

THE COURT: During the noon hour you may prepare a finding that will probably be satisfactory to the others. You may proceed with 57-- and make that to read 46, and 91 to be taken care of.

MR. RAY: They had better be prepared at that time, so that the decree will follow the amended finding and we won't

lose any time by that.

MR. HATCH: Next is 57, our proposed amendment-- on page 30 of the finding-- is a proposed substitute. The proposed substitute is as follows:

"That the flow of Provo River, its tributaries, springs, seepage and percolating waters in the normal flow, is sufficient to supply all the appropriations to the defendants, and the predecessors in interest of the plaintiff prior in point of time to May 12, 1903, for the purpose of irrigating, domestic and municipal use and for the generation of power in the Provo Division; said rights are therefore found to be in the same class, are equal in priority of right and are herein denominated Class "A", together with the number of acres of land with the duty of water per second foot on said land, the domestic and municipal requirements and generation of power requirements, and the quantities of water appropriated and necessarily and beneficially used, and to which each of said parties is entitled, are as follows:"

MR. RAY: Do you claim that in any way changes the provisions of 57, Judge Hatch, as found?

MR. HATCH: Yes, you read 57 and then read the proposed substitute.

MR. RAY: Which do you contend is in accordance with the decision?

MR. HATCH: Both.

MR. RAY: If I may suggest, your honor, I have not in our objections put any objection to paragraph 57, not because I did not object to it, but because I assumed the hearing was not as to points involving the evidence in support of Section 57. Of course, I now contend, as I have heretofore contended, that the evidence in this case does not show that

there is a sufficient flow in Provo River, and the experience of the commissioner since the trial of the case has shown there is not sufficient water to take care of the appropriations which this paragraph denominates Class "A". That raises the question whether we are controlled by the prorating statute and the rights within that are all equally prorated. I object, of course, to both paragraphs. I have objected to them, but I assume it is not open to argument at this time. It seems to me this paragraph as stated in the court's original finding is clear on the question covered.

MR. MCDONALD: If your honor please, I will make this observation. If this paragraph pertains to the upper division, or division in Wasatch County, I cannot tell from reading it whether it is intended to apply to Wasatch County, or both to Wasatch and Utah County.

MR. RAY: It is the first paragraph as to the Provo Division.

MR. HATCH: There are no Class A rights in the Wasatch Division. The Provo defendants are classified A, B, C and D, the Wasatch defendants are classified by numerals 1 to 18 or 19, that is the appropriation up to May 12, 1903.

THE COURT: Mr. Ray, eliminating from consideration for a moment your objection to the court making the finding at all as contained in 57, what objection have you to the difference in language?

MR. RAY: I am not at all certain that the amended one does not raise the question more squarely for my purposes than the original. I am not prepared to say it does not. If it does I ought not object to that.

THE COURT: I have wondered what your objection would be if we laid aside your objection to any finding at all.

MR. RAY: I am not certain this does not raise the question more squarely.

THE COURT: I am inclined to think it more squarely states the theory upon which this court decided it. I understand that theory is not conceded by you at all, and opposed to it.

MR. RAY: My contention is both there is no such normal river, and the normal river is not the controlling factor here.

MR. HATCH: Of course the court is putting them into one class, must find there was sufficient to supply their actual necessities up to that time, to that period, and put them all in the same class; that pro rata does not in any manner affect their necessities; it is prorated according to their necessities and the water is sufficient to supply all those necessities under any normal period, as I understand it.

MR. RAY: Judge Hatch, I understand the court, you and I have agreed this is a better finding for you, and just as good for me.

THE COURT: Unless there are some further suggestions made-- I don't want to foreclose parties at this time from making suggestions, but I am inclined to adopt your language rather than the one in the original draft, unless there are some further suggestions made.

MR. STORY: While we are on paragraph 58, I desire to call the court's attention to paragraph "d". Now, I call your honor's attention to the words "during the non-irrigation season" there. Those should be eliminated, or the limits of the season determined.

THE COURT: Unless an irrigating season and non-irrigating season is defined later, the court will make a

general order striking out that language wherever it occurs.

MR. STORY: I don't understand your honor will strike them out until the question--

THE COURT: Not at this time. Unless there is something in the decree that makes those expressions intelligible they ought to be stricken out.

MR. HATCH: Our next is paragraph 77 on page 40/

MR. McDONALD: Judge Hatch, you didn't finish paragraph 57.

MR. HATCH: Yes, we did. We just proposed the heading of the paragraph, the amendment is only as to the caption.

THE COURT: Your substitution is as to the entire paragraph, Judge Hatch.

MR. HATCH: Yes, you are right. In 58 we commence to enumerate the individuals. Page 40, there seems to be some uncertainty as to that 77. The heading of the section is: "Lowest Ditch on North Side Provo River".

MR. RAY: I suggest as to things like that the court might add if there is no objection. That is clearly a correction in the line of clarity, and I do not think there is any earthly objection to it.

THE COURT: That is a good suggestion. I take it all of the counsel have looked at these proposals, and if there is no objection this may go out.

MR. HATCH: Substitute for the first four lines of paragraph 78, the following:

"That the following parties are to be supplied from the waters arising in a slough in Section 2, Township 7 South, Range 2 East, Salt Lake Meridian, and in the bed of Provo River, in said section, except the main

channel carrying water to the Fort Field".

THE COURT: Are there any objections to that suggestion? It may be adopted then.

MR. HATCH: Paragraph 83, amend subdivision "a" of paragraph 83, to read "One second foot of water from the Provo River". It is John C. Whiting's right.

MR. RAY: Does that come from Provo River or from Springs?

MR. HATCH: From the Provo River. This is to conform to the decision. The decision fixes it, or I think it fixes it. There are certain springs that he states-- here is the decision-- "That the said John C. Whiting is the owner of 3.33 second feet from Provo River for one hundred hours each and every fourteen days." Now, that is one second foot continuous flow, the water from Provo River.

MR. RAY: Does the court decide he is entitled to one second foot of continuous flow? That is a mere matter of mathematics.

MR. HATCH: No, it is computed, I understand, by Mr. Wentz, and was put into this as making it definite as to what he is entitled to, one second foot of water. Whatever he is entitled to, however, this one second foot is from the Provo River, and the finding does not find it from the Provo River, but it does fix  $3\frac{1}{3}$  feet from Round Valley and Enoch Spring and Little Spring, but this second foot, to make it clear and certain, gives him the water from Provo River.

THE COURT: Is it the recollection of any of the other parties this one second foot comes from some other source?

MR. RAY: I say this, I have no recollection of the testimony. I was advised it came from springs.

MR. HATCH: The Wright decree is what his right is

based upon.

THE COURT: Mr. Wentz--

MR. WENTZ: This is the amount given from the river.

MR. RAY: It is from Provo River, Mr. Wentz?

MR. WENTZ: Yes.

MR. HATCH: And amend subdivision "c" of the same paragraph by striking out the words "and to 3.50", and write "three and one-half second feet."

MR. STORY: In passing, your honor, I just mention that in the following paragraph of that section, following two paragraphs, the appropriator is given the right to use the water from January 1st to December 31st of each year for irrigation purposes. I just mention that so as to have in mind the general question of the irrigation period.

THE COURT: That last change may be adopted.

MR. HATCH: Now, there is a typographical error in my copy of the findings, c-a-r-r-k for creek. The next is paragraph 86.

MR. STORY: There is, I think, a word left out in the last, or the third from the last line, 4th from the last line of paragraph 85, should not the word "not" be inserted after the word "is", so as to read "is not required"?

MR. TANNER: No, the "not" should not be there.

THE COURT: That would not express what the court decided.

MR. HATCH: Paragraph 86, we move to strike from the 8th and 9th lines of paragraph 86 the words "not to exceed 100 second feet".

MR. RAY: Why, Judge?

MR. HATCH: Read the paragraph, that the Provo Pressed Brick Company--

MR. RAY: I have read it.

MR. BAKER: If the court please, while they are looking that up, we have had paragraph 69, and there is a motion that has been served, and I think in the files to amend paragraph 68, which motion, as I understand it, has been abandoned, but so that it may be clear, I move that the motion to modify the proposed findings and decree as affecting paragraph 69 of the findings and 15 of the decree be stricken from the files. That is, with the consent and in accordance with the desire, as I understand, of attorney Chase Hatch, who has interposed the motion.

MR. CHASE HATCH: We will ask to withdraw that motion.

THE COURT: I think we had better take these up as they are made.

MR. BAKER: I thought it might release several attorneys.

THE COURT: It may be known at this time that motion will be made. Now, have you something further to say about 86?

MR. HATCH: Yes, your honor, in the finding, the last line of the finding is "not exceeding 100 cubic feet per second". Now, that seems to be surplusage, and might be misleading and confusing.

THE COURT: Is it contended they are entitled to a certificate to more than 100 second feet?

MR. HATCH: No, but it might be contended they were entitled to 100 second feet.

THE COURT: No, this is a limitation. The way it

is stated, they are entitled to all the water used by these other parties, not to exceed 100 second feet, and I am inclined to think, Judge Hatch, your suggestion would make it uncertain and lead to confusion. If we say they were entitled to all the water eliminating that expression, "not to exceed 100 second feet", the waters herein awarded and used by the defendants, it would mean all the waters regardless of whether it amounted to more than a hundred second feet or not. I think it is more definite as it stands.

MR. HATCH: All of the waters awarded to Provo City for all of its purposes through these races they are entitled to.

MR. RAY: Up to a hundred second feet.

MR. HATCH: They are not awarded a hundred second feet. Provo City and--

THE COURT: The Pressed Brick Company is awarded a hundred second feet, if it is there, and used by the others, but not to exceed that.

MR. HATCH: My understanding is that all the water it is entitled to use under this decree is less than a hundred second feet, as fixed by the decree itself, and that is why it struck me as being likely to create confusion.

THE COURT: My view is it is clearer where it is, more clearly expresses what the decree intends, that is a limitation on their rights, limiting them to a hundred feet, and describing just where it is. I am inclined to deny your application to make that change of paragraph 86.

MR. HATCH: The next is a substitute for subdivision "e", paragraph 87.

MR. STORY: We are not going to object to that change.

THE COURT: It may be adopted then.

MR. HATCH: There is a question of the decision of the Circuit Court of Appeals as to tunnel water flowing into Snake Creek, tributary of the Provo River.

THE COURT: Case was sent back for a new trial, wasn't it?

MR. RAY: No, case was reversed.

THE COURT: What are you asking with reference to this?

MR. HATCH: The next is 88.

THE COURT: Does that have reference to the Snake Creek water?

MR. HATCH: 88 is John C. Whiting. It would seem that all the water is taken from Whiting after a certain period, by the finding as it is, and he is entitled to 92/1000 second feet after the waters from the reservoirs are turned down, and it is to clear that up. For the caption of paragraph 88, we substitute the following-- it now reads: "From a time in each year not earlier than June 15th and not later than June 30th when said company elects to release the waters stored by it"; we are asking to amend it,

"That subject to the rights of John C. Whiting as set forth in paragraph 83 hereof, excepting the .092 second feet received by him as successor to John Hartle, the Provo Reservoir Company as successor in interest to Joseph R. Murdock as administrator of the estate of William Wright, deceased, is entitled to and has the right to the use of the following:"

MR. RAY: Are you sure that conforms with the decision? It seems to me we are getting a pretty good water right there for Mr. Whiting. We have an intermittent three and a half, turned

that to a constant one, and then turn it over to the Provo Reservoir, it seems to me.

MR. BOOTH: John C. Whiting and the Provo Reservoir are entitled to the Wright water.

MR. HATCH: This fixes a right to John C. Whiting, and takes it from the Provo Reservoir Company, .092 of a second foot. In Section 83 we have fixed Whiting's right as successor in interest to Joseph R. Murdock, and then we have fixed his right as successor to John Hartle. Now, this proposed substitute makes 88 conform to Section 83.

THE COURT: Any objection to this change? It may be adopted, if there is none.

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 12:00 NOON, RECESS TO 1:30 P.M.  
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MR. BROCKBANK: The transcript of this case shows that the case was dismissed against Brice McBride. At that time Mr. McBride was in the service, and we now ask he be reinstated and his rights be adjudicated as set out in the findings and the decree.

THE COURT: Any objection to this. An order may be made reinstating Mr. McBride as a defendant. He has filed a pleading, has he?

MR. BROCKBANK: Yes.

MR. HATCH: If the court please, paragraph 43 was stricken. The striking of that paragraph as a whole will rather disarrange the other findings and also the decree, and we suggest and offer paragraph 43 be as follows:

"Paragraph 43. The language in paragraph 43 is stricken, but the number of said paragraph is retained for the purpose of maintaining uniformity of the other

findings and decree which are referred to in cross references therein."

The striking of the paragraph would necessitate renumbering all the other paragraphs in the findings, and if reference is thereafter made to it, in the decree.

As to the direction of the court as to paragraphs 46 and 91, we find that 91 is under a classification from "b" down, and is preliminary to the setting forth of the rights under those classifications. Paragraph 46 is a different paragraph, and in order to retain the uniformity and the numbers as well in their order, we have the amendments proposed as to both paragraph 46 and 91, instead of combining them in one and renumbering them, and we have set out in the language of the stipulation in each paragraph-- in the first paragraph 46, we name the several parties having reservoirs, and follow the finding as it now is down to river, the word "river".

THE COURT: Headwaters of said river.

MR. HATCH: And the word "and", and have the right to store quantities of water in the high or flood water season that are in excess of the quantity herein awarded. Said reservoirs are also entitled to store all the waters that can be stored in them between September 15th and April 15th of each year. Then, in paragraph 46 we follow the latter part, "and during the low water period of time release the same and commingle it with the waters of said river, to recapture and use said stored water to a necessary and beneficial use."

THE COURT: Any objection to those paragraphs?

MR. HATCH: Simply follows the language..

MR. STORY: Of course, it is duplicating the language.

MR. HATCH: In a sense it is duplication, but at the same time they are different applications.

Now, 91-- as to 46 we strike out the words between "and"

at the end of the 5th line, and the word "and" in the 7th line, the words "each and every year during the high water period and the non-irrigating season impound and store large quantities of water".

MR. RAY: Your printed slip shows exactly what you do.

MR. HATCH: Yes.

MR. RAY: We have no objection.

THE COURT: The changes may be made as suggested in 46 and 91.

MR. HATCH: Subdivision "c" of 88 was allowed.

Now, our next proposed amendment is to amend by qualifying the 17th Class rights of Spring Creek Ditch Irrigation Company, Sage Brush Irrigation Company and Charleston Irrigation Company, as defined on page 68, under the subdivision "bq" at the very bottom:

"Said Charleston Irrigation Company shall have, and it is hereby granted the right to change its point of diversion for its upper canal to a point on the Provo River above the lower Midway dam. Said change shall not affect the established rights of other persons to the use of water on the Provo River".

Then between "bg" and "br"-- our motion is "bg" and "br", but should be "bq" and "br", the provision as follows:

"Provided that the Seventeenth class rights herein awarded to the Spring Creek Ditch Irrigation Company, the Sage Brush Irrigation Company, and the Charleston Irrigation Company shall be taken at such times only and shall be limited to the same pro rata volume as Seventeenth Class water right is available to and is being distributed as herein provided to the several users above the Midway Upper Dam".

MR. RAY: Those people object to that change, your honor, because of the fact their right is now and always has been dependent, I think the evidence shows, on seepage water coming in between the two points, and that is a radical change and radical limitation, and they object to that change.

MR. HATCH: We are basing it, as I understand the agreement between the parties in this case affected by this provision, that that was provided in the agreement between the several companies and the plaintiff and among themselves.

THE COURT: In making your objection you object on behalf of the--

MR. RAY: Of the three companies, Sage Brush, Spring Creek and Charleston. It is not in accordance with the decree or agreement.

MR. HATCH: The decision. I don't remember as to the decision. Pass that for the time being and can get back to it.

MR. McDONALD: I want the record to show I also interpose an objection on behalf of the same parties, the three irrigation companies, and I want to offer some suggestions to the court when you are ready to hear it.

MR. HATCH: It being objected to, we would like to pass it temporarily.

THE COURT: You may proceed.

MR. HATCH: The Seventeenth is substitute for "I", page 69, the following: "First Class, and as a prior right in and to the water of the Ontario Drain Tunnel, 5.5 second feet to be measured at the Midway Upper Dam".

That is as I understand, and we have already amended heretofore as to being measured at the Midway dam, and has a prior right to waters on the Ontario Drain Tunnel to that extent.

THE COURT: Any objection to this change? It may be adopted.

MR. HATCH: Now, substitute for "VII", page 69, the following-- that is defining the right of September 15th to April 15th-- that is subject, of course, to the same objection interposed by Mr. Story as to irrigation rights-- the words "First Class, and as a prior right in and to the water of the Ontario Drain Tunnel, 5.5 second feet to be measured at the Midway Upper dam". Simply a repetition of what is above. They have the same right after, they had before that period.

THE COURT: It may be adopted.

MR. HATCH: 19, Amend the last paragraph on Page 70, by inserting between the word "meridian" and the word "to" on the next to the last line, the following words, "sufficient water".

MR. CHASE HATCH: No objection to that.

THE COURT: The amendment may be made.

MR. HATCH: Amend subdivision "b", paragraph 104, page 71-A, by inserting between the word "division" and the word "are" in the seventh line, the words "wherever it is hereinafter set out".

THE COURT: Any objection to this amendment? It may be adopted.

MR. HATCH: I understand 71-A has replaced 71.

THE COURT: No, 71 follows 71-A on the copy I have. †

MR. HATCH: Substitute for the last six lines of paragraph 156, page 88, the following-- there are three paragraphs and we strike out the two last subdivisions of that paragraph, the motion is, and insert the following:

"The final determination and fixing of the quantity of water that should be deducted for loss in transmission of the stored water, the water from the Weber River water shed, and the Ontario Tunnel water ought to be postponed until such time as observations and measurements will enable the court to fix the same with reasonable certainty. The court will therefore retain jurisdiction of this case for that purpose and at some future time, upon the application of any party interested therein, will hear such evidence as may be available, and determine the amount of loss in transmission of such water. Pending such hearing and determination there may be deducted from the stored waters, four percent for loss by evaporation and seepage"

MR. RAY: May it please your honor, I have proposed an amendment to that paragraph, which, if it is satisfactory to the court, I would desire to call the court's attention to now.

THE COURT: I had thought of suggesting before noon, if any of the counsel have amendments to propose to any of these same paragraphs your amendments are directed to, it would be well they be disclosed at the time these are being presented.

MR. RICHARDS: We have also a proposed amendment to this paragraph.

MR. HATCH: We think they should all be considered together.

MR. RAY: I leave the paragraph the same as it is except I add thereto after the last paragraph, "That the commissioner shall proceed at once to determine with as great accuracy as practicable the loss in transit of said storage waters. That the expenses of such determination shall be borne by the plaintiff herein."

The language is satisfactory to me. I don't know why, inasmuch as the evidence showed there was a substantial loss there, we should take the paragraph as suggested by Mr. Hatch and postpone it until some convenient time. It is something that ought to be determined readily and quickly with as great accuracy as the subject permits of. I think the testimony in this case showed it could be determined with some fair accuracy, though not with absolute accuracy. My further suggestion in that respect is we take it the expense of that investigation should be borne by the plaintiff herein. It seems to me that is equitable. It is not made upon the ground that the prior appropriators have an exclusive right to the channel of Provo River. That is not anything they claim or could claim here, or they have any property in the channel, but they do have natural waters flowing in there, and there is a burden cast upon the defendant when he commingles water later appropriated with that water that that commingling shall not interfere in any way with the right of the use of the primary appropriators. He could not use it for power purposes if he diminished it in quantity, or he deteriorated it in quality, and upon the same line of reasoning we contend when he commingles his water with it, he bears the burden of seeing that he takes no more water from the channel than he puts in, less the seepage and the evaporation. In our proposed amendment here we are interested in only two things, that the determination be made quickly, as accurately as may be, and the expense of that determination be borne by the plaintiff.

MR. RICHARDS: Provo City makes the same objection. Our opinion is this, that at this time, or when this decree is signed, that the necessary order should be made for the taking of the observation, and whatever may be necessary, to determine what this loss in transportation is going to be, and that it be fixed as quickly as can be. Maybe take six months, maybe take a year, may take two or three years, but that it begin at

once, that it be not left open to be called some other year, but now while we are at it that the appointment be made of some one, or more than one, to investigate and report to the court, and have it determined as expeditiously as possible what the loss is, then have the decree modified to cover that. Now, as to the loss in transportation and the burden, I join in what my brother has said. The burden is upon them to show they are not taking out more than they are entitled to take out; not upon the defendants to show that fact. They have a perfect right to use the channel, they have a perfect right to turn the water in it, but those who are using the channel first should not be taken at a disadvantage, or a burden cast upon them of demonstrating that which they are entitled to have shown, and are entitled to have shown by the facts, That the quantity taken out is diminished by the proper percentage before taken out, and the burden should be borne-- I don't say the plaintiff entirely, I don't know about the Ontario Tunnel, and the others, but upon the people who are going to use the storage water, they collectively should bear that burden.

MR. HATCH: This proposed amendment, if the court please, is simply changing the substance of the paragraph to the language of the decision of the court rendered in this case which is as follows:

"The final determination and fixing of the quantity of water that should be deducted for loss in transmission ought to be postponed until such time as observations and measurements will enable the court to fix the same with reasonable certainty, The court will therefore retain jurisdiction of this case for that purpose, and at some future time, upon the application of any party interested therein, will hear such evidence as may be available and determine the amount of loss in transmission of such stored water."

Now, 156, as it now reads, is:

"That the court will retain original jurisdiction of this cause, to from time to time, determine and fix the quantity of loss by evaporation and seepage".

Now, we have followed the language, this is the proposed amendment:

"The final determination and fixing of the quantity of water that should be deducted for loss in transmission of the stored water, the water from the Weber River watershed, and the Ontario Tunnel water ought to be postponed until such time as observations and measurements will enable the court to fix the same with reasonable certainty. The court will therefore retain jurisdiction of this case for that purpose and at some future time, upon the application of any party interested therein, will hear such evidence as may be available, and determine the amount of loss in transmission of such water. Pending such hearing and determination there may be deducted from the stored waters, four percent for loss by evaporation and seepage."

The exact language of the decision.

THE COURT: Just a moment, will you read yours again.

MR. RAYL: My proposed amendment is at the end of paragraph 117 there should be added this language:

"The commissioner shall proceed at once to determine with as great accuracy as practicable, the loss in transit of said storage waters. That the expense of such determination shall be borne by the plaintiff herein."

That is apparently confining it as payment too closely, because there may be other people using storage waters than the plaintiff, but the people using and commingling the waters.

THE COURT: Judge Hatch, do you object to the court putting in following your statement there, that the commissioner is directed to proceed to make such investigation as will enable him to report to the court the loss?

MR. HATCH: We object to the matter as to the commissioner proceeding to determine, or to anybody proceeding to determine. I will say, your honor, we showed in the evidence here a three months examination of that river and put on the testimony here several years ago as to the loss or increase by competent engineers employed by us, and gave to these people, and all of them, all that we had with regard to it. That during all of this time the court has had a commissioner distributing this water. It has been several years, and this is the first time that they suggest this step be taken. It seems to me rather ill timed to come in at this time and say it be done forthwith, when it might have been done years ago by any one of them; and if they had any evidence different from that we produced to produce it at the different hearings of this court, and my theory of the matter is simply this, that if they at any time shall have any evidence there is more than a four per cent loss let them produce it, and have that changed as provided by the decree and this finding, but until they can show something more than that, our contention is that the water is increased to the user below by the turning in of our quantity of stored water, and I think the evidence will substantilly bear us out in that, but that the increasing of the quantity of a stream increases the rapidity with which it flows and decreases the seepage and evaporation. That is as I understand and remember the testimony in this case.

MR. RAY: If you really believe that, you ought not object to getting the advantage of that increase by the investigation.

MR. HATCH: We can come in and have it changed when we can get additional proof to that which we have already offered, and we expect to do it at a later time, to get this four percent cut off, and not have to stand this four percent reduction during all time. If it is not actual loss by seepage and evaporation, and we can show it to the satisfaction of the court we will probably be the first ones to come into this court and ask it be changed, but we certainly should not be required to bring proof other than that we have brought until there is some showing made to a court that that that we have produced is not correct. Now, as to proceeding at once, as I understood from the argument, of course, we could not commence until we are prepared to turn the water down, be sometime in June probably of this year, and then it is during a constantly receding river for sometime when our quantity is the same quantity from day to day turned into the river, the river is continually decreasing.

MR. RAY: That would be true every year of the river's history, whether you investigate or whether we.

MR. HATCH: We have investigated, your Honor, and our investigations, evidence of them, are in the record here, and we have not objected to the four percent reduction, in fact, that was a tentative agreement between us and the canal companies above, and it was adopted at the hearing, and we do not object to it, not now, but we expect to object to it later when we can get more conclusive proof than that which we have offered. Of course, there is the further objection, if the court please. I do not understand that their proposed amendment is admissible under the order of the court, that it is to make more clear the substance of the findings, or to fill in, as I understand, omissions and palpable errors, or errors that have crept in through inadvertence.

MR. RICHARDS: Or excusable neglect, either of these

last two will cover.

MR. HATCH: I cannot understand they can possibly be excused for not having made this investigation during the seven years the case has been before the court. We have made all the investigations that could be made possibly, and given them the benefit of it. Now they ask we pay for someone else to do the same thing over that we have done, and present it here. Of course, I cannot understand there would be any righteousness in that.

THE COURT: I did not ask as to your views of that part of it. I asked your views upon the part of the suggestion that provided for the commissioner to make such observation, to acquire that information, and enable him to report to the court. I didn't ask your position in regard to paying cost, because I have no idea what that will be.

MR. HATCH: We have no objection to that, and I suppose the commissioner would determine it as part of his duty to determine the rise and fall and increase and decrease of anything applicable to the river.

MR. RAY: You started your protest to the court with the language you objected to the commissioner making any investigation.

MR. HATCH: Then I did not state what I intended to mean. I have no objection to anybody making any investigation. What I most strenuously object to Mr. Ray's proposed amendment we be taxed with the costs.

THE COURT: The court might say in relation to that, I will give my views and hear from counsel further, my view is the court is not in situation to determine just who should pay the costs of such investigation, because the court cannot determine what investigation should be made in advance. If the investigation is made by the commissioner in connection

with his duties, his salary would cover it. If, on the other hand, somewhat elaborate tests and investigations were made by either side, it might be inequitable and unjust to tax all of that upon either party. The court would have to determine that when the matter was presented, so that I do not think the court ought to include in this decree at this time a statement that the costs of any future hearing or investigation will be borne by any particular party. I do not think the court is in position to do that, but I do think the court ought to include here, or in the decree, or in some order, a direction to the commissioner with reference to taking such observations and acquiring such information as will aid the court in determining this when the matter comes up.

MR. SOULE: If the court please, in connection with this matter, the Washington Irrigation Company has an objection to four percent for loss by evaporation, and I thought I had better call the court's attention now. We understand the Provo Reservoir's reservoirs are some eighty miles distant from the place of use, in other words, the water traverses about eighty miles.

MR. HATCH: The record shows the entire length of the river is only sixty-five miles.

MR. RAY: I think the decree provides it is eighty.

MR. SOULE: That is my recollection of it, seventy miles, I think, in the decree. The Washington Irrigation Company has a reservoir, and they transmit the water only twenty miles. We feel it is not fair to require as large a percentage of deduction from our water as it would from the reservoirs that carry the water a longer distance, especially where the difference is so great. We think that should be taken into account at this time.

MR. EVANS: If the court please, may I make just

one observation. It seems to me that under the rule fixed by the court for this hearing, that we were limited to special specific things; among those things were any errors or omissions or anybody who desired to file objections to the decree could file them on a certain day fixed. As I remember it was the 12th, and they would come up for hearing at this time. We are here now for the purpose of hearing those things under the call, under the order of the court.

MR. RAY: Will you permit a question?

MR. EVANS: Just a moment until I get through. We now come and offer, having previously filed our objections to this decree, we offer this substitute for the paragraph it was intended to be substituted for. It seems to me the question ought to be whether or not the decree as originally proposed should stand, or whether or not the substitute which we have offered here should stand as a substitute, and go into the question of this seepage water, it seems to me, later. It will automatically come up under the very section itself whenever anybody makes an application to the court to determine the quantity of loss in transit of this water, and it is a matter seems to me now taking the time of the court when it ought not to take the time of the court.

MR. RAY: I offer a substitute too. Isn't that entitled to consideration?

MR. RICHARDS: And I offer one.

MR. EVANS: Sure, if you offer a substitute.

MR. RAY: We just read it to you.

MR. EVANS: I beg your pardon then.

THE COURT: I thought your argument was in relation to Mr. Soule's proposal to go into the correctness of the four percent. I didn't understand it was in relation to the other

substitutes.

MR. EVANS: It seems to me the question of the four percent is a matter that ought to be raised and order made based upon the subject we are now discussing. Whenever that matter is raised we can go into it and determine it.

MR. SOULE: I raised my objection before the 12th, and served a copy.

THE COURT: My impression is it is not within those matters we can take up at this time. That is my impression. It is a matter of substance of the decree.

MR. RICHARDS: This decree purports to go into facts, and isn't it upon those three things your honor submitted these questions, the general provision of the decree. I take it the court did not intend to say that the decree prepared as it was presented should be binding and be no suggestion. Then the committee appointed to draw the decree has not drawn it and has had nothing to do with it, and it is not their decree, and they do not offer it as their decree.

THE COURT: Whose is it?

MR. RICHARDS: It is not theirs; they have not had anything to do with presenting it.

THE COURT: If this decree is not presented by this committee, the court had probably better take an adjournment at this time.

MR. RICHARDS: As far as I am concerned, I have not heard of the committee meeting at all. Have you, Mr. Ray, have you, Mr. Evans, succeeding General Wedgwood?

MR. EVANS: Not meeting as a committee, but I have endeavored to get them to.

THE COURT: I might ask why?

MR. EVANS: Because I could not get the committee to meet.

THE COURT: I do not take very kindly to the criticisms that are made by the committee.

MR. RICHARDS: I am not attacking anybody but ourselves, but getting at the facts, I think if your honor will indulge me a minute, I will be plain enough to unmask it, see where we are. Your honor appointed a committee to do this work, and it was ascertained it was going to be a great deal of work for this committee to go through and check up all the individual rights of these five hundred users, and while I was away, on my return home from out of the state, I understood it had been arranged that Mr. Wentz and Mr. Thompson were going to check out those matters and put them in proper shape, and I understand they have done it, and I am not seeking to impeach the accuracy of the work in any way, shape or form, but I am simply seeking to say that this committee has not handed this report to the court, and does not hand it to the court as being a report from this committee and one that will preclude consideration. These are general provisions. I understood from the notice the court gave us we might be heard upon three different points. I have not the copy of the notice.

THE COURT: I have it here.

MR. RICHARDS: I submit on 3-- 2 points Judge Hatch referred to-- 3 to make it more specific, this comes within it, if it be anything that has not been covered in the decree, doesn't try anybody's rights.

THE COURT: What are you arguing to the court. The court has ruled those suggestions you and Mr. Ray made come properly within it.

MR. RICHARDS: That is it, and I understood your

honor to say it was a matter you could not now consider.

THE COURT: No.

MR. RICHARDS: I beg your pardon then, I misunderstood the court. Then the point I rise to make was this, now is the very time, while we are clearing up all these things, to make whatever proof is going to be made to ascertain what this loss in transportation is. Now, I have suggested in my suggestions which were filed on the 11th or 12th of the month, and I sent a carbon copy to the court, not an attempted expression of how it should be stated in the decree, but we thought it should be now determined by the court and probably by stipulation, whether the commissioner shall do this, or whether somebody associated with him, I am not particular, but now is the time when provision ought to be made and order made to set this matter of observation and investigation into effect. I appreciate what Judge Hatch said, they may not be able to do a thing until June, if may take all of this season and next, but let the order be made now so that these men, or these commissioners, shall be ready to take the season and conditions as presented, and as quickly as presented, and make a report to the court; and my idea would be that report should come to the court for approval by the court and not determination by the commissioner or the commission, but at that time when the hearing is had on the commissioner's report that the percent of loss is so much, why then let there be a hearing of that, and let it be determined and final adjudication had as a supplement to this decree, then it is done. Whether it will take six months or six years I don't know, but now I think is the time to do it rather than cut loose, then go home and after two or three years take it up again.

MR. BOOTH: Would you preclude anybody else from giving testimony except the commissioner appointed by the court?

MR. RICHARDS: Oh no. Such a time the commissioner will report and let it come up, and if anybody else has testimony to offer let it be offered, then let the court, on the testimony of the commissioner and any additional testimony offered by the parties, determine what it is going to be, and finish it. Let us start now to get to that end.

MR. RAY: May it please your honor, I want to say I believe your honor's suggestion would meet with my entire approval and that of my clients, the expense of this determination be delayed until they ascertain what it is and whether it is extra expense, and that may be taken into consideration in my amendment, but the commissioner is an officer of the court, with men going up and down the river all the time, and that is all I want to suggest, and I am perfectly certain it is within the purview of the objections to be offered today.

THE COURT: I do not think there is any question about it. As I suggested, it seems to me that ought to be done.

MR. HATCH: We offer no objection whatever to the commissioner making any report he and his staff may be able to make with regard to anything that affects the flow of water in that river, and we think that under this finding of the court in the original decision that it can be done. I suggest this in view of the argument, that to determine it it would have to cover an entire irrigation year, and not less than that, and possibly two of those years, and the report to be made to the court; the commissioner will report annually, I presume, and the report is accessible to every party to the action. Then if upon that report any party shall see fit to move the court to change the order as it now stands, four per cent, that it do so, and then the court, I take it, would make an order giving all the parties ample time to determine whether or not the report of the commissioner is correct,

should not be binding upon anybody.

MR. RAY: No.

MR. HATCH: And if, after the commissioner makes his report, anyone sees fit to move the court and notice the other parties of the action into court to change this, then it may be done. I think the order of the court at this time should say that the duties of the commissioner shall be to make such observations as are necessary, or as he may be able to do without any unnecessary added expense.

THE COURT: It might be well to include in that order he include the result of such observations in his annual report.

MR. RAY: That is satisfactory. I do not have any disagreement with Judge Hatch.

THE COURT: I do not think there is any disagreement between any of you.

MR. HATCH: I do not think it is necessary to add anything except our suggested amendment to this paragraph. The other paragraphs appointing the commissioner and defining his duties, is where I think that should be.

THE COURT: I do not expect it makes much difference where it occurs, just so it is in.

MR. MCDONALD: Your honor please, it is understood there will be some direction to the commissioner to make the adjustments at a reasonable time.

MR. HATCH: Make the investigation, not the adjustment, I do not understand the commissioner will have any authority other than to report to the court.

THE COURT: With that left in that way, call the court's attention to it, if it don't appear some place else, and insert it.

MR. HATCH: What will the court do with our proposed amendment?

THE COURT: I am inclined to adopt it with the understanding there is either added to it, that is, either add to it the suggestion made by Mr. Ray's proposed change, or the substance of that incorporated in some other part of the finding.

MR. HATCH: We have no objection to that.

THE COURT: So that there will be a direction to the commissioner to take this matter up as soon as it may be done, whenever the season is such it can be looked after, and report in his report.

MR. SOULE: If the court please, I take it that the court is going to hold the storage companies to four per cent loss.

THE COURT: I will hear you when we come to your proposals.

MR. SOULE: I thought maybe you would want to dispose of it under this same clause now.

THE COURT: I take it you have proposed one.

MR. SOULE: I have not proposed any form of amendment. What I would propose right after the wording storage companies impose four per cent loss at the close, except the Washington Irrigation, which shall be two per cent loss. The record shows our reservoir is twenty miles from the place of use. If there is a loss certainly farther it flows, the greater the loss and the record shows it is seventy miles to the other reservoirs. I understand our reservoirs and Provo Reservoir are the only ones.

MR. HATCH: No, there is the Wasatch and Timpanogos that take water just below yours, not over seven miles. Here

is the Ontario, whose water flows only about four or five miles.

MR. SOULE: I did not know that was the fact. Of course, if that is a fact, it would not make so much difference. I will not insist on my objection if that is the case.

MR. HATCH: Now, our next proposed amendment is substitute for subdivision "a", paragraph 160, the following: "That the First to the Seventeenth Classes, First and Second Districts of Wasatch Division diverting-- we will withdraw that.

MR. RAY: It will be necessary then to reconsider your objection No. 16, if you withdraw No. 22. Oh, no--

MR. HATCH: No. 23 is to strike out all of paragraph 161, after the period on the 11th line, that is, after "continuously". 161 is divided into two paragraphs. We move to strike out the lower paragraph.

THE COURT: Any objection to striking this out?

MR. HATCH: It restricts that transmission loss to certain companies. It ought to include everybody who uses water from the system, and should not be applicable only to certain individuals, parties to the action, as we view it. It should be applicable to half a dozen individuals who have a private ditch, the same as applicable to a canal company where hundreds use the water.

MR. RAY: I never could see why it was in, so I cannot see why it should not go out.

THE COURT: It may be stricken out then.

MR. STORY: Are all the amendments to the decree in conformity with these proposed amendments to the findings?

MR. HATCH: I have gone over the decree.

MR. RICHARDS: One feature in connection with this paragraph I think I should call attention to it for the purpose of definiteness. That is next to the last line of the first paragraph of 161. It says the allowable losses shall include only the actual, reasonable, unavoidable transmission losses, and shall extend over the section of the canal that carries more than one irrigation stream continuously. How much water is that, one irrigation stream, ought it not speak with more definiteness than that?

MR. HATCH: I do not see how it can be done.

MR. RICHARDS: How many feet of water?

MR. HATCH: One irrigating stream in practice varies from quarter of a second foot to six second feet. Now, it is owing to where the water is being used and the purpose for which it is being used, determines whether or not it is a stream in practice, and I do not know of any legal definition of irrigating stream.

MR. RICHARDS: The court has held repeatedly such a reference or description is so vague that it means nothing.

MR. RAY: It means nothing as to quantity of water, but doesn't it classify those streams which shall be subject to loss?

MR. RICHARDS: That is a question, if you want to raise it here. It seems to me we ought to have it so definite the decree would be of value after it was made.

MR. HATCH: If I was to qualify it, I would say such a stream as being used at one time by two different parties, whatever the quantity. That is the only way I could define it.

THE COURT: Are you satisfied with this language?

MR. RICHARDS: It seems to me it ought to be more definite.

MR. HATCH: If you can suggest anything that would be more definite, I would probably agree with you forthwith..

MR. BROCKBANK: There may be some conflict limiting it to two streams under the Heber City stipulation, where the decree sets out the Charleston Irrigation Company shall be entitled to a certain duty delivered at their land, it seems to me only one stream of water running to a man in that district, he shall be entitled to receive sufficient water, together with the losses to give him that water, whether in a ditch of one stream or two streams.

MR. HATCH: If the word "only" were inserted between the word "canal" and "that", first subdivision of paragraph 161, that would mean it could not apply to a canal carrying only one irrigation stream. It says it shall extend to those carrying two. Inserting the word "only" at that particular point, it would mean it shall not extend to canals or ditches with only one irrigating stream, as I think that is the intent of the court. I suggest it be inserted to make it absolutely, positively certain that it did not apply to a canal carrying only one stream. As to the suggestion of my brother, there are specific findings as to the Charleston Irrigation Company, Sage Brush Irrigation Company, and others. I understand the rule to be that where there is a specific award it would prevail over a general such as this. If the second paragraph had not been stricken out, it would include specifically those, all except the Charleston Irrigation Company.

MR. EVANS: That was probably the reason for writing that second paragraph, to show what particular canals it applied to.

MR. STORY: Why don't you use these words "except as herein expressly provided"?

MR. HATCH: Paragraph just stricken out is probably the

only one provided.

MR. EVANS: That tells what particular companies it is applicable to, and that is probably why it was put in there. If you had left that in there, they would not have had any difficulty about it.

THE COURT: There seems to be no suggestion of change of this paragraph, so we will pass to something else.

MR. HATCH: That is all we have of proposed amendments to the findings.

THE COURT: I will ask the other counsel, have you examined the proposed amendments to the decree proposed by the plaintiff in line with these amendments to the findings. I merely ask that so if you have no objection to them we probably need not take the time to have them presented.

MR. RICHARDS: I suppose the amendments to the decree are merely to put them in harmony with the findings?

MR. HATCH: That is what we tried to do, to make them conform to the findings.

MR. RICHARDS: There is nothing new added, is there, Judge?

MR. HATCH: No, there is nothing proposed in the decree that is not proposed in the findings. The proposed amendments to the decree are simply to make the decree conform to the findings as they are amended by our proposed amendments.

THE COURT: With that statement then, is there anything further to be said in relation to these?

MR. HATCH: We have nothing further.

THE COURT: The amendments proposed to the decree then will also be adopted in the same respects that the court has

adopted the suggestions of amendments to the findings, and where the proposed amendments to the findings were denied, the court will deny your proposed amendments to the decree.

MR. RAY: May it please your honor, their objection No. 16 has not been disposed of, I think..

THE COURT: Yes, that is the one Mr. McDonald was to make some investigation in relation to.

MR. MCDONALD: The objection made upon the ground that the proposed amendment would not be in harmony with the decision rendered by the court.

THE COURT: I do not think that was 16.

MR. HATCH: 16 was not disposed of.

THE COURT: There was one prior to that with reference to some springs, McDonald and Sessions Springs.

MR. MCDONALD: No, that was disposed of. It was relative to Sage Brush and the other two water companies.

MR. HATCH: 16 was not disposed of. It was defining Seventeenth Rights. That was passed, and still before the court.

MR. MCDONALD: The stipulation provides these respective companies shall have the water which is decree to them in the decree, and as it now stands, and in accordance with the original decision and the proposed amendment would make a radical change relative to these three companies. The court will note--

MR. HATCH: Pardon me, I probably misunderstood you. I understood you to say that the stipulation provides that the water shall be as provided by the decree as it now stands, the Sage Brush--

MR. MCDONALD: As to quantity of water.

MR. HATCH: Spring Creek was not party to the Fulton decree.

MR. MCDONALD: I am speaking of the decision before the court.

MR. HATCH: This decision was only made a few days ago.

MR. MCDONALD: No, I am referring to the original decision of the court in this case, the tentative decision.

MR. HATCH: Mr. McDonald, let me call your attention to paragraph 102 on page 61 of the findings where it sets forth amendments made to the stipulation as to these particular defendants.

MR. MCDONALD: Yes, I have the amendments. Paragraph 40 of what I call the original decision, decision by your honor, provides:

"That pursuant to the terms of a stipulation entered into and the evidence introduced the Spring Creek Irrigation Company is entitled to a first class water right of 12 second feet and a 17th class water right of 6 second feet for the irrigation of 720 acres of land; except during the period from July 5th to September 15th in each year said party is entitled to 14.4 second feet measured at the measuring weir as described in paragraph 34, as amended, of the stipulation."

Now, the original decision has that provision in it, and probably provides in accordance with the amended stipulation. The amendment reads as follows:

"Provided further, that such company shall have said duty at all times when available as against the plaintiff, and the said company shall have at all times a quantity of water not less per acre than that distributed".

THE COURT: What are you reading from?

MR. MCDONALD: From the amended stipulation.

MR. RAY: Your honor will find that in paragraph 61.

MR. MCDONALD: Your honor will note in the original stipulation and decree there is a quantity of water, 10 second feet of water to the Sage Brush Irrigation Company, for instance, from July 5th to September 15th, that may be in the 12th class or 17th class, or whatever ~~class~~<sup>class</sup> is denominated. The proposed amendment provided that the 17th class rights herein awarded to the Spring Creek Ditch Company, Sage Brush and Charleston, shall be taken at such times only, and shall be limited to the same pro rata volume as 17th class rights is available to, and being distributed.

THE COURT: As a matter of fact, what change does that make?

MR. MCDONALD: It makes this change, the springs which were eliminated from this case this morning are the main source of supply of those particular companies, and the springs are several miles south of the Midway upper dam. Now, we have provided for two divisions in Wasatch County, and the point I make is this: In practice, I think, and in fact, the 17th class water may be all gone at the point above the Midway upper dam, whereas below, because of these springs and so on, these parties are entitled to a substantial water right.

THE COURT: You mean your three companies?

MR. MCDONALD: Yes.

THE COURT: From the springs?

MR. MCDONALD: From the springs, and other sources, seepage, probably some water from the river.

THE COURT: Would anything the court puts in this decree have any effect on them using that water?

MR. MCDONALD: It will have no effect upon that except if this provision is adopted then these people are limited to the same quantity of water that the people above the Midway upper dam are entitled to, whereas, as a matter of fact, these people have got a substantial water right in the 17th class below the Midway upper dam where there is no water in the 17th class above the Midway upper dam, and part of that water comes from the river system.

THE COURT: Whatever comes from the river, of course must be controlled by this decree.

MR. MCDONALD: There is some comes from the river.

THE COURT: Does not make any difference how much they have coming from those springs. They were not eliminated this morning, they were eliminated when the case was commenced, they have never been in the case, and it was a statement to clear that situation. They were not in the case, never had been.

MR. MCDONALD: As I remember they may be tributaries of the Provo River, and water probably has been diverted and used for forty years by old users, and it may be nobody would claim the water against these old appropriators, but what I am getting at, there is some water coming from the river system.

THE COURT: Whatever there is from the river system ought to be considered in this.

MR. MCDONALD: It seems to me it will mix the matter--

MR. HATCH: I was going to offer an explanation to the court I think would make it perfectly plain and clear why we propose this amendment, and you had the floor.

MR. MCDONALD: I thought you were through each time

you stopped.

MR. HATCH: That is why I arose, not to interrupt you.

MR. MCDONALD: I will wait for you to make your suggestion.

MR. HATCH: The proposition is this. These parties are made parties to this action. The head of their canal is shown with definiteness, and a dam in Spring Creek, which is a substantial tributary to Provo River. These springs referred to, that are eliminated, form a portion of the head waters of Spring Creek, and during the irrigation season they are dammed off dry at the dam of the parties using them immediately below the springs, but immediately below the dam there begins to be an inflow into the creek. This is not in the evidence, but simply by way of explanation, and a hundred rods below the dam where it is dammed off tight, as is the rule in all these mountain streams, there is a substantial flow of water in the creek which comes on down to the dam of the Spring Creek people, Spring Creek Ditch people, but below their dam in Spring Creek there is inflow that reaches the head waters of the Charleston upper canal, and it is constantly increasing volume of water, if not diverted at all above, but at the place where they were not made parties, at these springs, it is right virtually at the head water of the springs itself, and for that reason the tight dam being kept in all the time during the irrigation season, they were not made parties, but below that where there is continuous inflow and many people using the water of this Spring Creek stream they were made parties. If the water were allowed to flow it would reach the Provo River. Now, under the stipulation and under the rule as proposed by Brother McDonald, these people would have a 40 acre duty during the entire irrigation season, except they are limited. They had the 17th Class rights so long as

the water is available up above the Provo Division, and these people having rights below are supplied, have a 40 acre duty, under this provision, as I understand it, as it is in the findings and in the decree it would award to these people, Sage Brush, Spring Creek and Charleston, a 40 acre duty during the entire season, and not limit them as to the people in Utah County or elsewhere. We propose to amend that by limiting their rights as the parties above the Midway dam are limited, and the stipulation also provides it, as I understand it. The stipulation as amended,

"It is further stipulated and provided that the Sage Brush Irrigation Company and the Spring Creek Ditch Irrigation Company shall not be entitled to more than one second foot of water for each fifty acres of land from July 6th to September 15th of each year, said waters to be measured at the measuring weir of said companies' canals, now located west of the Rio Grande Western Depot, at Heber City, Utah, and that the Charleston Irrigation Company, through its upper canal, shall be entitled to a duty of one second foot of water for sixty acres of land measured at the lands from July 5th to September 15th of each year; and provided further that said three companies, to-wit, Spring Creek Ditch Company, Sage Brush Irrigation Company and Charleston Irrigation Company, through its upper canal shall have said duties at all times when available as against plaintiff; and that the said companies shall at all times have a quantity of water not less per acre than that distributed to any user in Summit or Wasatch Counties under this decree exclusive of any store or reservoir waters."

MR. RAY: May I ask you a question for my information there so I will understand you?

MR. HATCH: Yes.

MR. RAY: I represent these people. My thought about that stipulation is this, and if it is expressed in the decree it is satisfactory to me, that we limit ourselves to a duty there of fifty from July 5th to September 15th, and sixty, and we are entitled to reach those maximum duties out of the sources, that is, the springs referred to by Judge Hatch, plus the river. Now, if the limitation which he puts in the decree is allowed, then we are not limited by the stipulation to fifty and to sixty respectively drawing upon the river and springs, but our limitation is limited to what is available to the users above the dam, and that is not the stipulation.

MR. HATCH: No, the decree provides and findings provide and the classes provide.

MR. RAY: Do we get the fifty as long as it is available both from the river and the springs between July 5th and September 15th? Why then put in the limitation we are limited by the duty of the users above the Midway dam?

MR. HATCH: Pardon me, you don't get what we are saying. We are saying they are limited in the 17th Class, that is a 40 acre duty.

MR. RAY: We don't contend we are entitled to a forty acre duty after July 5th.

MR. HATCH: That is what we intend to provide, because the 17th Class is a 40 acre duty, and we say that when it is not available above the Midway dam it should not be applied below. That is our proposed amendment, the 40 acre duty, to place them in the same class as Midway and Wasatch, Timpanogos and all the other classes in the 17th class. They have a fixed duty of fifty acres, and then in the 17th Class they are awarded water further which puts them in the 40 acre class, and they should be reduced from the 40 acre class to their

fifty acre class when it becomes necessary to reduce the people below.

MR. RAY: Yes, that is under the provision at the end here, at all times they shall have a duty at least as high as anybody above.

MR. HATCH: And no more.

MR. RAY: Whether it goes to September 15th or not.

MR. HATCH: In the 17th Class.

MR. RAY: Yes, in the 17th Class, but if they are dropped out of the 17th Class then they might, between July 5th and September 15th go into a specified duty as per the amended stipulation, and they may get that either out of the river or the springs.

MR. HATCH: Our provision is to cover just that point.

THE COURT: Are you satisfied, Mr. Ray, it does cover that in that way? It is a little obscure to me. If it gives to you what this stipulation was made for, it is all right, as far as the court is concerned.

MR. MCDONALD: The decree as it stands is in harmony with both the stipulation and the original decision of the court, and what I was going to point out is this. There are these two sources of water as explained by Judge Hatch, there are two divisions in Wasatch County.

MR. HATCH: Three.

MR. MCDONALD: Three. And you will notice the very language of this, there are other divisions and other conditions, probably changes down there. In this division, the division only takes in, I don't know, but below the upper Midway dam.

THE COURT: What are the divisions up there?

MR. HATCH: The Midway dam and the Wright Ranch is Third Division. First Division reaches to the Hailstone Ranch, Second from the Hailstone Ranch to the Midway upper dam.

MR. MCDONALD: Your honor will note by this amendment whenever the 17th Class is shut off above the Midway dam, as must be shut off, all those people at Charleston regardless of whether they have water in the 17th Class or not, that is coming from a different source, and who will take it? Some stranger come along, or a party to the suit, and say to these Charleston people, your 17th Class is gone up above the Midway upper dam, we will take this water. Now, notwithstanding Charleston and these people may have been using it <sup>for</sup> fifty or sixty years.

MR. HATCH: Let me suggest something to you, Mr. McDonald, when the 17th Class is cut off from the people above,-- the people above the Midway upper dam only have this 17th Class so long as people in Utah County Division are supplied with the quantities awarded to them under this decree. Now, the people above are interested in it to this extent, that if the quantity awarded to these three companies is more than a 40 acre duty, the people above would be shut off from their 17th Class right to supply people below, while these people would still be using it on indefinitely, whereas, if they are cut off at equal times and proportions they will each be giving up their portions to supply that in Utah County in case of necessity.

THE COURT: Then, from your statement, Judge Hatch, it would appear to the court when there is no 17th Class water available for the people above the Midway dam, that there would be no 17th Class water below, would there?

MR. HATCH: There might be.

THE COURT: How could there be?

MR. HATCH: It we are compelled to turn down our 17th Class entirely, and not prorate with these three or four people below, we would be shut off entirely, and supply the demands here and they would still be using it.

MR. RAY: Judge Hatch, may I interrupt you?

MR. HATCH: Since their water comes in below. Now, we would be shut off first, and they would continue probably on to the end of the season, if the water was sufficient.

THE COURT: I understood you to say 17th water ceased as a class when the people of Utah County--

MR. HATCH: We are not speaking of the 17th Class as to us.

THE COURT: Wouldn't it as to every one using 17th Class water?

MR. HATCH: I don't know as to the other parties, but their contention is our 17th Class--

THE COURT: I am speaking of your contention now. When the time arrives in the recision of the water to a point when the Utah users are not supplied, then your 17th Class ceases above, that is, your right to use water as 17th Class, that what you say?

MR. HATCH: No, not wholly. We can use a part, pro rata of that 17th Class probably for two or three weeks, but not the full quantity of 17th Class.

MR. RAY: May I make a suggestion. We seem to be perfect accord here, and the stipulation sets forth with particularity what that right is. Now, in the drafting of these findings, what they have done on page 61 is set forth the findings just as specifically as they can. Then in drawing the findings they turn to page 68, but do not vary from the

stipulation at all in any way. Now, what the proposed amendment is, solely an interpretation of the stipulation, attempting to vary it, seems to me. When I talk with Judge Hatch and Mr. Tanner, they seem to be well enough accord on it, and we may leave the stipulation, no quarrel about it.

MR. MCDONALD: I started to make my suggestions several times. We are standing squarely on the stipulation and the original decision, and the proposed amendment varies from the stipulation and the decision. Now, all that we have been saying here, of course, is by way of actual distribution of the water which will probably require evidence, and for that reason we are standing on those documents upon which these water rights were adjusted and settled. These parties took days and days and days in discussion before they arrived at the decision upon which the original decision was based.

THE COURT: You mean the stipulation?

MR. MCDONALD: Stipulation, days and days, and your Honor waited at Heber number of days, and then we came to Provo and some amendments were made, and all parties finally got that stipulation the way they wanted it, and this court based its decision on that stipulation. Now, a decree has been based on that decision, and stipulation, but this proposed amendment would upset the entire thing and take this water from the people in this other division or district, who have used it for fifty years, and give it to somebody else.

THE COURT: I am inclined to think it is a good plan at this time to discuss this matter, because, as I view this proposed amendment, it is merely an interpretation of the provisions of the stipulation, and decision under it. It don't change it any from what I understand the stipulation to be, but your contention is it does change it materially.

MR. MCDONALD: I can see readily it does, and the

trouble that is going to exist by reason of actual complication.

THE COURT: That is the reason I suggest it would be well to discuss it at this time.

(ARGUMENT)

THE COURT: My interpretation of this decree is that the 17th Class water users stand upon an equality so far as their right to the use of water is concerned, and that no one above would be required to turn any water down the stream beyond the reduction that is necessary to apply to all the 17th Class users, and if those below had more than those above, those above would merely hold more from coming down to offset and compensate for the inflow to the stream between the two points.

MR. HATCH: But the inflow from the river to the Spring Creek is a negligible quantity. We are treating the Spring Creek, from which they divert their water, as a branch of the Provo River, and they are diverting water the same as though they diverted it directly from the river, but at a point from which the people above could not divert it. I do not care to take up the time of the court, but I do not think the court understands.

THE COURT: I am sure I don't, Judge Hatch.

MR. HATCH: Now, I will restate it. We will suppose these people in Utah Valley were 20 second feet short of their water. The people at and above the Midway dam were diverting 20 second feet of water under their 17th Class right, not sufficient to supply them in full their 17th Class right, and, as I understand this, and as I understand Mr. McDonald, they would be required to turn their full 20 second feet to supply this right, while the Charleston, Sage Brush and Spring Creek Companies could still continue using the full 40 acre duty.

THE COURT: Where do you find that?

MR. HATCH: It is not put so plainly as I have put it.

THE COURT: Let me ask Mr. McDonald a question. Do you claim your 17th Class water right entitles you to more water of that class than the same water right above the dam?

MR. MCDONALD: No, but what I claim is this, that in this particular district there is water to supply the 17th Class when there isn't any in the First District.

THE COURT: How is that possible?

MR. MCDONALD: Speaking from the way your honor speaks it would be impossible, but the way it worked out there when there is no water to be used from the surface in the upper district--

MR. HATCH: Mr. McDonald is right absolutely as he states it. We dam the river off dry at the Midway upper dam, and there isn't only sufficient to supply us with our awarded rights in a class earlier than the 17th class.

THE COURT: You are not required then to turn any water down?

MR. HATCH: Not at that period, but if we had 20 second feet of 17th Class right, we would be required to turn all that down until these people below were supplied.

THE COURT: No, not all, wouldn't the people below have to give their pro rata?

MR. HATCH: If the decree unquestionably did pro rate it with the Charleston, Sage Brush and all, we would have no objection, but our provision is a provision that the 17th Class rights herein awarded Spring Creek Ditch Company, Sage Brush Irrigation Company and Charleston Irrigation Company

shall be taken at such times only and shall be limited to the same pro rata volume as 17th Class water is available to and is being distributed, as herein provided to the several users above the Midway Upper dam.

THE COURT: Wouldn't that be manifestly unfair?

MR. HATCH: Why?

THE COURT: If there is no water in the stream above the dam to supply your 17th Class rights you cannot have them at all.

MR. HATCH: No.

THE COURT: Then, if there is water coming into the stream so that the people below can get their 17th Class water right, what interest is it to you above there that they shall be cut off and send down the water to somebody below when they are entitled to use it, merely when you haven't the water up there?

MR. HATCH: I am not arguing for the people above the dam.

THE COURT: I will change it then and say what interest have you--

MR. HATCH: I am arguing for the people below the dam in Utah Valley, my clients, but I was illustrating it, these people could retain the 40 acre duty up there for the entire season, and we below limited to our other duties. That is as I read this, when they are all shut off alike.

THE COURT: You cannot shut them all alike, if the water is not above there.

MR. RAY: Your honor, Judge Hatch just advises me I had no interest representing people down here during the later irrigation season because of the tight dam. Now, he is

arguing he is interested in this valley down here.

MR. MCDONALD: I want to call your honor's attention to a further provision of this decree, and bear in mind this was threshed out for weeks.

THE COURT: My views are with you. I would rather hear from the other side.

MR. MCDONALD: I want to call your honor's attention to one further provision in this finding, paragraph 160, I cannot tell what the page is here-- page 89:

"When the quantity of water in said river and the canals of the parties hereto, in the First and Second Districts of the Wasatch Division is insufficient to supply the two districts above named with the full amount of the waters denominated as the Seventeenth Class and prior to June 25th of any year, the said First District shall have the right to its full amount of said Seventeenth Class before the said Second District!"

THE COURT: You are in a different district?

MR. MCDONALD: Yes.

(AFTERNOON RECESS)

THE COURT: At this time, gentlemen, for the information of all of us, if we are unable to finish tonight, when shall we continue this matter?

MR. STORY: Your honor, I have a case set in Filmore Monday, so that it will be impossible for me to be here. I have no objection, however, to any of the proposed changes, with the exception of those which have been read by the Provo Reservoir Company. Then I have a few, so far as we are concerned.

MR. RAY: Mine will be very brief. I cannot be here next week any time.

MR. McDONALD: I suggest your honor could fix it some time after next week. I will be tied up all this coming week.

THE COURT: It appears to be impossible to finish it tonight.

MR. EVANS: I might suggest, if it is not taken care of next week, I could not be here for considerable time.

MR. BOOTH: Judge Hanson will hold a session in Vernal, that is, leave here on the 5th.

MR. HATCH: I can be here any time, so far as I know.

THE COURT: Do you think it is possible to finish tonight if we hold to say half past five?

MR. RAY: I don't want more than ten minutes for the clients I represent. We are willing to submit Objection 16, as far as we are concerned.

MR. HATCH: We have a stipulation with these people, and I think it is in the record-- I don't know-- but we have an agreement with them, in any event, signed by the Sage Brush, as stated to me by Mr. Murdock, just in accordance with this provision we have suggested, and I think that the provision is the spirit and intent of the finding. There was one matter that I did call the attention of the court to, that is, that a 40 acre duty is not a necessary use from our standpoint, in any season of the year except for the purposes of storage up there, using it for reservoir purposes, and we have an application here for 150 second feet of water, and we think this 40 acre duty should not be continued indefinitely. It ought to be restricted and limited as to all of those people by reason

of its being not a necessary use during the entire season, and that the storage purposes obtained after certain seasons of the year is not available to anybody below, and we feel they should all be restricted to the same time and same point of this pro rata of the 17th Class water, where it is diverted above the head of the canyon.

THE COURT: I see no reason for doing that. I cannot see any foundation for your argument, and if the physical conditions are such that the users above the dam cannot get the water why you should make that the reason the others entitled to it below should be cut off; I see no justification in it, that is, your statement here.

MR. HATCH: The people above cannot get it, but the people below can use it as long as we are supplied with our 150 second feet under our application, and our 70 acre duty, we haven't any cause to complain.

THE COURT: If you are not, you have no cause to complain.

MR. HATCH: We think so.

THE COURT: I don't think so. This proposal may go out. I do not think it should be put in.

MR. RAY: Is it understood then, your honor, the Provo Reservoir Company amendments as allowed will be embodied in the decree amended?

THE COURT: Yes.

MR. RAY: May I then, on behalf of the designated parties to this action, suggest just one further amendment to the decree and to the findings. I have in my objections, which are set forth in the files, raised the question solely for the purpose of the record as to the Blue Cliff right. I do not care to present that at this time, except to that effect,

as I don't suppose your honor cares to hear argument on that.

THE COURT: No.

MR. RAY: The other amendment is paragraph 127 of the decree. I move it be amended to read as follows:

"It is further ordered, adjudged and decreed that said commissioner appointed by the court shall be appointed by the court each year for a period of one year. That the court shall give notice each year at least ten days in advance by publication in a newspaper published in Utah County, and a newspaper published in Wasatch County of the date upon which such appointment shall be made. At the time of such appointment the salary of the Commissioner and the number and salary of his deputies where practicable, shall be fixed.

Said Commissioner shall receive, until the further order of the court a salary of Three Thousand Dollars per annum, together with reasonable allowance for office rent, stationery, postage, telephone service, and actual and necessary traveling expenses, payable in quarterly installments by the Clerk of this Court from money deposited with the clerk of this court by the parties for that purpose."

The only thing I ask there, your Honor, is notice be given not by service, but by publication in Wasatch County and here of the date, and his salary be fixed that time.

MR. HATCH: We object to that, if the court please. We think the commissioner should be appointed and his term fixed at once.

MR. RAY: We want him appointed at this hearing for the coming season.

MR. HATCH: That he should hold his office until such time as some one shall make application for the appoint-

ment of another commissioner.

MR. RICHARDS: Provo City joins in the suggestion made by Brother Ray. We have the same objection on file.

THE COURT: Did you file a copy of your objection?

MR. RAY: Yes, your honor.

THE COURT: Now, I will hear from you, Judge Hatch. Mr. Ray, the last proposition is to insert at the end of paragraph 117 the suggestion with reference to the commissioner being directed to proceed. The proposed substitution was adopted of the plaintiff, with the understanding it was to be taken care of by something of this kind. I think probably this would be the proper time to include that.

MR. RAY: May I make my suggestion why I propose the other in here. There are a great many small users here, they are distributed over a broad territory, the commissioner is appointed for a year, your honor can readily understand a man might not want to protest against a commissioner, or constantly come to the court with complaints, if the court would fix a definite day on which those things might be met. A satisfactory commissioner would go on year after year. This is not a protest against any present commissioner, it is my proposition on behalf of my clients to ask for the continuance of Mr. Wentz. He is the man we want, and so long as he is available, I think we will want him, but I think it is a matter of protection to everybody, a matter of deputies and salary.

MR. HATCH: I withdraw the objection interposed.

THE COURT: Then the proposed substitution or amendment to Section 127 is adopted.

MR. EVANS: How about this year?

MR. RAY: Oh no, Mr. Wentz will be appointed for

this year as far as we are concerned.

MR. EVANS: Won't we have to give notice to the takers?

MR. RAY: Of course not. Mr. Wentz may be appointed now for a year.

THE COURT: Now, the order in which they are indexed, first Provo Reservoir Company's suggestions, second, Provo City. Provo City comes next. I think I will take them up in that order and see if we can dispose of them all this afternoon.

I do not think I made any order with reference to the commissioner proceeding to determine the loss. That is 117. I think unless there is some particular objection to it, I will approve the suggestion made in the third paragraph of Mr. Ray's suggestion here, unless the language should be changed some.

MR. RAY: To be added to the amendment as suggested by Judge Hatch.

THE COURT: To be added to that section as amended.

MR. HATCH: That the expense should be borne-- ✓

THE COURT: No, the matter of expense is eliminated. That may be adopted.

MR. RICHARDS: I wish to suggest to the court the fact it appears here Judge Booth is one of the defendants in this action, and I understand he has departed this life. I was wondering whether provision had been made for substitution and also whether or not there may not have been a similar occurrence with some of the other defendants, whether there is any provision made for checking up on that point.

MR. RAY: In that connection may I ask the name of

Ray & Rawlins be entered as attorneys or associate counsel for the names of the people appearing in our notice of intention to move to modify the findings. There is a long list of names there.

MR. RICHARDS: It seems to me that ought to be cared for by someone who has knowledge, because there are probably quite a few,

There is a clerical error, I take it on page 28 of the findings, next to the last line, "This is the first litigation that has been made"; I take it that is not the word intended, I don't know whether it should be "had".

The first suggestion by way of amendment we offer is to the 56th paragraph where it sets out the divisions and districts, counties in which those districts are located, and the division should be stated. For instance, Provo Division shall include all that area below and including what is known and commonly called the Wright Ranch. That is definite enough for people who live near that ranch, but it seems to me we should state the county in which the ranch is situated, same with the district. Then the first district, where the Hailstone Ranch is would show the same, and the Third District. I offer those as amendments.

THE COURT: Those amendments may be made.

MR. RICHARDS: Now, in Finding No. 58, Provo City (a) from May 10th to June 20th, duty 57, on page 30, I think the word "acres" should be inserted after the word "57", and I think the word "acre" should be following the figures all through the decree.

MR. EVANS: If we follow that rule out it would necessarily involve the re-writing.

MR. RICHARDS: No, the pen could be taken. If it means acres it should say acres.

MR. BOOTH: Where it states in the beginning of that subdivision there are 2,058.6 acres of farm land and states duty of 36.12.

MR. RICHARDS: My notion is we ought to use the word "acres" there, and I think it should be as to each of the others. I should like to have it so far as it affects Provo City.

MR. BOOTH: If you are going to be particular you should say 57 acres to a second foot.

MR. HATCH: The paragraph above covers it. I think it is as clear and certain as it could be made.

MR. RICHARDS: Have you any objection to the adding of the word "acres" after each of the five entries?

MR. HATCH: If I felt it would add anything to the certainty of the paper I would not have, but I do not think it adds anything, simply makes a lot of unnecessary work.

THE COURT: I will suggest this, if it is deemed of sufficient importance to add the word "acres", the object can be accomplished by a third paragraph, one or two lines, which sets forth where duty is referred to the figures represent the number of acres of water, rather than go through the decree from beginning to end.

MR. RICHARDS: I have no further interest except in the five items here.

THE COURT: I understand, but if it is changed in one, it should be changed in all. That might be inserted at some proper point, just an indication what the figures after the word "duty" mean.

MR. RICHARDS: That is satisfactory to us.

THE COURT: I take it Mr. Wentz will redraft these,

and you will take note putting in a paragraph of that kind.

MR. RICHARDS: The next one is substitution for a re-draft of subdivision "e" on page 30, to make definite and come within the requirements of the decision, and this substitute is offered:

"That said defendant Provo City has appropriated, and has the right to collect by its pipe line and waterworks system as now located and constructed in Provo Canyon, Utah County, Utah, and is entitled to divert into its said waterworks system and to convey and use for domestic and municipal purposes at Provo City and adjacent thereto all of the waters of South Guard Quarter Spring, which arises in a ravine above the flume line of the Utah Power & Light Company, and below the ditch known as the Johnson Ditch, situated in the southwest quarter of Section 33, in Township 5, South of Range 3 East, of the Salt Lake Base & Meridian. Also all of the waters of all springs arising between the county road, as now located and used, and the flume line of the Utah Power & Light Company and down from the county highway bridge crossing said river near the mouth of Bridal Veil Falls to the west line of the northeast quarter of Section 5 in Township 6, South of Range 3 East of the Salt Lake Base & Meridian; excepting therefrom, however, all of the waters of Maple or commonly called Yellow Kacket Spring, measuring about one-fourth of a second foot."

THE COURT: Any objection to that?

MR. HATCH: Yes, your Honor. The stipulation provides as follows, copy of transcript page 4159, Volume 9:

THE COURT: Gentlemen, have you something to offer at this time?

MR. EVANS: If the court please, after conference between the plaintiff and defendant Provo

City, the following agreement has been entered into:

'It is stipulated by and between the plaintiff and the defendant Provo City as follows:

First, The court shall make and enter its findings and decree awarding to Provo City all the waters arising and flowing from the springs in Provo Canyon claimed by the defendant Provo City, and flowing into its pipe line and waterworks system, except the waters of the spring referred to as Maple or Yellow Jacket spring, which was taken into the Provo pipe line and water system in the year 1914, or thereabouts, and which has an approximate flow of one-fourth of a second foot.

Second. The court shall find and decree to Provo City 16.5 second feet constant flow of the waters of Provo River flowing in and through the Factory Race.

Third. The defendant, Provo City, withdraw and waives its objections to classification of waters of Blue Cliff right in the proposed decision of the court!"

Now, this goes much farther than the stipulation, and would permit them, as we understand, to take all the waters that are awarded to us which find their way into the Blue Cliff Canal at a point below where they have diverted water, and waters that they never have had in their pipe lines. It is broader, embraces every spring down to a certain point, whether they have ever used it or not. We conceded all of those springs that they had then in their pipe line, other than the one spring, and the other springs go to make up our quantity of the waters of the Blue Cliff. That is as I understand it, and paragraph "e", subdivision "e" of this paragraph, covers the stipulation

in the case as we understand it, and the paragraph they propose to substitute for "e" would be a violation, we we believe, of the stipulation, and is not in accordance with the findings of the court in the tentative decision. The decision fixes the matter, the decision gives them a certain quantity of water.

THE COURT: The decision did not include these matters, they were stipulated afterwards.

MR. HATCH: These were stipulated afterwards, and subdivision "e", as we take it, is in conformity with the stipulation, and ought to remain.

MR. RICHARDS: May it please the court, this matter was threshed out, your honor will remember, at length, and if you will permit me, I will read from the record, which will bring us briefly to it. As Judge Hatch has read, I will now follow from that. Mr. Jacob Evans stated the stipulation, when he concluded I made this remark: "That is correct, your Honor", then:

" MR. A. C. HATCH: I understand that it goes a little farther than that too, and you withdraw the objection that you may have as to the award made to the plaintiff as to the Blue Cliff right?

MR. C. C. RICHARDS: I don't know that is right, that has not been suggested.

MR. A. C. HATCH: That was part of the discussion I made when I was in there, to withdraw your objection in any--

MR. C. C. RICHARDS: Any objection we have made, and all objections we have made, we withdraw and waive.

MR. A. C. HATCH: And they are no longer--

MR. C. C. RICHARDS: And we do not expect to

raise those objections or renew those objections. We use the word 'waive' there for that purpose to cover.

THE COURT: That seems to be broad enough.

MR. JACOB EVANS: I might suggest, if the court please, that the two paragraphs of the stipulation which were discussed--

MR. A. C. HATCH: There is another matter, just a moment until I get through.

THE COURT: Let me ask if I understand what you mean, so that there will be no misunderstanding about the stipulation. In the second paragraph, 'the court shall find and decree to Provo City 16.5 second feet constant flow of the water of Provo River, 'then you say' flowing in and through the Factory Race!

MR. EVANS: That was intended, if the court please, to substitute the figures.

THE COURT: I understand there is a substitution between the 13 and 16, but the flowing in and through the Factory Race may be construed as being limited to what is now flowing in the Factory Race.

MR. C. C. RICHARDS: No, our idea was to be river water,

THE COURT: I understand you to mean the flow of 16.5 is to be taken into the Factory Race.

MR. EVANS: In other words, 16.5 is substituted for the figures 13.75.

THE COURT: So I understand it, this is not descriptive, it is merely defining where it is to be taken.

MR. EVANS: It is the power right water."

THE COURT: I understand the objection is not what

you refer to, but the objection is you have included some other springs.

MR. RICHARDS: Are there any other springs? I understand not, it is not intended to include any other.

MR. HATCH: Oh yes, there are springs all along our Blue Cliff Canal that seep in and go to make up three or four second feet of water, remainder of our fifty feet we take from the Provo River.

MR. RICHARDS: Can you designate what they are?

MR. HATCH: No, because they are not named, drifts and seeps and flows along the bank there into our canal, and under your proposed amendment it would entitle you to take all of them and will divert them into your pipe.

MR. RICHARDS: It is not our purpose to take any of your springs, simply take the springs we have been taking and use that water.

MR. HATCH: The other fixes it definitely.

MR. RICHARDS: No, there isn't definiteness enough there, it should be necessary for us to name those springs.

MR. HATCH: And you are limited then to a certain quantity in your pipe line by further agreement entered into here.

MR. RICHARDS: This is the last agreement we have. Let me read the conclusion of it.

"MR. HATCH: There is another matter, they also have an objection to our amending our complaint as we have set forth. I understand that is also--

MR. F. S. RICHARDS: No, we have not made any objection or expressed any opinion on

at all, that matter don't come up, I understand, until the next time.

THE COURT: I understand he merely asked whether he would have an opportunity to be heard.

MR. EVANS: I want to say if they are going to object to us amending our complaint so as to make it conform to the proof that has been offered, which was the purpose of that amendment, or if they are going to make any objections or retard us in proceeding with the trial of this case, then it was not our understanding that this stipulation which has just been read is to be of any binding force or effect upon us.

MR. RICHARDS: MR. Evans, we have not given your amendment the slightest consideration. You proposed it, and for ought we know it to be entirely satisfactory. This wipes out two of the four points of difference.

MR. HATCH: Not necessarily.

MR. EVANS: If it is not satisfactory, we want it understood now.

MR. RICHARDS: What other differences have we with you?

MR. HATCH: There are technical objections that might be raised to defeat our Blue Cliff claim, and we do not at this time propose to be put into a position whereby the parties may take advantage of any technicality in order to attempt to defeat such claim as we have established by the proof.

THE COURT: Now, I understood they waived all objection to your Blue Cliff claim, that is the way I understood it.

MR. HATCH: And that, if the court please, might be as set forth in our original complaint.

We are now before the court proposing to amend.

MR. RICHARDS: We are referring to the proposed decision, that the change in his proposed decision is to classify you as a primary instead of secondary right. I used that term, and the objection was made to that.

THE COURT: You withdraw that?

MR. RICHARDS: I withdraw it and waive it. That is what we mean by this, and think we have told it in plain language.

THE COURT: It seems so to the court.

MR. EVANS: Let it be understood then the City, through their attorneys, or otherwise, at the time the question comes before the court as to whether or not we will be permitted to amend our complaint is heard, object to it, that amendment, that this stipulation as now made and read into the record may be withdrawn. In other words, we understood as far as we were concerned all objections in this matter were being withdrawn, they would no further retard us.

THE COURT: The court will not hear you upon the application to withdraw this stipulation, neither will I hear them upon any objection to the Blue Cliff.

MR. RICHARDS: Let us be frank. This was written and read and read by you, so that we all knew before we come in what it meant. It is not our purpose to change it.

MR. WEDGWOOD: It is the spirit of the act and intent.

MR. RICHARDS: We are not hear to play<sup>fast and</sup> loose with our language."

Now, it seems to us perfect faith has been kept with these people, and it was agreed the water of those springs should be awarded to Provo City, and we are simply putting it in such shape it will be definite enough to answer the requirements of the Supreme Court as to quantity.

THE COURT: The objection is you have included springs that are not in the stipulation. I don't know about that.

MR. RICHARDS: I don't either.

THE COURT: What springs, Judge Hatch, or Mr. Evans?

MR. HATCH: They are not named. The court has been by the Blue Cliff line of the canal and saw the condition that exists there.

THE COURT: I don't think you understand me, what springs do you contend were included in the stipulation?

MR. HATCH: Every spring they had then flowing in their pipe line.

THE COURT: What were those?

MR. HATCH: I don't know, but I do know there were some springs that would be included within this proposed amendment, they did not have flowing in their pipe line, and that is my objection to it, and their amendment would give to them those springs within the area, whether they were flowing in the pipe line or whether they were not any time.

THE COURT: That would be true of the findings as prepared, as far as they go, wouldn't it?

MR. HATCH: I don't think so. It says all those waters now flowing from springs into said waterworks system.

THE COURT: And the springs and water to which the

said defendant Provo City is entitled and more particularly described as follows: The spring known as the South Guard Quarter Spring, which arises in a ravine above the flume line of the Utah Power & Light Company and below the ditch known as the Johnson Ditch.

MR. RICHARDS: I have no objection--

MR. EVANS: If this designates all the springs you have taken into your pipe line, then why do you add some other springs?

MR. RICHARDS: We do not understand we have. I have no objection to this going in, we except the Yellow Jacket Spring and any springs arising in the Blue Cliff canal, if that is the bone of contention, any springs except what we are already connected with.

MR. EVANS: This stipulation was made with a view of limiting the city to the water they had taken in their pipe line. We conceded a great deal at the time we made this stipulation, we gave them a great deal more water than the court had awarded to them, by saying they might have the water taken into their pipe line. Now they come back and want more than what we conceded.

THE COURT: The difference between you is a question of fact, I take it, as to what was being taken into the pipe line at that time. They are protesting they do not want any water at all except what was taken in at that time. That is an indefinite and uncertain designation, to say water taken in at that time without some description.

MR. HATCH: We have no objection to the description the court had.

THE COURT: If it can be designated, the springs that were supplying that.

MR. EVANS: They say all water arising in the springs between the county road and the flume line of the Power & Light Company. They do not say the water they have taken in.

THE COURT: That is your presentation.

MR. RICHARDS: I remember there was very serious contest over fifty feet of water in the Blue Cliff canal that they were anxious to get out of the way, and we stipulated.

THE COURT: I understood so, there were concessions on both sides.

MR. HATCH: We have no objection to their having all they had in their pipe line at the time, and to their defining what it is, making it definite and specific, but we do not want the particular proposition laid down-- I understand they had exact surveys and measurements and plats of all of the waters they have appropriated and diverted into their pipe line.

MR. RICHARDS: We took days at that, and it culminated in this stipulation. We were told not to waste time of the court to prove title. If your honor wishes me, I can put my hand on it in a few minutes, where one of two of the gentlemen, I am not certain whether Judge Hatch or General Wedgwood or Mr. Ray insisted we should not take time, and finally the court said perhaps we wanted to make a record against the other defendants not here consenting. I said that is exactly what we want to do, so as to make the record, and we run through our proof hurriedly. Now, this matter was absolutely agreed. Now, I have no objection to excepting anything that raises ~~objection~~ above and flows into the Blue Cliff Canal, or rises in the Blue Cliff Canal.

THE COURT: Is that satisfactory to you, if there is excepted all springs rising above and flowing in or rising in the canal?

MR. HATCH: I think there can be no objection to it.

THE COURT: Then this will be adopted, if you will so amend it to make that plain.

MR. RICHARDS: That is all spring rising above the Blue Cliff Canal which flow into the canal, or springs arising in the canal?

THE COURT: Yes.

MR. HATCH: Just a moment, if the court please, it seems I wholly misunderstood my clients here in regard to their acquiescence in that matter, and if the court will permit me I will ask to withdraw it.

THE COURT: You may withdraw your consent. The court adopts your substitution with that exception.

MR. RICHARDS: I just learned I made my statement a little too broad. It seems some of the springs that we have had connected up all the time are above the canal, so that the exception of all springs above would cut off some that are already in, and were at the time connected up with our system, but the exception could be made there of all that had not been.

THE COURT: If you noticed the language of the court as to the exception, I think it would cover what you want. The exception was all those springs arising above and flowing into the canal or those arising in the canal.

MR. RICHARDS: Of course, our <sup>water</sup> ~~works~~ would not be flowing into the canal.

MR. EVANS: I take it you have taken no additional springs in since this stipulation was made?

MR. RICHARDS: I understand nothing.

MR. EVANS: And you don't intend to take any other

additional springs in or develop the springs already taken in, so that they shall flow a greater quantity of water. What you intend is take the water you had at that time.

MR. RICHARDS: We intend to take the water flowing from those springs.

MR. EVANS: Do you intend to deepen them?

THE COURT: The court is not interested in that, Mr. Evans. That is a matter you will have to determine when it comes up.

MR. RICHARDS: Just a clerical suggestion, finding 92 subdivision "b", first line, page 49, after the words "Sego Irrigation" the word "Company" ought to be added.

Our next objection, 156 is covered, the annual appointment of a commissioner.

Now, at page 91 of the findings, 169, the assessment to the power users, in the opinion of the city, is disproportionate to the amount that should be assessed, I do not presume to state what they should be, but the intimation is the amount suggested is disproportionate to the amount and service rendered, and they should be increased.

Then the changes in the decree will be as stated in our suggestions, and to comport with the amendments to the findings.

MR. HATCH: What did you suggest as to the findings as to payments, 169?

MR. RICHARDS: The suggestion is made at the instance of my clients, in the making of the assessment a larger sum should be charged against the power users than the figures named. Just what it should be--

MR. HATCH: You think Heber City Mills ought to be charged more?

MR. RICHARDS: Yes, because of the service they are

getting disproportionate as to the charge of the farmers.

MR. HATCH: They get no service from the commissioner, or any other person, except the distributing of waters for irrigation purpose to the Wasatch Canal.

MR. RICHARDS: Isn't that service, isn't the supervision of the commissioner on the whole river service?

MR. HATCH: This is not on the river. It is six miles from the river, and the water is simply applied for power purposes as it is used by the canal company, needs not to be measured at any time by the commissioner. And as to Joseph R. Murdock, who doesn't use the water at all, and has not for several years, and may never use it, he pays seventy-five cents a quarter, \$1.50 a month, whatever it is, it is 169. It may be some power users ought to be taxed more.

MR. RICHARDS: I do not suggest going into the details, but call the court's attention to that, however, and leave it with the court.

THE COURT: Without more information than I have, I would not be able to say whether it is proportionate or disproportionate with the assessments made.

MR. STORY: I suppose it is based more or less on the experience the commissioner has had in the distribution of the water, and this is assumed to be a fair proportionate charge based on that experience.

MR. RICHARDS: Let me suggest this then. Our suggestion is inadequate, and I refer your honor to the commissioner as the best evidence what is being done between the different users, and leave it there. In other words, I am willing to leave our objection to the court and let the court inquire of the commissioner, and take such action as the court deems proper.

THE COURT: Are you willing to do that?

MR. STORY: I don't know, your honor. I have no objection to the court getting all the information he can, but to say I am going to consent in advance-- this is what we have been objecting to all along, we think it is high.

MR. HATCH: These figures were fixed, we think, before the commissioner had the experience he now has. I think the suggestion of Brother Richards is proper.

THE COURT: If satisfactory, I will consult with the commissioner, and get what information I can from him, and make the adjustment accordingly; that is according to my judgment, after getting the facts from him. I have no idea what proportion this represents, nor how it compares with the other large users of water.