

MR. STORY: Your Honor pardon me just a moment. So far as the Utah Power & Light Company is concerned-- that of course is the object of the discussion I presume-- the only controversy there ever is so far as their rights are concerned is between the Provo Reservoir Company and itself. In other words, those are the two rights between which the water flowing in the river must be divided. We do no conflict with any other users. Now, it does not take any more time, I take it, to regulate that particular headgate than it does the headgate of any other ditch upon the stream, and particularly the ditches where they do conflict with many other rights. We feel that we have been paying-- I say it in all frankness-- more than our just share. On the other hand we have been ready to pay it.

THE COURT: Is this the amount you have been paying, one hundred and eighty dollars a year?

MR. STORY: Yes, we are willing to continue but don't want to have it increased. We do not think it would be at all fair to increase it.

MR. RICHARDS: . It has been suggested by way of comparison Provo City is paying fifty-two dollars a month for its service as against fifteen on the part of the company. My clients suggest a disproportion there.

MR. STORY: Yes, but they conflict with vastly more rights than we do. That is why they have to have much more regulation than we do.

THE COURT: With the information I have before me-- I understand the Power Company objects to it being done that way-- with the information I have before me, I will have to say I have no basis on which I can make any change. I do not know anything about the situation.

MR. MCDONALD: Your Honor please, I was going to suggest-- in fact I did not know an opportunity would be given at this hearing for this.

THE COURT: This is a matter, gentlemen, I think comes in connection with and should come in connection with, the appointment of the commissioner. The court will appoint a commissioner at either this session or immediately after it at a session for that purpose, and at that time the compensation of the commissioner, and the method of raising it and expense of the commissioner, of course, will come up all together.

MR. MCDONALD: That is what I have advised the people of Wasatch County. They were prepared to come here and make a showing, but did not think they would be listened to at this time, and for that reason have not presented it at this time.

THE COURT: I will make no change in this at this time. However, I think if this is carried into the decree it should be carried into it in different language. I suppose it is, and it should be, until the further order of the court. It should not be a positive statement like this is, fixing the amount without change.

MR. BOOTH: Section 130, at page 75.

MR. STORY: You mean, shall be as follows until the further order of the court?

THE COURT: Yes. When this matter comes up in connection with the appointment of the commissioner it shall be open at that time to be fixed.

MR. MCDONALD: I would like to inquire at this time the pleasure of the court relative to hearing an item which is one of itself. The Midway Irrigation Company and

Wilford Van Wagonen are asking the court to amend a certain paragraph of the language of the decree for the reason they are not parties at all to the Provo River system; certain of their waters do not reach the river and I understand Mr. Wentz does not give them any service, and they are charged up with regulation of the system, and they have filed motion and served a notice. If you Honor cared to take it up I could call attention to it now; or it could be done at the time.

THE COURT: It is merely with reference to the proportion of this expense heretofore charged to them?

MR. MCDONALD: Yes.

THE COURT: I would prefer to take it up at the time we take up the matter of the appointment of the commissioner, if we can dispose of these other matters first and get them out of the way.

MR. HATCH: If the court will permit a suggestion, in preparing the decree, the court put in such changes in this section as it shall determine will be right for the current season.

MR. MORGAN: May it please the court, calling attention to the decree, paragraph 131, providing for a commissioner to distribute the waters in the most economical way to prevent waste, and it shall appear that combining the flow of a number of parties and giving each of them an equivalent quantity with a proper sized irrigating stream for a period of time at reasonable intervals commonly called the rotation system, thereby effecting a saving of water, and at the same time meeting the full necessities of the users, that the commissioner may do so, and any party may at any time petition the court to modify or change the method of distribution of the quantity of water herein

awarded upon written application to the court. Now, the Upper East Union Irrigation Company has filed a motion to have the court provide for a distribution by the rotation system, so far as their canal is concerned. It seems the Faucett Field people take water through that canal, and a certain amount of water is awarded to the Faucett Field Ditch Company, and a certain amount of water is awarded to the Upper East Union Irrigation Company. I would like to inquire whether the court at this hearing or adjourned hearing, will take up matters of that kind?

THE COURT: Do you represent all these parties?

MR. MORGAN: I represent the Upper East Union, and I understand there are some objections. The decree provides oral or written testimony may be offered. We will prefer to offer oral testimony.

THE COURT: I hardly think we will have time to take it up this hearing.

MR. MORGAN: We are not anxious about it now, but like to know whether the court would hear that matter now. We think now is the proper time to hear it. The parties are all before the court and the presiding judge of the court is not familiar with the facts, and we believe it will be much more economical to distribute this water on the rotation system rather than distribute it by the cubic feet per second, as decreed by the findings and decrees.

MR. HATCH: That I take it would be left to the Commissioner to do so without an order of the court.

MR. MORGAN: Yes, it is left to the commissioner, but the decree provides the parties may ask that the court do it now.

MR. EVANS: Will it involve the taking of evidence?

MR. MORGAN: It would if there was objection.

MR. RAY: The Faucett Field would object to it.

MR. HATCH: I would suggest we dispose of this decree as it is, and then take that up as provided in the decree as a separate matter. It is prolonging this matter until probably we will never get a decree, and we are anxious to have the original case disposed of at some time, and under this section or paragraph that is a matter that can be taken up at any time on application to the court, and I think we ought not to delay the closing of this case.

THE COURT: I think we can take it up at the time the other matter comes before the court.

MR. STORY: Your Honor, would you permit me to make some objections at this time? They won't take me a great while, and I cannot be here Monday.

THE COURT: You are next on the list.

MR. STORY: Section 82 of the findings, on page 84-- the first question, or first objection we make really relates to the question of irrigation season. That we have already discussed somewhat. The specific objection is that the paragraph does not fix the period during which the water therein mentioned may be diverted and used by the said appropriator. That is relating to the John D. Dixon right. And this defendant further objects to the said appropriator being granted the right to use water during a longer period than that during which the same was used for irrigation purposes at the original point of diversion, to-wit, between the 15th day of April and the 15th day of September of each year; and this defendant suggests that the sub-paragraph be modified so as to restrict the use of the water to the said irrigation period. Of course, if the irrigation period is fixed governing all the rights covered by the decree, it would

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automatically cover that one too. There is just this specific difference between this and the other rights, namely that this is one of the rights which has been transferred down the river. Of course, it was used for irrigation purposes at the old point of diversion during certain definite periods of time, we will say between April 15th and September 15th, and after that the water was permitted to flow down the river and used by the Power Company. Now, having changed it down the river, certainly would object to having the period of use enlarged to our detriment. However, as I say, if the irrigation period is fixed, as I certainly think it should be, governing all the irrigation rights under the decree, then it would automatically take care of that.

MR. RAY: Whenever the question of fixing irrigation season is open, I want to be heard.

MR. STORY: So if your honor will permit me to pass that a moment, I will take up one or two others. In sub-paragraph "b" of Section 87, which is the section relating to the Utah Power & Light Company's rights, the period during which the water may be used is not fixed.

THE COURT: That is the Lost Creek water?

MR. STORY: Lost Creek and Bridal Veil Falls. Of course, they have used that water throughout the year, same as from the river. I think it should be made co-extensive with the annual period January 1st to December 31st.

THE COURT: Any objection to that amendment?

MR. STORY: Page 46, sub-paragraph "b", section 87, that is certainly in conformity with the testimony, your honor.

THE COURT: Do I hear any objection?

MR. HATCH: We have no objection.

THE COURT: The amendment may be made. I have

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interlined it.

MR. STORY: Now, your honor, the next objection I wish to make is a very small one, relates to the limitation placed upon the power rights, section 87 of the findings, section 33 of the decree. The section at the present time uses the word "substantially" and "substantial". In other words must be so used as not to substantially interfere with the natural flow of such water, and thus cause substantial fluctuation in the flow thereof. Now, I take it the word "substantial" when used in that connection means to any large amount. Obviously you cannot avoid substantial fluctuation when you turn the water out of your flume and turn it back in again. It seems to me that the question is whether or not we unreasonably interfere. The word "unreasonably" has quite a well defined legal meaning in matters of that kind. I may not so use my rights as to unreasonably interfere with the rights of another appropriator, and it seems to me it should be changed so as to use the word "unreasonably".

MR. EVANS: Why not strike out the word "substantially" and let it read "so as not to interfere".

MR. STORY: I may interfere to a certain extent, it cannot be helped, the use by one appropriator naturally interferes with another. The question is does he reasonably interfere.

MR. RICHARDS: On behalf of the City we shall have to object to the change, and call attention to the Chidester decree which awards the water as follows: "That the Telluride Power Company has no right to impound the waters of Provo River so as to interfere"-- not unreasonably interfere, or substantially interfere, but so as to interfere with the natural flow thereof-- etc. (Reading)

MR. STORY: Injuriouly I suppose contemplates unreasonably.

THE COURT: I don't know if there was any evidence on that subject in this case. There has been quite a lot in other cases, that it is possibly to operate a power plant without substantial fluctuation.

MR. RAY: There was a lot of evidence taken in this case.

THE COURT: There has been evidence that it is possible to operate then without fluctuation, and I understand the law to be their rights are subject to that limitation, they must not operate them, ^{so} to as make a substantial fluctuation which will interfere with the use of the water by other users.

MR. RAY: You will remember in the trial of this case we introduced evidence relative to the intake of the Timpanogos and Provo Bench, control of the gate and forebays things of that sort, for the purpose of preventing the fluctuation caused by the shutting off of the water, and Mr. Wentz was sworn as a witness.

MR. HATCH: Considerable evidence taken on that point, and the question of substantial was, as I understand it, used.

MR. RICHARDS: Our idea, this decree having been in force for fourteen years last month, the Chidester decree, there isn't really any proof in this case, or fact presented, reason or justification for changing it, and simply shifting to another basis which may go from one of fact to one of law, whether it is reasonable or unreasonable. It is inviting complications. As far as the city is concerned, we would prefer to avoid it.

MR. EVANS: I think this decree was introduced in evidence, and in this decree is a stipulation between the

Telluride Power Company and City which prevents them from interfering with the fluctuation of the water there, so that there is evidence in the record upon which to base the word "substantially".

MR. STORY: I do not think there is any very great difference between us. I do not think the Power Company has the right to unreasonably interfere with another man's right. The only question is, can we express it more accurately with one word than the other. I feel we express it more accurately with the word "unreasonably".

MR. HATCH: Of course, we insist the word "substantially" is definite and certain, and word "unreasonably" leaves it open.

THE COURT: The word "substantially" is the term usually used in reference to power rights, so far as my experience has gone. I think it may remain in.

MR. STORY: And that will carry with it the denial of the sixth objection to the findings and decree.

Now to sub-paragraphs "a" and "b" of Section 88. That raises the same question that is raised in the first objection to the Dixon right, in other words, the time during which the water may be used by the Provo Reservoir Company.

MR. RICHARDS: That was amended I thought.

MR. STORY: May have been amended, but not in this particular. At the time we have this section 88 under consideration, I did not know your honor desired to take up other objections to the same section, but the question of irrigation season enters into that and raises the same question as the first objection, so for the time being, I will pass that.

MR. HATCH: Not as to time .

MR. STORY: Yes. However, if the irrigation season is fixed by this decree, then of course it will automatically cover that point, same as the Dixon right, but we certainly object to you taking the water at the headgate and enlarging the period of use, and we think it should be definitely fixed.

If I may go on to the next and last objection, your honor, except those that are involved in the irrigation period, we object to Sections 92 to 98, inclusive, and Section 100 of the findings, and sections 38 to 44, inclusive, and section 46 of the decree.

MR. HATCH: Give us the page.

MR. STORY: These are the sections relating to an adjudication of rights based upon applications filed in the office of the State Engineer, which have not as yet reached the point where a Certificate of Appropriation has been issued by the State Engineer. In other words, these particular paragraphs merely hooked an inchoate right, and we object to the wording of the sections as they are drawn.

MR. EVANS: Have you any suggestion how they should be worded?

MR. STORY: Yes sir, just a moment. My suggestions are as follows: Object to them in so far as the same find and adjudicate that the several appropriators named in said paragraphs are entitled to complete the appropriations therein mentioned, and to make final proof thereof, and as to what the rights of the said applicants shall be, if and when the said appropriations shall be completed, and suggests that each of said sections as now drawn be changed by striking the following words at the end of the first paragraph thereof, viz.: "and is entitled to complete said appropriation and make final proof thereof", and by striking from the second paragraph thereof the following word, viz.:

"from year to year and time to time under"; and substituting therefor the following: "during the period of each year covered by." And by striking all the last paragraph thereof, and substituting in lieu thereof the following:

"Provided, however, that the priority and amount of this appropriation is conditioned upon compliance with the terms of the application upon which said appropriation is based, to-wit, application No. _____ filed in the office of the State Engineer of Utah, and the same is subject to the provisions of the laws of the State of Utah governing the issuance of certificates of completion of appropriation by said State Engineer."

In other words, I take it this court does not intend at this time to adjudicate anything more at the very most than what the present status of that inchoate right may be, and I wish to avoid, if possible, in this decree anything which by any possibility may hereafter be taken as an adjudication of anything that is to be done in the future, because some very important rights as between the parties to this litigation may hinge upon a decree of that kind, so that we suggest each of said sections as now drawn be changed as suggested.

Now, that does give them, if the language is used I have suggested, it gives them an adjudication at a certain time they have this right, but it does not in any way adjudicate anything in futuro, and lets it be very definitely understood there is no intention in this decree to adjudicate anything, the rights of the parties with reference to ~~a matter~~ making final proof in the office of the State Engineer, or anything which would be binding upon the State Engineer in his final determination.

THE COURT: The view the court has, this court has no right to go beyond the mere fact of determining the priorities

of these various applications; in the event they proceed and perfect their right by complying with the laws of application, and merely find the laws have been complied with up to this time. If it is intended to do anything beyond that the court should not do it.

MR. STORY: I am afraid the language used in the findings and decree as now drawn would have a different construction, because they certainly relate and cover acts in futuro.

MR. HATCH: The way I read this is they may from time to time as they have complied with this use the water under these applications; that they have made applications that were in good standing at the time of the hearing, and by complying with the law, they are entitled to the use of the water.

THE COURT: That is unquestionably their right, and, as far as they have complied, they are in a certain class, and I think that the division should be left there. Now, in order to make it plain, it might be that your suggestion on page 3 of your suggestions, that language might follow in these several paragraphs, 93, 92, whatever they are, referring to the various applications set forth in these paragraphs, with this proviso: Providing, however, that the priority and amount of this appropriation is conditioned on compliance with the law.

MR. STORY: That covers it, I don't know the other is material.

THE COURT: I think you are entitled to have that in there to make it plain. What objection have you to that, Judge Hatch?

MR. HATCH: I do not think that it can affect us in any way.

THE COURT: It makes it plain the court does not intend to make any decree --

MR. HATCH: Paragraph 92, first part of it, I think ought to stand.

THE COURT: I am suggesting they all stand just as they have been prepared by the committee, but adding in each paragraph this modification, this proviso, to make it plain the court is not intending to determine the question of the rights that may be insisted upon in the State Engineer's office, matter for him to determine.

MR. STORY: I think that covers it.

THE COURT: Then that proviso may be inserted after each of the paragraphs 92 to 98 in the findings and 38 to 44 in the decree, and also section 46 of the decree.

MR. STORY: Now, your honor, just a word with reference to the other question, namely, the irrigation season. We are affected by that only in so far as those rights which have been transferred down the river are concerned, I think. Nevertheless, it does seem to me that a definite irrigation season should be fixed by the court, and if so, as I have said before, it will include these objections which I have made. Now, I have heard some time in the past, I remember, that beneficial use is the measure and limit of an appropriation, and some cases ~~xx~~ decided in support of that proposition, and this court is engaged in awarding the right which has been perfected in that manner, and supposed to have been based on the evidence introduced in the case in support of such appropriation. Now your finding must, of course, conform to the evidence introduced. Unless I am very much mistaken, there has been absolutely no evidence introduced in this case of any irrigation right being used prior to the 15th of April, or subsequent to the 1st of November, each year. So

far as we are concerned, the particular days don't make any great deal of difference, but certainly in order to conform to the evidence, the decree cannot go beyond the time that the evidence shows the water has been used in order to perfect an appropriation; and that it seems to me, your honor, is the reason why you should fix the period, and if you do not then, of course, all reference to irrigation season in the decree would have to be eliminated, but the way the decree at the present time reads, as I interpret it, between the 10th day of September and 10th day ~~of September~~ -- whatever the date is -- of the following May, there is an irrigation right fixed of so many acres duty, of so many acres per second, and there is no evidence to sustain an irrigation use during that period. There may be some evidence to sustain a claim for domestic use between certain periods, but certainly domestic use would be different from irrigation use, and the measure of the right would also be different under the authorities. We are particularly interested, however, only in those particular rights which have been transferred down stream and past our headgate, and we feel we are seriously injured if those rights-- Provo Reservoir Company is now permitted to use those rights for a longer period of time than they were formerly used at the original point of diversion. I thank your honor.

MR. RAY: May it please your honor, personally I don't see any reason for specifying any season for the irrigation season. I think that grows out of the past when the court did not appoint commissioners and keep supervision of the water rights. Water rights are based on beneficial use, but an irrigation season is not, and as long as your honor appoints a commissioner who says at no time can water be turned that shall not be beneficially used when turned, there ought not to be any particular irrigation season. Some years they have to irrigate in October and November, and in the spring they have to irrigate to plow. That is

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a beneficial use, a recognized use. If the waters are solely in charge of the commissioners, turning of them, there ought not to be any irrigation season. There ought not to be any winter use to interfere with anybody, because there cannot be any irrigation in the winter. When the right is referred to as an irrigation right, it will take care of itself, and when we refer to the irrigation season, it means any season when the water is used for irrigation.

THE COURT: Then you would be in favor of eliminating entirely the expression "irrigation season"?

MR. RAY: No, I would use the word "irrigation season", and as used it would mean any period during the year when the water is applied to the land. Mr. Story refers to the fact they have introduced evidence of a beneficial use during a certain period, but the period has not been the same, and the court strikes the evidence.

(ARGUMENT)

THE COURT: I am inclined to think there would be difficulty unless the court incorporated a definition of irrigation season in the decree. If a definition such as you have suggested were incorporated, there would not be any difficulty, but otherwise than that, it would be a matter of difficulty.

MR. RAY: The commissioner would have just such instructions as I have suggested there in the decree, or some other.

MR. HATCH: If the court please, the season varies from year to year and from place to place. Now, I have, signed with the Wasatch Irrigation Company, ~~signed~~ a letter, it is an agreement whereby they claim the right to the use of the water up to the 15th of November, and they take care of the water flowing in their canal up to that time. If I want to

use it thereafter, I become responsible for the canal, and any damages that may accrue from overflowing, freezing, and that sort of thing, and assume the control of the ditch from the 15th of November until such time in the spring as they again want to divert and use the right. The time in the spring varies say from April 1st up to May 10th, when water can be put into that canal in some seasons. Other seasons it might be used the entire year, but they use it in Wasatch County for irrigating the land to plow it every season until they become frozen to such a depth they can no longer plow.

THE COURT: Gentlemen, I think probably we have gone as late as we can today, because some of the parties want to catch the car that passes through here about six o'clock.

(Discussion as to time of meeting.)

 5:30 P.M., RECESS TO 10:00 A.M., FEBRUARY 21, 1921.

THE COURT: I think we had proceeded with these matters down to the proposals of Mr. Brockbank, I. E. Brockbank representing Park, Cutler and McBride.

MR. BROCKBANK: Your honor, there are three motions there that may be considered on the same basis, that of David S. Park, Daniel B. McBride and M. B. Cutler. The purpose of that motion is to change the acreage in each of the respective defendants varying from 2.49 to 2.67 acres. I might state the theory of that motion is as follows: The defendants represented to me that at the time testimony was taken in this matter there was one set of facts carried to its logical conclusion, and that is in regard to the property of Brice McBride, in which case, as I understand it, the increase in acreage was allowed, and the attorneys, Mr. Sanford and Mr. Booth, who represented these parties, informed the defendants

that the decree would also allow their increased acreage, as they gave testimony to support. We find it has not done so, as in the case of Mr. McBride.

THE COURT: What was your pleading in reference to their acreage?

MR. BROCKBANK: It was considerably more than the change. The sharp conflict of testimony in that matter was in the testimony of Mr. Scott Stewart and Mr. John Stewart. One fixed the acreage at 12.30 and the other at 14.60, and that testimony is given in the case of Mr. Park in the transcript page 2585.

THE COURT: It is an error, is it?

MR. BROCKBANK: They represented to us it is merely an oversight in not having their acreage increased.

MR. EVANS: As I understand that, that was a matter that was contested. It was submitted on both sides, and the court found as the decree now provides.

MR. HATCH: Who are the parties he asks to change the acreage?

THE COURT: David S. Park, Daniel B. McBride and M. B. Cutler.

MR. EVANS: Where is that?

MR. BROCKBANK: It is up in the river bottoms.

MR. EVANS: There is a sharp conflict of evidence in regard to the acreage up there, the land was partially covered with trees and brush, and my recollection of the evidence is that Mr. Stewart actually made a survey of that land.

MR. HATCH: Both Stewarts.

MR. EVANS: And the court made a finding.

THE COURT: I know there were some instances of that kind. I do not recall the names of the parties, but I remember of going over the evidence of those people, Mr. Stewart and the other Mr. Stewart.

MR. BROCKBANK: As I looked over the transcript, that case was fought out in the case of Mr. McBride and his acreage allowed, and the defendants informed me as they were in the same class, their acreage would also be allowed.

MR. EVANS: This acreage that is given you under the decree is in accordance with the tentative finding of the court.

MR. BRICKBANK: I am informed this evidence was introduced after the tentative decree was issued. It only makes a difference in each case, I think, of about two acres.

MR. EVANS: I see no reason why we should consent to more acreage now than the court found.

MR. BROCKBANK: The theory was, as they explained to me, in the case of Brice McBride, the discussion was continued to its final conclusion, and his acreage was allowed on the very same testimony and facts as these people who are denied. The very same testimony went before the court in each case, and the acreage was allowed because it was fought out, and in as much as they were in the same class, the time of the court was not taken by fighting for the other acreage. That is the theory they present to me, being substituted for Mr. Booth and Mr. Sanford.

THE COURT: During the noon recess, I will attempt to make some investigation what that situation was. If this is purely an error, and decision subsequent to the tentative decision should have included these parties, of course, then it should be done. If, however, it did not, it is too late now, of course, to correct it.

MR. BROCKBANK: I recognize that point.

MR. EVANS: I might suggest this while on that point, each of those owners up there in the river bottoms stood on their own evidence, they had their own separate tracts and evidence taken as to their individual tracts. I cannot see how the evidence increasing the acreage of one would affect the evidence as to the others.

THE COURT: I will see if I can find anything on it. Mr. Brockbank, you have another matter, the Charleston Irrigation Company.

MR. BROCKBANK: Yes, I have a motion there in behalf of the Charleston Irrigation Company. The purpose of that motion is merely to make the decree conform to the findings, and especially set out in the stipulation, which is known as the Heber stipulation, as amended, and found on page 61 of the findings. As I have looked over the decree, I find no provision made that the Charleston Irrigation Company through its upper canal shall be entitled to a duty of one second foot of water measured at the land from July 5th to September 15th of each year; and that motion merely provides a paragraph in the decree setting forth that right.

THE COURT: Any objection to this, gentlemen?

MR. HATCH: It seems to conform to the stipulation as amended.

THE COURT: The exact language, as near as I can read it. This may be allowed, this amendment, both as to the findings and decree. That was all you had?

MR. BROCKBANK: That is all, your honor.

THE COURT: Mr. Soule, with reference to the Washington Irrigation Company.

MR. SOULE: If the court please, I have two motions here. The first motion I filed was a matter that Mr. Wentz called my attention to, that in the court's decision my clients had been allowed water rights in the first class and 17th class, and in the 1st class water rights they have been allowed what should have been 11th class water, and I have been given more in the decision in the 1st class water than I was entitled to, a small portion of my first class water should be reduced to 11th class, and I believe he is correct in that, and we have re-written pages 63, 64, 65, 66 and 67 of the findings, in which he segregates the 1st class and 11th class. It is the same amount of water, the only change is reduces part of it to 11th class.

MR. HATCH: There is another change, I understand. Under the Fulton decree certain lands of Mr. Soule's clients were awarded 60 acre duty, and other lands a 70 acre duty?

MR. SOULE: That is how the 11th class comes in.

MR. HATCH: As I understand these proposed amendments, by the re-writing of the five pages, corrects those matters, and I have signed the motion with Mr. Soule to adopt these five pages as an amendment to conform to what the facts were.

THE COURT: Are there any parties who object to this?

MR. MCDONALD: I suggest it is something new to me, I have not heard about it before, and I don't know how it may affect the parties I represent in Wasatch County.

THE COURT: Affect them beneficially.

MR. HATCH: Puts them in the 11th class and conforms to the stipulation.

MR. MCDONALD: If it conforms to the stipulation, we

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have no objection.

THE COURT: Then this may be allowed, and if upon investigation, you want to suggest something to the court later, you may do so.

MR. SOULE: I have another motion, I will pass to subdivision 3 of it first. I ask that the water right which appears in the name of Mary A. White, as administratrix of the estate of Thomas H. White, deceased, be changed to read Mary A. White and A. S. Carlyle, as successors to Mary A. White, administratrix. It makes no change in the water, but gives him part of the water. He has purchased in this estate.

THE COURT: You represent Mary A. White?

MR. SOULE: Yes.

THE COURT: I see no objection to that being allowed.

MR. SOULE: Now, in subdivision 4 of the motion, I ask to amend the pleading increasing the acreage in Ola W. Larsen's claim from 60 to 90 acres. The decision gives Ola W. Larsen 90 acres, and the findings gives him 90 acres, the error is in the pleading.

THE COURT: Any objection to the amendment of this pleading?

MR. HATCH: Yes, we do. My understanding is that 60 acres is all the land that is irrigated by that man Larsen in both of his rights, Webb Creek and the river also, and I do not understand that the evidence shows that he is entitled to the 90 acres.

THE COURT: What did the decision give?

MR. SOULE: Gives him 90 acres.

THE COURT: Now, check that decision very carefully

with the evidence. The evidence was put in as a written list and testified to in bulk, but that list segregated the land and gave all the acreage of each one of those parties represented by Mr. Thomas and Mr. Soule, and that was followed and checked very carefully. It may be there was an error in that list, as it was testified to.

MR. HATCH: As to that, if the court please, Ola, W. Larsen, as I understand the matter, is a successor to divers parties there, and by reason of being successor he is not named in the Fulton decree at all, is he?

MR. SOULE: I do not think he is.

MR. HATCH: He is successor. As to that successorship, I don't know whether Larsen himself testified or not, but if you remember, there was testimony as to certain elements of that matter at the time. They were offered and read by Mr. Thomas, as being a statement, and I have forgotten just what the court said at the time, but it was not settled. As I understand it, he was to show his connections as to certain other parties.

THE COURT: You mean the matter of succession and transfers?

MR. HATCH: Yes, others were not questioned.

MR. SOULE: This is just successor of Joseph Ketchum, just the one right, that is the way I think the decision reads.

MR. HATCH: In tracing his rights back to the Fulton decree as successor to the parties 60 acres is all that he was entitled to, and 60 acres is all that they asked for, and, as I understand it, 60 acres was all that he is entitled to or ever has used, or succeeded to, as a prior right.

THE COURT: From whom did he get the land?

MR. SOULE: From Joseph Ketchum.

THE COURT: Was Ketchum one of the parties to the suit?

MR. SOULE: Yes, but I get my information from Mr. Wentz and Mr. Knight, that this was purely an error, he had 90 acres.

MR. HATCH: He has two or three hundred acres of land, but not irrigated. It mentions something, if I am not mistaken, as to rights from Provo River and Webb Creek.

THE COURT: Mr. Wentz, as I understood it, prepared this draft we are considering now. Possibly he can tell us, refer us to where the matter can be straightened out. Can you give us some information about it?

MR. WENTZ: Ola W. Larsen was the successor of Joseph Ketchum. Joseph Ketchum was a party in the Fulton decree and he was awarded 90 acres in the Fulton decree as a first class right. In the pleading in this case, he asked for 60 acres, but in the exhibit, 168, entered in the case, it states 90 acres first class right, and the decision gives 90 acres. In making up the proposed decision, we changed that to 60, according to the pleading.

THE COURT: In my decision I gave him 90?

MR. WENTZ: Yes sir.

THE COURT: That was in accordance with the exhibit introduced as a list of all these matters. You say that the Fulton decree awarded Mr. Kethhum 90 acres?

MR. WENTZ: Yes.

THE COURT: Did you understand it that way?

MR. HATCH: No, I didn't check it up personally. I understood the Fulton decree only awarded Ketchum 60 acres. May I ask Mr. Wentz if this Ola W. Larsen is not also awarded

water of Webb Creek in another place.

THE COURT: Under those circumstances, I think they should be permitted to amend his pleadings.

MR. HATCH: We do not object to the amendment to conform to the proof, if he is entitled to it.

THE COURT: I understand. Your position is that under the Fulton decree he would not be entitled to it?

MR. HATCH: He is given in the findings 60 acres 1st class and 38 acres 5th class. I understand you are asking for 90 acres. How was it in the decision?

MR. SOULE: 90 acres 1st class, 38 acres 5th class.

MR. HATCH: How is it in the five pages corrected?

MR. SOULE: The same way, he is in the 1st, 5th, 11th and 17th classes, page 65.

MR. HATCH: Is that the way you ask for it?

MR. SOULE: Yes, I ask the pleading be corrected to 90 acres. I did not know he had that much land. It may be the pleadings should be corrected to include the 38 as well as the 90.

MR. HATCH: Mr. Wentz, were there any changes in the proposed amendments offered by Mr. Soule and myself after I signed it?

MR. WENTZ: Yes, the copy you and Mr. Soule signed, or that you signed, was correcting the 1st and 11th classes as they are in the proposed decision, and the copy that was filed for Mr. Soule made the corrections to correspond to his other motion in the pleadings, increasing Larsen 60 to 90, including the other four names, amounting to about four acres.

MR. HATCH: There is 98 acres in the findings to which

he is entitled, 60 of first class, and balance put in the 5th class.

MR. WENTZ: My copy of the Fulton decree does not correspond with the copy you read here, and I have just sent for it.

MR. HATCH: I did not read from this at all. Did your honor read from the Fulton decree?

THE COURT: No, I have no copy before me.

MR. SOULE: I would like, if the court please, to take a little time to look into the details of that. I think we can save time.

THE COURT: We will pass on to something else, and refer back to this. Mr. Chase Hatch?

MR. SOULE: Just a minute, your Honor. I am not through. I have a correction in the spelling of Hattie J. Prescott to Hettie. I ask also on page 66 of the proposed findings, under the heading of "bc" to modify them. There is an error there. Ernest J. Prescott should have .25 second feet for 15 acres of land.

Now, paragraph 5, Mr. Wentz and Mr. Knight, the water-masters, tell me an error there. This man has 15 acres instead of 10. I have pled 10 and the decision is 10. They advise me it should have been 15 acres. I ask to amend the pleading to make it 15. That is "bc" page 66 of the findings. This man has 15 acres, and they are distributing water to him.

MR. EVANS: Does it show in the Fulton decree?

MR. SOULE: I think so. Is it, Mr. Knight?

MR. KNIGHT: This ground is not in the Fulton decree.

MR. HATCH: Was there any proof offered?

MR. WENTZ: The exhibit shows 15.

MR. SOULE: The exhibit offered in evidence shows 15 acres?

MR. WENTZ: Yes.

THE COURT: Does the decision show 15?

MR. SOULE: The decision shows 10. I did not offer the evidence and for that reason, I am not very familiar with it.

MR. EVANS: On what theory do you ask that?

MR. SOULE: That he has got the land and always been recognized as being 15 acres. The proof shows 15 acres, but the decision shows 10.

MR. EVANS: If that is the fact, it ought to be 15.

THE COURT: While it does not seem large, yet it is quite important to a man with only 15 acres to have 33 per cent left out.

MR. EVANS: I am informed by Mr. Tanner the proof showed 15 acres, and the original decision showed 15, but this was made up on the pleadings. If that is so, he is entitled to the amendment.

THE COURT: Under those circumstances this amendment will be allowed.

MR. EVANS: And the finding will be changed to 15?

THE COURT: Yes.

MR. SOULE: The next is paragraph 6. I ask simply a change in name again. At the bottom of page 66, William

L. Prescott, insert in lieu thereof Emily Prescott and Martha E. McNeil successor to Isaac Hunter, successor to William Prescott. That is page 66, "bd".

THE COURT: You represent William L. Prescott?

MR. SOULE: Yes.

THE COURT: It may be allowed, if they have become successors to this property.

MR. SOULE: Instead of allowing this motion, we will add William Prescott down to "ar".

THE COURT: Martha E. McNeil, successor to Charles Murphy. Then your successive paragraphs of your motion, you withdraw?

MR. SOULE: Yes.

THE COURT: And the change on page 66 I have made by interlineation on this exhibit here is to include William Prescott.

MR. SOULE: I believe we passed on this next one, Hettie Prescott, and passed on the one as to 15 acres for Prescott. Now, 9 insert preceding Mary A. White, the word "A. S. Carlyle", That is on page 63.

THE COURT: In "r" on 63, is that the one, A. S. Carlye, successor to Mary A. White?

MR. SOULE: Simply want to precede the words "Mary A. White" with A. S. Carcylye as successor.

THE COURT: That is the way it is in the one I have here.

MR. SOULE: That is in the correction offered.

THE COURT: Yes, and I understood that correction was

adopted except the matter later discovered and waiting for you to make some investigation.

MR. SOULE: That is all of that class of corrections. In the second division, however, of my motion they call my attention to another matter in the decision, or in the decree, at page 39 under "bk"; that same right appears as "bn" at page 67 of the findings. That is her individual right, not the right as administratrix, and the words "as administratrix of the estate of Thomas White", should be stricken out to make it conform with the findings; the findings are correct, just Mary A. White.

THE COURT: The words "as administratrix of the estate of Thomas A. White, deceased" may be stricken out in the decree.

MR. SOULE: Now, your honor please, in subdivision 2 of my motion I find that Mr. Knight and Mr. Wentz report to me there are four water users at Kamas who were not made parties to this suit, total of eight acres; Mr. Parley Gines, 5 acres; Rosel Leffler, 3/4 acres; George R. Hardman, Jr., acre and a quarter, and John T. Moon, one acre. It does not increase the claims in the Fulton decree. They have never been summoned, never been in the case, but have those water rights, and been distributing water to them. I thought it was such a small amount, they are willing to come in and have their rights adjudicated, it would be better to allow them this water right than close up the case with parties outside of the suit.

THE COURT: Do you represent them and ask to be included?

MR. SOULE: Yes, I represent them, and ask they be made parties and awarded water, as Mr. Wentz has figured it out.

MR. HATCH: Who do they succeed?

MR. SOULE: One succeeds G. O. Ellis, another successor of Mary Ann Moon, George R. Hardman, Jr., successor to Ephraim Lambert.

THE COURT: Are you familiar with those matters, Judge Hatch, so you can say?

MR. HATCH: I know the names. I think I recollect the award to Lambert in the Fulton decree about that quantity of land. I would not offer any objection to it.

THE COURT: Does any of the counsel offer any objection to this application to be made parties and to be awarded the water, as shown under the Fulton decree for all of them for the quantities stated?

MR. HATCH: Parties to whom they are successors. They are all successors to somebody.

THE COURT: These parties may be made parties defendant, and permitted at this time to file their pleading.

MR. SOULE: Your honor please, the pleading has been considered amended, and we will offer as the evidence on behalf of these people--if counsel will stipulate it may be allowed instead of calling witnesses-- the amounts as set out in the amendment. It has been figured out by Mr. Wentz on the same basis the other water rights are figured.

MR. HATCH: That was the stipulation.

THE COURT: I understood it should be an adjudication of that.

MR. SOULE: I wish to add to the motion the right of John T. Moon. I will write that in the motion as it is there, giving him his one acre. I have the three names in

the motion you have.

Now, I have one other matter. That is the first paragraph of my motion with reference to the storage rights of the Washington Irrigation Company. An error has occurred there. At the time the pleading was drawn, I was advised by my client we had an application in 1909 for 500 acre feet of water for the Washington Irrigation Company and pled that right. When we came to court here they produced two applications and I offered them both in evidence. One was withdrawn and Mr. Thomas submitted evidence on that later. The decree as drawn awards what we asked in our pleading, 500 acre feet to be completed along with other reservoir applications. Here is the second application I offered, and there is Mr. Davis' mark admitting it in evidence. It was then withdrawn for a copy to be substituted. The proof came in-- I have the evidence here-- Mr. Taylor testified -- "What is the area of this reservoir in acres?" "The area is 4567 acres." "What is the acre feet capacity?" "Capacity in acre feet 871.1." And the evidence showed it had filled to that capacity and that amount of water used.

THE COURT: I think I am familiar with the evidence. I remember distinctly, because you presented a brief whether you were entitled to that 371 and a fraction acre feet, not having--

MR. SOULE: It in the pleadings.

THE COURT: No, not on that question, but the fact you had put it to a beneficial use. You were proceeding on the theory you had pled all your applications, and it was determined not upon the question presented in your brief, but for the reason you had only pled 500 feet.

MR. SOULE: I consider there was a stipulation here pleadings might be amended to conform to the proof. When I

come to check up this decree a few days ago, much to my surprise, my clients produced two licenses, one for 500 acre feet, 2812, which the court has allowed, and another license for application 2813, for the 371.1 feet. I then went to the State Engineer's Office to find out the fact for myself, and I found there this company had on the same day in 1909 made two applications to appropriate water, each for 500 acre feet, and they had been advising me their application was 500. Now, the State Engineer has proceeded to award them all under the one 500 feet, and give them a license on the other of 371.1 acre feet. I did not know until last week they had two applications. In fact it was their understanding they had one, and I have asked the pleading be amended that I might plead this second application.

THE COURT: Any objection to this pleading being amended to conform to the proof?

MR. HATCH: We have none.

THE COURT: This motion may be allowed and pleading may be amended.

MR. SOULE: Then may I offer in evidence in the case the two licenses?

THE COURT: No, I do not think we can take any evidence. Your evidence is complete as to your right under those applications at that time to 871 acre feet, and the right to proceed.

MR. SOULE: Then the findings and decree may be amended. That is all. Thank you.

THE COURT: Next matter is Chase Hatch.

MR. CHASE HATCH: We ask that motion be stricken from the files. At the time it was thought to be agreeable with the water users, but it is not and it will require evidence to decide that.

THE COURT: Then this motion is withdrawn. You have another matter with reference to the Hubers.

MR. CHASE HATCH: Yes, your honor. In that matter that is based upon the records herein. At the time of the filing of the tentative decision John M. Huber, one of the defendants named herein, was left out of the decree and filed a motion on his behalf to be reinstated, and also motion of other neighbors, Nephi Huber, Joseph E. Huber and George Shear, asking their rights be segregated. Those motions were filed as set forth here, a hearing was had and duly allowed by the court. Therefore, we base this upon an omission.

THE COURT: I don't remember just what was done, but I remember the names.

MR. CHASE HATCH: To save any question, I served the Midway Irrigation Company with it.

THE COURT: Any objection to this correction being made in the findings and decree?

MR. CHASE HATCH: There are some errors in the computation. I think the figures are corrected by the decree.

MR. EVANS: That does not change the amount of water.

MR. CHASE HATCH: No, it merely asks to strike from the Midway Irrigation Company whatever acreage these parties are entitled to.

Then there is the motion of Joseph Hatch, Abram C. Hatch Minnesota A. Dodds, Jane H. Turner and Lacy Farnsworth. They were left out of the findings and decree. It was duly found in the tentative decision, but in making up the decree, through inadvertence, they were left out. We ask they be placed in.

THE COURT: Joseph Hatch, Abram C. Hatch, Minnesota A. Dodds, Jane H. Turner and Lacy Farnsworth.

MR. CHASE HATCH: We have also ask to correct the name Lucy H. Farnsworth to Lacy H. Farnsworth in all the places it appears.

THE COURT: This may be allowed.

MR. MCDONALD: I wondered if the plaintiff and the court intended what is set forth in Subdivision A of paragraph 39 of the purported decree. The motion is to strike out the word "Shingle Creek", and I merely want to call the court's attention and counsel for the plaintiff, because the record shows -- I have had the record transcribed, and it appears there the court did not find and will not find Shingle Creek is a tributary of the Weber River; and that was discussed the other day when this question arose and it was then considered and determined it would not be considered a tributary to the Weber River. You will notice the way it reads.

THE COURT: You want to strike it?

MR. HATCH: Our application covers Shingle Creek (944). He wants to strike out Shingle Creek. I do not think that can be done. Might strike out the description, tributary to Weber River, but the application distinctly specifies Shingle Creek.

MR. MCDONALD: I became confused on that. I looked at the decision, and the decision gives it for storage purposes only, and the matter was taken up I find, and the word "storage" stricken out. The word "Shingle Creek" is inserted and that was not in the decision as all. However, I think it would be in harmony with the entire record if you struck out "tributary to Weber River".

THE COURT: Yes, I think so. If the proof shows

they were entitled to water from Shingle Creek, wouldn't want to strike that out.

MR. HATCH: The facts are, as I remember, that Shingle Creek and Beaver Creek, a tributary to the Weber River -- the language here may be corrected, but Beaver Creek is a tributary to the Weber River. Now, Shingle Creek, comma, and Beaver Creek tributary to the Weber River. By putting a comma after the word "Shingle Creek", would make the matter absolutely plain, doesn't need any correction except a comma, and I do not think it does anyway, because it only refers to one creek as tributary to Weber River, and Weber River would refer back, as I understand, to Beaver Creek; but to save any question about it, put a comma after the word "Shingle Creek".

MR. MCDONALD: I wouldn't so construe it, but call the court's attention to it so that it may be made certain.

THE COURT: A comma may be inserted there.

MR. MCDONALD: I have one other item.

THE COURT: Sage Brush Irrigation Company?

MR. MCDONALD: No, that may be withdrawn, it is waived. I have one other item. It is relative to five acre water right of Leslie Syms, one of the users of Spring Creek in the river bottoms. At the last session of the court there was some evidence taken. There is no motion, because this come up after the last decision.

MR. HATCH: Have you a motion to amend at this time under the last order of the court?

MR. MCDONALD: No.

THE COURT: That is the reason I asked, I don't find anything.

MR. MCDONALD: There is nothing in there. It is a

matter we are calling attention to that was adjourned from the last session to be taken up at this session, to be taken up at this time. Mr. Syms has 11.76 acres of land and about 11 acres of it has been irrigated for many, many years. Mr. Scott Stewart made a measurement of the land, and apparently by some error measured a five acre tract. The farm is in two pieces, and he testified as to the five acre tract. We had a stipulation with the plaintiff in the case that the tract covered 11.76, as I remember, and we relied upon that stipulation which has been acquiesced in several times in open court by the parties to the action. When the decision was made up we discovered only five acres had been awarded to Mr. Syms, so we called the court's attention to the record as it then stood, and were informed the court had taken the testimony of Mr. Scott Stewart. We then informed the court we had relied in good faith on the stipulation with the plaintiff, and acquiesced in by the parties as constituting the area of land in question. The court then gave us the right to introduce testimony, which was done at the last hearing.

THE COURT: Where is the finding, what finding is it you ask to have corrected? The court made an order requiring all these matters to be put in writing and filed by the 12th of this month, so that we could have something to proceed upon, but I don't want to cut you out, if you didn't understand it. Where is the finding?

MR. MCDONALD: I will have to call your honor's attention to it later.

THE COURT: Probably we would not need to take the time. If there is no objection you would not need to do that.

MR. EVANS: Hasn't this been a controverted question all the time?

MR. MCDONALD: Never.

THE COURT: What finding is it?

MR. KNIGHT: 38m.

MR. EVANS: I understand this has been a controverted matter all the time, and evidence has been introduced.

MR. MCDONALD: I have the record here.

THE COURT: He is awarded water for five acres, what do you claim?

MR. MCDONALD: He should have 10.76. He has been getting that quantity of water right along, been using it ever since the action was commenced, as well as before.

MR. EVANS: I would like to ask Mr. Wentz what acreage he has been distributing the water to.

MR. WENTZ: I could not say without looking it up, but one some of these questions that were in controversy, we made out a schedule for water on the amount they asked for pending the time of the decision, whatever it was.

MR. MCDONALD: And that has been awarded in this instance, 10.76. I will say to the court and counsel this tract of land has been irrigated for many, many years, and to take that water away from him will ruin his farm.

THE COURT.: Of course, it ought not to be done, if that is the case. What is the condition of the evidence? You say there was some evidence taken on that subject last hearing, what was that?

MR. MCDONALD: Mr. Swan testified to the area, that was the only question involved. He testified to the area of the land.

MR. HATCH: Where is the land?

MR. MCDONALD: Out here in the river bottoms. Mr.

Tanner can tell us what it is called.

MR. EVANS: That is one of the pieces of land covered with cottonwood trees and brush.

MR. MCDONALD: No, there are some two or three acres of pasture, and some question whether there was cottonwoods on the pasture, and the record shows there is, but it is irrigated.

MR. HATCH: During the flood water?

MR. MCDONALD: No, during the season.

MR. HATCH: We went all over this, as I remember it, and gave the area of all these different tracts of land that were cultivated. They all have, large portions of these different tracts of land have considerable areas that are rocky and covered with shrub, cottonwood trees, fit for nothing else practically, but sometimes during the flood water they are covered with water, and grow a little grass, cattle are turned upon it; but that it produces sufficient grass to support life of itself is a question in my mind. I know we went all through that in the testimony in the beginning of this case, and Mr. Stewart testified as to the area of practically all, if not all, of these tracts of land that had been cultivated or were growing any kind of a crop. I understand we can pasture any kind of land, that is, we can turn cattle upon it if it is not precipitous, but whether it will sustain the life of an animal without allowing it to pasture elsewhere is a question in my mind.

THE COURT: What is the substance of Mr. Swan's evidence relating to this farm?

MR. MCDONALD: The substance is there is a total area of 10.76 acres, and he says there is over two-thirds of it planted in farm crops, balance in pasture.

THE COURT: That would be more than five acres.

MR. MCDONALD: There is 11 and a fraction, and there is a portion in the river bed which he eliminates, leaving 10.76 acres.

THE COURT: What was the stipulation?

MR. MCDONALD: We were to have 10.76.

MR. HATCH: Where is the stipulation?

MR. MCDONALD: It is by the Reservoir Company, and acquiesced in by the other parties in the court.

MR. HATCH: Show us the stipulation.

MR. MCDONALD: Leslie Syms 11 acres is the stipulation.

THE COURT: Was there a stipulation filed?

MR. MCDONALD: The stipulation is filed.

MR. EVANS: If there was a stipulation filed why was it necessary to take evidence?

MR. MCDONALD: Because it happened this way. When the decree was written up, nothing but the five acre tract had been reported by Mr. Stewart, when, as a matter of fact, there were eleven acres there, and we discovered this when the decision was made, and there was no controversy about anything except the area, and nothing about that, and the court requested us at the last hearing -- Mr. Swan handed your honor a plat of the ground showing the location.

THE COURT: The same thought is in my mind as appears to be in Mr. Evans'. If there was a stipulation, why did you introduce this evidence?

MR. MCDONALD: The stipulation should have governed,

but I tell you when the decision was rendered we were awarded five acres instead of eleven.

THE COURT: I would assume that you would have called the court's attention to the stipulation.

MR. MCDONALD: We did that, and the court said the decision was based on the testimony of Mr. Swann.

THE COURT: I think we can shorten this. If such a stipulation is on file and you will produce it, the court will correct this. Otherwise, the court will have to determine the substance of this evidence. Now, Mr. McDonald, if you will see if there is a stipulation, better prepare some memorandum I can attach to these files so that it will not be overlooked. You have no motion in writing. I am making my notation of the decision on these motions so whoever corrects the findings and decree will follow my notations here.

The next matter is the matter of Mr. Wahlquist, some two or three matters. Have you gentlemen examined the motions of Mr. Wahlquist, so that you can state whether you have any objections to them. The first one is with reference to the water of Round Valley Creek.

MR. HATCH: We have asked as to that, to correct it just as Mr. Wahlquist. That is right, isn't it, Mr. Wentz?

MR. WENTZ: Yes, it is the same motion, except a small fraction Mr. Wahlquist asks to be corrected, should be corrected.

MR. HATCH: .033 of a second foot.

THE COURT: Yes, John C. Whiting.

MR. HATCH: I think that is right.

THE COURT: Then this is allowed, and the next one is with relation to Winterton, William Bonner, Hamilton Snyder,

quite a number, page 81 of the findings.

MR. HATCH: The stipulation, Exhibit 168, fixes William Bonner's right at 6 acres. It was originally 5 acres, as I have it in mind, and was stipulated at 6, and I think that controls it.

THE COURT: What have you to say as to the Winterton?

MR. HATCH: Mr. Wentz says that is proper.

THE COURT: 35 acres instead of 30. That may be granted. As to the Bonner matter--

MR. HATCH: 6 acres we understand is the stipulation, he asks for 10.

THE COURT: Does anyone know upon what he bases the application for 10 acres? He doesn't say here.

MR. HATCH: He says to conform to the original decision.

MR. WENTZ: The original pleading was for five acres, then he amended to six acres and stipulated six acres, but in the tentative decision it was ten. We have corrected it.

MR. HATCH: Ten was error?

MR. WENTZ: Yes, typographical error.

THE COURT: This may be denied then, this paragraph. The next is with reference to--

MR. HATCH: It should be six acres.

THE COURT: The next with reference to Subdivision M of paragraph 135, James Hamilton, William Hamilton and others, he changes that to 33 acres.

MR. HATCH: I understand 33 acres is correct, your

honor, should be changed. I have a motion signed by myself on behalf of these people for the purpose of that change, and Mr. Wentz has-- that is right, isn't it?

MR. WENTZ: Yes.

THE COURT: This may be granted, 33 acres. That seems to be all of Mr. Wahlquist's. Now, he has another one. Morgan & Huffaker, on behalf of the Midway Irrigation Company.

MR. MCDONALD: Your honor please, I think that is an item the court's attention was called to the other day, eliminating certain portion of Midway Irrigation water right of Mr. Van Wagenen.

MR. HATCH: No, asks they be not required to pay anything toward the distribution of the water.

MR. MCDONALD: Mr. Van Wagenen asked me if I would represent them. I called the court's attention to it when we had under consideration the question of fixing compensation of engineer.

THE COURT: It was not passed upon. It was passed temporarily. I didn't make any determination, did I?

MR. MCDONALD: I don't remember. However, I asked if it be the pleasure of the court to take up the question now or later on, and it was suggested be better to hear it at a latter date.

THE COURT: I am inclined to think we should dispose of this matter of compensation of the commissioner at this session, if we can, for the next year.

MR. MCDONALD: As I understand it in this application-- I understand it is prepared by Mr. Wentz, and there are certain waters there of the Midway Irrigation Company, and also water belonging to Mr. Van Wagenen which have nothing to do with the Provo River.

THE COURT: I think this probably should be passed until we take up the matter of the compensation. There is a motion on behalf of the City, wasn't it, Mr. Richards, to change the apportionment of the costs to the power users. All of these matters I think should be taken up together. This may be passed then until we reach that feature of it.

MR. HATCH: You say Mr. Wahlquist has another motion?

THE COURT: On the index here seems to have, but I think it is an error. We have disposed, I think, of all of his, all I find.

Mr. Willis has some motions. Have you examined those? There are four of them.

MR. HATCH: I thought he would be here.

THE COURT: Referring to paragraph 109, Page 72 of the findings.

MR. BROCKBANK: Your honor, while waiting for that, I. E. Brockbank, administrator should be substituted for the estate of John E. Booth.

THE COURT: The substitution made be made, if there is no objection.

MR. HATCH: The first has been omitted from the decree, certain rights of the Timpanogos Irrigation Company, page 85, paragraph 46.

THE COURT: You have the other one, you can take that one first. There has been omitted from the decree findings and conclusions certain rights of the Timpanogos Irrigation Company -- I don't know just what he means, do you know what he refers to?

MR. WENTZ: It is application No. 944-A. Application 944 was filed originally for 15,000 acre feet, and half

was given to the Provo Reservoir, and afterwards they filed application 944-A for the remaining half.

MR. HATCH: I remember that now, it was not in the tentative decision, but it should have been. Application 944-A for 7500 acre feet, and following the same as is awarded to Provo Reservoir Company for the 944.

THE COURT: That change may be made. Elizabeth Kummer Hamilton, successor to the interests of the estate of John Kummer, deceased.

MR. HATCH: I don't know anything about that. I know Mrs. Elizabeth Kummer Hamilton and Emma Kummer Bond are daughters of John Kummer, and successors to what interest he had, but what interest it was, I don't know.

MR. WENTZ: The quantity in the proposed findings and decree is given in the name of Emma Kummer Bond, and this motion of Mr. Willis's is merely asking to substitute the name of Elizabeth Kummer Hamilton.

THE COURT: No, he says it is omitted entirely, I take it, from his motion. Your understanding it is merely a substitution?

MR. WENTZ: It is a substitution, but he understands it is an omission. The Heber City stipulation provides a certain number of acres to the Midway Irrigation Company and to the parties whose waters the said company controls and distributes. In the tentative decision Emma Kummer Bond was given a separate quantity, and in the proposed findings we have included that with the Midway.

THE COURT: He just wants it segregated?

MR. WENTZ: Yes.

THE COURT: That may be done.

MR. HATCH: That reduces the amount to the Irrigation Company.

THE COURT: Six acres. Who represents the Midway Irrigation Company, anyone here, is that satisfactory to them, do they resist it?

MR. HATCH: The only motion I know of here is signed by attorneys by Wilford Van Wagenen. Seems attorneys have not signed it themselves at all. That is the one Mr. McDonald is representing.

MR. MCDONALD: The only thing I know at the present time is the item we called attention to the other day relative to costs and expenses. Mr. Van Wagenen said he was going to inform me as to some other matters relative to water rights, but at the present time I have no information.

THE COURT: The next paragraph of Mr. Willis' refers to the Hicken matter.

MR. HATCH: 10.89, should be 10.98 acres.

MR. BROCKBANK: Was given in the decision 10.98. The pleading was 10.89, stipulation was 10.98 and in the tentative decision it was 10.98.

THE COURT: I think it should remain at 10.89, if that is the case.

No. 4, Joseph Hatch 20 acres of water.

MR. HATCH: In that case the water is decreed in a body to the Wasatch Irrigation Company. Joseph Hatch's right was separate and distinct right, but in common with. He has absolutely nothing to show except his proof in this case he has that right.

THE COURT: How is it pled, did he plead it?

MR. HATCH: I think so, yes. I think he pled it and

Willis represented him and Emma Wheritt and one or two other individuals in the town who simply had one acre rights, but I think they should be awarded their right in common with the Wasatch Irrigation Company.

THE COURT: That would just reduce the amount.

MR. HATCH: Yes, the court found them in the tentative decision.

THE COURT: This may be allowed then.

MR. MCDONALD: It is suggested in that it ought to be in common with the Wasatch Irrigation Company. That may cause trouble. We have had no notice of this motion at all, and therefore we could not give it any consideration, didn't know anything about it.

MR. HATCH: They had notice when the court found it in the tentative decree, it was found to them, and you don't deny their right.

MR. MCDONALD: I don't know anything about it.

MR. HATCH: It is in common, your Honor.

THE COURT: Mr. McDonald, with reference to your having notice, I intended that the order I made with reference to this hearing should be served, copy given to all the attorneys, order fixing the date.

MR. MCDONALD: It was.

THE COURT: If it was, then you were charged with notice of everything filed prior to the 11th, because the order required the proposed changes should all be filed with the clerk before the 12th, so as to give parties an opportunity to examine them.

MR. MCDONALD: I had that notice, but I didn't have

any notice of the change desired.

MR. HATCH: No change. Simply asked he be awarded the right heretofore awarded to him instead of in a lump, and the Wasatch Irrigation Company be segregated and he be given his rights in common with the Wasatch Irrigation Company. It is page 52.

THE COURT: Does the evidence furnish a basis for determining the quantity of water they are entitled to?

MR. HATCH: Only the acres of land they have irrigated, and the court fixes the duty of the land irrigated by the Wasatch Irrigation Company.

THE COURT: Does it show the acreage of the Emma Wherritt Land?

MR. HATCH: Emma Wherritt, one city lot.

THE COURT: The court doesn't know what a city lot is.

MR. HATCH: It is not more than one acre.

THE COURT: A city lot in Salt Lake is more than one acre. I was wondering if there was any basis upon which the court could make this separate award. My recollection is there is no evidence to enable the court to make the separate award; that the parties use ^{the} water through this ditch and was included in the award made to this canal, and without sufficient data upon which I could make a separation.

MR. HATCH: I was not here at the taking of the proof, that is, I don't remember the taking of the proof, but if any was offered, it would be upon the basis of one acre of land to one city lot. That is right, isn't it, you understand that, Mr. McDonald?

MR. MCDONALD: I think that is correct.

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MR. HATCH: That would be the basis of it, if any evidence was offered. I am not certain that it was.

MR. BOOTH: As I understand, the Wasatch Irrigation Company is a stock company, and Mr. Hatch and Emma Wherritt are not stockholders, but water through that canal; is that right?

MR. HATCH: Yes, the canal was organized -- it was originally an irrigation district under the old Territory law, and it included, it consisted of Heber. It never did work under that basis, and it was finally-- those who were using water under the Wasatch Canal who would join the corporation organized a corporation. There were a few who did not become members of the corporation and who held their original rights to Lake Creek, and still irrigate and use the water rights from Lake Creek running past the Wasatch Canal. There was an exchange of rights and a lot of things done up there.

THE COURT: Mr. McDonald, does the Wasatch Irrigation Company question the right of these parties?

MR. McDONALD: To take this water? Water has been awarded, I understand, to the Wasatch Irrigation Company as a whole to cover these lots, and these small tracts. Now, it should, ^{not} be segregated, because there is nothing in the evidence I know of authorizes the court to segregate and award water rights of those small tracts of land separate from the award made to the Wasatch Irrigation Company. They have a water right in common, and it ought to remain as it is in the decision, I think. It is already awarded to the Wasatch Irrigation Company.

THE COURT: Is that right, ought it to be awarded to the Wasatch Irrigation Company, what right have they to it?

MR. HATCH: They haven't any right, absolutely none, except that they control and distribute it to the different

users by their watermaster.

THE COURT: I wanted to get their view of it, I have yours. I think I understand it. I wanted to get your view what right they had to the water, what objection they have to determining these parties have that much water through this canal.

MR. MCDONALD: I do not think there is any legal objection to it. I have just conferred with the president of the company and they have had that water right.

THE COURT: Is there any question of the quantity, the land on which it ought to be awarded?

MR. MCDONALD: Not so far as city lots is concerned. I am informed by the president a city lot represents an acre.

MR. CHASE HATCH: As to Betty Oleson and Antone Oleson, I represent them, and we introduced proof as to the using of water on the city lot. We also proved a share of stock in the water company represented that water right. I did not raise the question at this time, because my clients reported to me they were arranging to transfer their right to the Wasatch Irrigation Company and be issued stock. Whether they have done it or not, I don't know.

THE COURT: Mr. Clegg, are these amounts the correct amount for this acreage?

MR. CLEGG: Yes, they are correct.

THE COURT: I think this should be granted.

MR. HATCH: He moves to amend as to the Timpanogos Irrigation Company, and sets out the proposed additional rights of the Timpanogos under 944-A.

THE COURT: That is the one we disposed of.

MR. HATCH: Yes, but he sets out here what he proposes

his amendment to be.

THE COURT: Have you examined it?

MR. HATCH: No, I have not. There is a letter from Mr. Wentz with regard to it.

THE COURT: That has been disposed of. I take it Mr. Willis is not particular as to the language used. The right of the Timpanogos Irrigation Company under application 944-A has been ordered recognized in the findings, and this, if it conceded it is correct, may be adopted.

MR. HATCH: He proposes to make it fit in, substitute for the heading of the paragraph 145, page 84, eighteenth, nineteenth and twentieth class rights, and sets them out. As we have gone over it, it seems to be proper.

THE COURT: This Section 4 $\frac{1}{2}$ as he indicated?

MR. HATCH: No, proposed motion to modify proposed findings and decree, it is a separate paper.

THE COURT: Let us dispose of this one first before we go to the other one. There are three. We have disposed of one. This is the second one, Section No. 4 $\frac{1}{2}$.

MR. HATCH: Section 4 $\frac{1}{2}$ is an amendment to the answer on file herein. That is five thousand acre feet in Shingle Creek and twenty-five hundred acre feet in Beaver Creek located. We have no objection to that.

THE COURT: That amendment may be allowed then.

MR. MCDONALD: THE only thing I notice is that inconsistency with the record, it makes Shingle Creek part of Weber River.

THE COURT: This is amendment to the complaint. We have corrected that in the findings. That makes a refer-

ence to Weber water shed, referring only to Beaver Creek. We cannot regulate the manner in which he wants to plead it. Now, the other motion--

MR. HATCH: Is to modify the proposed findings and decree to make them conform.

THE COURT : 109, page 72, proposed findings, be amended by adding thereto the following:

MR. BROCKBANK: That is another motion, he has four motions there.

MR. HATCH: We went over that. It is another motion as to the Kummer people.

THE COURT: This motion will be allowed with the exception as to the reference to William Bonner, which remains at 6.

12:00 NOON, RECESS TO 1:30 P.M.

THE COURT: The court will resume its session at this time. The next motion seems to be one by Stewart, Stewart and Alexander, representing the Stewart Ranch.

MR. MCDONALD: Your Honor please, there is one we passed this morning I would like to finish up. That is the matter I called your honor's attention to this morning. I have the stipulation before me, and it awards eleven acres to Leslie Syms.

THE COURT: You have examined it, Judge Hatch?

MR. HATCH: Yes, your Honor, that is correct.

THE COURT: The motion to amend the findings may be sustained, and findings amended to show 11 acres of land, pursuant to the stipulation.

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The motion of Stewart, Stewart & Alexander is merely directed to changing names, the corporate name.

MR. HATCH: Striking out "Company".

THE COURT: Striking out "Company". It is merely Stewart Ranch, a corporation. This may be granted.

Next one appearing is Morgan, Coleman & Straw, representing the Upper East Union Irrigation Company.

MR. McDONALD: I understand that is a matter in which the parties generally are not interested, matter of location of water.

THE COURT: That is all, between the tenants in common. Mr. Evans represents one of the parties.

MR. HATCH: I also understood it would not require the taking of testimony.

THE COURT: While we are waiting for Judge Morgan, the next is Mrs. Anderson.

MRS. ANDERSON: There are my papers, here is one paper, here is the abstract, that is the United States patent, I will read it. "UNITED STATES OF AMERICA" etc. (Reading).

Now, Judge Morse, you can't take no part of this patent. This is the right and work for the right, but I got letter and he don't have no jurisdiction over Deer Creek so I got it. I have used it. This is a certificate that on the 21st day of August, 1916 (Reading).

Now, Judge Morse, you signed the paper, you can't very well go against yourself. So I have used it to the present, uses it for the right, and I have used it so long. Now, Mr. Wentz, I want my paper, it cost me fifty dollars.

THE COURT: Mrs. Anderson, proceed as fast as you can, because we have to take up other matters.

MRS. ANDERSON: Certainly, because I want my rights.

I got a letter here, office of G. F. McGonagle, State Engineer, "Your communication of the 4th inst." etc, (Reading). I filed this as November 26th, and I want no one to interfere with my rights in Deer Creek.

Much obliged, Judge Morse, do you want to hear more?

THE COURT: No, I think that is enough.

MR. BROCKBANK: The matter held over was the matter of Daniel McBride, Cutler and Park. I understand the plaintiff take no further steps in the matter.

MR. HATCH: As to us, we have no objection to the motion being granted.

THE COURT: The Park, Cutler & McBride?

MR. BROCKBANK: Yes, that was held over.

THE COURT: It may be granted.

John D. Dixon, paragraph 82, page 44 of the findings proposed to substitute the following:

"As successor in interest to J. H. Snyder, Joshua J. Mecham, John W. Hoover and Hyrum Heiselt to 2.80 second feet of water which was appropriated upon lands in Provo Canyon, the place of use and the point of diversion having been changed, and the said water is now being used on lands below the mouth of Provo Canyon, and the point of diversion from Provo River is now at and near the mouth of Provo Canyon, Utah County, Utah, and said use may be continued and the quantity to which the said defendant is entitled at his said point of diversion at and near the mouth of Provo Canyon is 2.52 second feet."

Proposed to make a similar change with the decree. Any objection to that by anyone?

MR. HATCH: We haven't any.

THE COURT: It may be granted, if there is no objec-

tion. Is Mr. Dixon here, or represented by anyone? It would seem when you come to notice the difference the change ought not to be made, I don't know.

MR. TANNER: The change ought not to be made, your Honor, except for the purpose of making it less exclusive on the original appropriation, being exclusively in the South Fork. Part of the lands are in the South Fork of Provo Canyon, and part of the lands are at the head of Provo Canyon, in the vicinity of the Wright Estate land.

THE COURT: That change ought to be made.

MR. TANNER: Yes, the part that should be retained in the original which was proved in the testimony, and accepted, is the use to the Provo Reservoir Canal. I might say, your honor, that I am an owner is that water right and I have an interest in the preservation of its use through the Provo Reservoir Canal, as was stated in the original draft of the findings.

THE COURT: Then the part of the amendment which strikes out along the South Fork Creek may be allowed. The rest will be stricken out, but the remainder of the finding as it is now prepared may remain as it is. That will incorporate all the suggestion that was made here, except under the Provo Reservoir Canal system.

MR. TANNER: Yes.

THE COURT: A. L. Tanner and Esthma Tanner.

MR. TANNER: Your honor, that is simply a reapportionment of the acreage involved between these two parties, which was proved as one unit, in accordance with a stipulation that was filed by the parties in this case, the total acreage to both parties remaining the same, and the total volume distributed to the two parties being the same.

THE COURT: Then there is no one interested except the parties. This may be granted. Now, there is another one here marked by Mr. Brockbank.

MR. BROCKBANK: I think all my matters have been considered.

THE COURT: Mr. Morgan, with reference to the Upper East Union Irrigation Company, I think was left over.

MR. MORGAN: The commissioner informs me there was testimony showing the Upper East Union Canal, or the Faucett Field Canal is used in common by the Upper East Union and the Faucett Field people. Our motion runs to the request on the part of the Upper East Union Irrigation Company that the court in the decree provide for the distribution of the water by rotation. The decree now awards a certain amount to each of the parties. Finding No. 71 is a finding with respect to the amount the Faucett Field people are entitled to, and 61 is the amount the Upper East Union Canal Company is entitled to. The commissioner also informed me that last year the water was actually distributed by rotation, and if we can have the decree arranged that way, it will avoid any conflict in distribution between these two parties. We think the parties are now all before the court. It is a matter of mere computation with respect to the time these people would be entitled to water. The commissioner informs me the Faucett Field people were allowed to water twenty-four hours, the whole stream going into the canal. The Upper East Union people were then given water for six days and eight hours, and that made the rotation so that the Faucett Field were not required to take it at the same time each week, or each interval, thus avoiding continual night use.

THE COURT: The Faucett Field quantity gets down to $1\frac{1}{2}$ second feet at times.

MR. MORGAN: Yes.

THE COURT: That is not sufficient to irrigate successfully, is it? Is that your view of it?

MR. MORGAN: I think it would be much more economical to them if the water were concentrated.

THE COURT: Upper East Union is 10.64 the lowest.

MR. MORGAN: The commissioner informs me the Faucett Field people take this water out of the canal at several points, and it will be very difficult to equitably arrange the distribution.

THE COURT: Who represents the Upper East Union?

MR. MORGAN: I represent the Upper East Union.

THE COURT: And the Faucett Field?

MR. MORGAN: No.

THE COURT: Who represents the Faucett Field?

MR. MORGAN: I don't know of anyone.

MR. BOOTH: Judge Booth did represent them. I don't know whether they have arranged with anyone else. I think Mr. Ray represents them.

THE COURT: Are any of those people here? Are there any objections?

MR. MORGAN: Mr. Ray stated the other day there would be some objection; I don't know what it is.

THE COURT: The court for certain purposes will retain jurisdiction of this case for ever I take it, as is usual, and this may be one of the matters that the court will retain jurisdiction of, it being merely a matter of method of distribution and administration of the rights awarded, and there may be incorporated in this decree a provision, until further order of the court this water may be distributed in the way you have

asked for in your motion.

MR. MORGAN: By rotation?

THE COURT: By rotation, with leave to the Faucett Field people to apply to the court to make a showing why it ought not to be changed and delivered to them according to quantity rather than by rotation.

MR. MORGAN: That will be satisfactory.

THE COURT: Now, I think there remains nothing further except a suggestion made with reference to the springs, some misapprehension or uncertainty as to that, and the matter of appointment of commissioner, and fixing apportionment of costs. I will hear you with reference to the springs.

MR. HATCH: In regard to the springs, yesterday when it was proposed to amend Subdivision E, or the substitute of Subdivision E of Finding 58, I was objecting to the change when Mr. Murdock, looking at me, said, "Yes, that is all right, and let it go". I understood that to mean my client had no objection to it, and I so stated to the court, which was error on my part, and I then asked the court to withdraw my statement that we had no objection, which was permitted, and the court then at once found that the substitute should be allowed with an addition excepting from the spring, those flowing into and arising in the Blue Cliff Canal. That would, so far as the Blue Cliff Canal is concerned, remedy any trouble that might exist, but as to other rights in the river, it would not, and the stipulation provides specifically what they shall have; that is, they shall have such water from such springs as were then flowing in their water pipes and water system except the Maple Spring, and that is what they said was all they wanted. I call the court's attention to the testimony of Mr. Swan, who was the city engineer, Vol. 2, page 835, of the transcript. He says, from the Hoover Ranch down there is return seepage

coming in practically all the way down the river. There are just above Spring Dell particularly, there are springs on both sides of the canyon clear down to the water's edge, and probably large returning seepage water coming up in the bed of the river just above the Spring Dell and from there on down.

THE COURT: Is the city taking into their pipes this water?

MR. HATCH: No, that new springs were being opened down to and even after the commencement of this suit, as shown by Provo City's witness Swan, Vol. 2, page 744.(Reading).

Now, this is page 745 (Reading).

Now, the appropriation of springs by Provo City have been fully completed at the time of the hearing when the stipulation between the plaintiff and Provo City was made, as is shown by the testimony of Provo City's witness Thompson, transcript, Vol. 9 page 4160. This is a portion of his testimony.

"Q. Do you know whether all the waters of the springs rising in the canyon that are claimed by the city are turned into and used in the distributive system?

A. They have been this summer. (That is at the time of his testimony.) I judge before that, but this summer I have watched it very carefully."

Mr. C. C. Richards, in his statement before the court in the discussion of this matter, distinctly limited the city's rights in the spring to those that were taken in at the time of the stipulation. Vol. 9.

"MR. RICHARDS: Gentlemen, I have got a bunch of notices of appropriations of the springs only that we have taken into the pipe line system.

MR. JACOB EVANS: I should like to make an inquiry concerning them, whether or not the notices are notices of appropriation of springs only that have taken into the pipe line system?

"MR. RICHARDS: We claim for nothing else.

MR. EVANS: Then we have no objection to their introduction. In any event, if there are notices there that cover some springs that were not taken into the system, you would claim nothing for those springs that were not taken into the system?

MR. RICHARDS: Oh, no."

Now, that there were other springs contiguous and and practical to divert into the water works system is shown by the testimony of Mr. Swan, Vol. 2, page 928:

"Q. Have you all the water in your pipe line system that you can put into it except you take it from the river itself?

A. No.

Q. Why not?

A. Because we can put more in.

Q. From Springs?

A. Yes, there are other springs.

Q. Why haven't you put them in?

A. We have been putting them in, some nearly every year."

Now, the testimony is that there are many springs that had not at the time of this testimony been taken into the system, at the time of this stipulation, that are there, that can yet be taken in, and even though the plaintiff were not objecting, it is diverting virtually from the seepage and spring water that finds its way into the Provo River quantities that ought not to be diverted; especially ought not to after they stipulated with us as they have here. Now, I do not wish to be understood that we want to take from Provo City anything we stipulated they should have. The stipulation was to settle differences between us, and yesterday it was

rather urged we were seeking something from them and were willing to concede much in order to get what we wanted. Admit that we wanted them to concede to us something which we believed we were absolutely entitled to, what did we concede to them? It was water for the water works system. We were here showing that they were-- trying to show, and I believe did almost conclusively show, that with a proper use as they then had it they could probably not use the lowest quantity found to have been flowing in their pipe line at any time when the measurements were given, four and some second feet, four and a fraction second feet, as I remember, what we were contending was all they were entitled to. In the stipulation we granted to them not less in effect than-- well not less than-- here it is, the lowest quantity measured 5.16 to 12.88 second feet of water in their pipe line, when we were contending that four something-- four second feet, I am reminded by Mr. Tanner, in the tentative decree was the finding of their water works system. Now, I am informed that this inflow of the river, springs and other water, as testified to by Mr. Swan, will amount to 12 second feet of water.

THE COURT: From the springs mentioned in this amendment?

MR. HATCH: In this amendment, and they are not all the springs that have not been taken into their pipe line up to the present time.

THE COURT: I understood Mr. Richards to say they claimed nothing that had not been taken into their pipe line at the time of this stipulation.

MR. HATCH: He says that, but my objection is the decree and finding says more. It give them all the springs between certain points except only those that flow into the Blue Cliff Canal, or rise in the Blue Cliff canal under the exception as suggested by the court yesterday. Now, the

Blue Cliff Canal is on the north and west side of the river and all of the springs on the south side not yet put into the pipe line might under this be even hereafter diverted into the pipe line. Our objection was that it did not, the proposed amendment does not confine them to the springs that are now in their pipe line, and I understand--

THE COURT: Will you read the proposed amendment. Mr. Richards gave me a copy of it and I put it in here, but I do not find it now.

MR. HATCH: Subdivision E.

"That said defendant Provo City has appropriated, has the right to collect by its pipe line and water works system, as now located and constructed in Provo Canyon, Utah County, Utah, and is entitled to convey and use for domestic and municipal purposes at Provo City, Utah and adjacent thereto, all those waters of South Guard Quarter Springs, which arises in a ravine above the flume line of the Utah Power & Light Company, and below the ditch known as the Johnson Ditch, situate 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, 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 Jacket spring, measuring about one-fourth of a second foot."

Then the further amendment as suggested is,

"All of the waters of all the springs which flow into

or rise in the Blue Cliff Canal."

The objection to the proposed substitute is it nowhere attempts to limit them to the waters they have appropriated and to the water that is conceded to them in the stipulation. Now, if your honor please, under the first clause of this stipulation they are especially confined to the water flowing into their pipe line and water works system, but it is possible under the amendment as it was submitted yesterday, and as substituted for Subdivision E for them to claim, as I understand, approximately 12 second feet of water in addition, and to take it into their pipe line.

THE COURT: What is the capacity of their pipe line?

MR. THOMPSON: It will carry 15 second feet.

MR. HATCH: They sometimes now have with the springs they have heretofore diverted, 12.88 feet .

THE COURT: They could not take 12 more.

MR. HATCH: No, but they could by diverting these other springs keep it to 12.88 all the time, and that is what we object to. Sometimes the springs they have diverted now gives them a quantity of only 5.15 second feet. I call your honor's attention to the exhibit, the plat that was filed in the case here, 303, placed in the files this 9th day of April, 1920, in place of tracing, by order of Judge Morse. Now, I understand this is in evidence in the case. Mr. Tanner, if you will point out to me the river bridge where the head of this award will begin. Where is the river bridge?

(Discussion between court, counsel and Mr. Tanner as to map, not audible.)

MR. RICHARDS: Now, our understanding of the situation is just this. I am informed that the water that Mr. Swan referred to that might be taken into our pipe line additional to what was being taken in, was the water coming from the springs

or of the springs in the Blue Cliff Canal, and not otherwise. It is also true there are no other springs in there. If there are, we don't want them. We simply want a definite description what there is here, and these are in the nature of percolations rather than springs. If they were known by some name that we could designate them in the decree and in the findings, that is all we would ask, but they have no name, they are all here and there, just as they have been shown. Now, our brethren have not yet pointed out, and if I am correctly informed, cannot point out any other and different springs than these we have excepted in that section. I said before and say it now, we are not trying to get anything more than the stipulation suggested. We have the water of those springs running into our pipe.

MR. HATCH: If the stipulation says that, we will be satisfied, but it does not confine it.

MR. RICHARDS: Just a minute, Judge, let me talk a minute.

MR. HATCH: Pardon me, I thought you wanted me to say something.

MR. RICHARDS: I did. The suggestion has been made as to that identification, and that is all we are seeking to get here, is identification. We cannot name the springs, they have no names. It seemed to us the only way was to get it by some designation upon the ground by natural objects, or actual survey. We are not seeking for percolations, we are not seeking for anything except the waters that have been entering our pipe lines, and the water that comes from the springs that we have developed that do go there, and with these explanations as made the other day, and my brethren made here today, and as they make it now, they do not point out there is any other spring. If there is any other spring there, it must be known to some of these engineers. This does not give

us the right to go there and undermine that country and drain it. We do not ask that right. It is to designate the springs in this locality, so we will have something definite in our decree.

MR. EVANS: Mr. Richards, could it be arranged to limit this by saying it shall be limited to the quantity heretofore taken into the pipe line?

MR. RICHARDS: That was not the stipulation. The stipulation was we were to have the water of those springs, five feet or six feet, or whatever they flowed. That is all we are asking for, and I insist on having that specifically. Now, if there is another spring up there, you people must know it, point it out. It would give us no title to it anyway.

MR. HATCH: If the court please, as to that, that is all we want, is to have it specific. There are probably a hundred springs in Provo Canyon, no one of which is known by any definite name, but each flowing a quantity of water. They only have names given to them for some particular purpose, little springs of water flowing three or four inches per second, probably. Calling attention, - one or two springs just below this river bridge on the county road in Provo Canyon. Your honor has driven through the canyon, will probably remember them coming out of the mountainside and flowing across the road. Now, I do not think there is a man in the court house that can give a name to identify either of those springs, but they are there. They are not in the pipe line, but they may be put into it under this amendment, and there are probably thirty or forty other springs similar to them. I take it that there must be, under the testimony of Mr. Swan, as he has given it here in the record, and it is to avoid that that we are now objecting to that particular grant of all of the springs arising between certain points, that they never have used and some of them they probably never will, but it leaves it wide open for

them to go in there and take up the 12 second feet of water, 13 second feet of water, or capacity of the pipe, during the entire season every year, and that is not the stipulation. I take it that is not what the court intended to give them, and they never have had it, they are not entitled to it, and don't claim it now.

Now, I have been informed that Provo City has a survey definitely locating every seep and spring they have put into their pipe line. I may be misinformed. If they have, it can be definitely fixed here now.

THE COURT: Is that correct?

MR. SWAN: That map there.

THE COURT: I didn't ask you about the map. Is that correct, that you have a survey that shows every spring that goes in?

MR. SWAN: Nothing more than the survey from which the data was put on the map.

THE COURT: You have no such information?

MR. SWAN: That is all the information we have.

THE COURT: You don't care to answer the question?

MR. RICHARDS: Have you any additional information relative to the location of the springs other than the information on the map?

MR. SWAN: No sir.

MR. HATCH: Doesn't this show every intake into your pipe line?

MR. SWAN: Shows every branch and lateral, but doesn't show every intake, because the intakes are along in galleries, many places, it is impossible to locate it in a definite spring.

The whole mountainside there is moved, and the water changes along that line, and you cannot definitely locate those springs.

MR. HATCH: There are springs between the Provo River bridge in the canyon, on the county road, and the west line of --

MR. RICHARDS: I am told by Mr. Swan--

MR. HATCH: West line of Section 5.

MR. RICHARDS: I am told by Mr. Swan, there is no spring, or anything that could be called a spring within that territory that has been described in our proposed finding and decree, that could be taken into our pipe line except those that are excepted by the Blue Cliff and Yellow Jacket. There are no other waters in that section that could be taken into the system.

MR. HATCH: As now constructed-- he doesn't quality it by that-- but the pipe line may be extended when they are awarded the right to all these waters. They are not limited to their present pipe line.

MR. RICHARDS: Then my statement, if our pipe line were extended across the territory we have named here, there would not be any others.

MR. HATCH: Then I would dispute it, and have absolutely no question about proving conclusively that it is not right.

MR. RICHARDS: I am not suggesting water could not be carried from outside, but within the limits.

MR. HATCH: Between the bridge and west line?

MR. RICHARDS: Yes.

MR. HATCH: It seems to me so plain anybody traveling through the canyon could not help but see.

MR. RICHARDS: Let us have a suggestion then.

MR. HATCH: I say you ought to be confined to the stipulation, the springs you have diverted into your pipe line water works system, as it was constructed, at the time of the stipulation. Your honor has the stipulation, and that confines them to the springs they had then diverted into their pipe line, and the testimony shows that from those springs they received into their pipe line at the times of the different measurements. The lowest quantity was 5.16, and highest quantity 12.88 second feet, and we had that when we stipulated, and they confined themselves then to the water of these particular springs. Now, if they don't know the names of them, they having diverted them and put them into their pipe line and used them, how can they expect us to know the names of those springs.

THE COURT: I do not think it is material at all as to the names. If they can be identified, of course, there ought to be some identification of the springs. It is not desirable in any decree that an expression is used which would require evidence in order to make it definite and certain, and if this, the language of the stipulation, was carried into the decree, it would be uncertain. If we can ~~make~~ make it certain we ought to do it, of course.

MR. HATCH: I do not know of any way to make it certain except from their notes. If they cannot do it, having surveyed and diverted it, and made their applications that Mr. Richards put in, it would seem to be a question that could not be made certain, but it would be up to them to make it certain.

THE COURT: The court hasn't any information that would enable the court to make it certain, but I think since we examine this stipulation here there should be something in the decree expressing the substance of this stipulation in respect to the fact that the waters contemplated by the

stipulation are the waters from the springs that have been taken into the pipe line that time.

MR. EVANS: Why couldn't that be carried into this amendment and thereby limited? It seems to me it is only a question of language.

MR. HATCH: I thought the finding, as it originally stood, covered it, page 30.

THE COURT: I have it right before me, I have been reading it.

MR. HATCH: The last line there is after "Johnson Ditch", "springs arising between the county road and the flume line of the Utah Power & Light Company, and down from the county highway bridge crossing said river near the 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." But all of this is qualified, all those waters now flowing from springs into said waterworks system, that covers it. Then they specifically except, however, the waters of Maple, or commonly called Yellow Jacket Spring, and the springs or water to which the said defendant Provo City is entitled, are more particularly designated as follows. Now, if they can be designated any more particularly than they are in this paragraph, I take it it is their duty to so designate them, but that they be confined to the language of the paragraph before the word "spring",- all preceding that. Then the balance of the paragraph as it was in the original finding, attempts to point out the particular springs that flow into their system, and does it, I take it, so far as it is possible to do it from the evidence, and if the evidence was not sufficient to identify their rights, that is their fault, not ours; but they should not be permitted by a broad taking in of springs to cover anything that they are not entitled to, and they are clearly not entitled to that 12 second feet of water

in addition to their 12.88 when their pipe will only hold 13.

THE COURT: Now, Mr. Richards, what additional territory is included in the description you have given in your proposed amendment to that that is given in the subdivision E, paragraph 57.

MR. RICHARDS: Can you point it out, Mr. Swan?

MR. SWAN: There is the bridge, near the east line here on this map, little ways west of this section corner, short distance right there, shown on the map where the county road crosses the river. The other point is the west line of northeast quarter of Section 5. That would be half way down this line here. This is the northeast corner of Section 5, and northeast quarter would be along here between these two points, bring it down here.

THE COURT: That is the description in the original draft. Now what is the description you have in this, what does it take in?

MR. SWAN: Description is limited to the same distance, and includes the territory between the flume of the Power Company and the county road, which is shown here on this map, with the exception of this one spring which is especially designated which comes above.

MR. HATCH: The flume is on the north side of the river, and county road on the south for practicably the entire distance.

MR. SWAN: Yes sir, all the distance.

MR. HATCH: And it takes in every seep and spring that comes into that river during that entire course, without any limitation, under the proposed substitute.

MR. RICHARDS: You wouldn't suggest the word "spring" covers percolation and seepage, and we could drain the whole country?

MR. HATCH: No, but anything coming to the surface out of the ground is designated a spring, regardless of the quantity. We call it spring, that is the general definition of the term. You would not be permitted to dig except you were allowed to develop and increase the flow of your springs that are awarded to you.

MR. RICHARDS: Exactly, and simply apply, ^{to} the present conditions, or the condition that obtained at that time. Do you understand there is any change in the conditions now and what they were?

MR. HATCH: I don't understand there is, but if you confined yourself to the waters you have diverted into your ditch, I am contending you shall be confined to the waters you have appropriated regardless of the quantity. We admit it is less than six feet to twelve second feet. We are not questioning that, but what we do question is the broad xxxx taking in of everything in sight.

THE COURT: Gentlemen, from reading the draft of this subdivision on page 30, and the proposed change, I see no difference whatever in them, except that in the draft it is limited to the waters that had been taken into their pipe at that time. The description is just the same. I do not see any difference at all. Is there any difference?

MR. HATCH: I think there isn't any except one limits them to the water they had actually.

THE COURT: Yes.

MR. HATCH: And the other does not. The other takes in all that that they have not, if there be any, and the evidence shows there is 12 second feet.

THE COURT: I think under the evidence, they are entitled to all that was running at that time from this territory.

MR. RICHARDS: There are only two points I suggest by the change in that subdivision. The first was to show only it was not some indefinite quantity that was flowing in the pipe, so as to leave a question the court hereafter would say there is no specific or definite quantity named, and fixed it as being all the water coming from the springs so that it would be definite from those particular springs. Then not being able to name them, the lines were drawn, as I was told that would include nothing else but just those.

THE COURT: It is drawn in both of them. There is no difference in the lines. That is the reason I asked Mr. Swan where these places were, the description of the territory in which these springs arise, and you are entitled to all of them under either of these drafts. It is just the same, isn't it, Mr. Swan?

MR. SWAN: We aimed to make it exactly the same.

THE COURT: And under the language of each of these proposed drafts, you are entitled to all of the water from all the springs in that territory, limited, however, to the fact you had not had it in your pipe before.

MR. HATCH: I don't so read it, your honor. The defendant Provo City has appropriated, has the right to collect by its pipe line and waterworks system as now located and constructed in Provo Canyon, all those waters now flowing from springs into said water works system, except, however, the waters of Maple, or commonly called Yellow Jacket Spring. The other wording says, they are entitled to divert into its said waterworks system, and to convey and use for domestic and municipal purposes.

THE COURT: Judge Hatch, that is exactly what I suggested a moment ago, that the springs described in the two are just the same territory in which the springs arise, and all the

springs are referred to in both instances, but in the draft that was prepared, original draft, there is a limitation contained in the first part of the paragraph to the water that was taken into their pipe line as then constructed; isn't that correct?

MR. HATCH: Yes.

THE COURT: That is the only difference.

MR. HATCH: As to that we offer no objection to the original "e", but we object to the proposed substitute.

THE COURT: I do not think the substitute, when I come to see the stipulation, conforms to the stipulation. I think it leaves out some important factors in the stipulation, and does not make it any more definite and certain than the original does. The stipulation is uncertain, there is no certainty to it.

MR. RICHARDS: It was not intended to limit anything, and I shall be glad to tell you what happened.

THE COURT: You have left out, all those waters now flowing from said springs into said waterworks system.

MR. RICHARDS: We have a right to collect them, and elimination of the phrase was simply to avoid the question arising of double construction, whether it would be possible to construe the water flowing as being an indefinite quantity, and to make that definite, I used the term, all^{of} the water of those springs, so to avoid that question of uncertainty or double construction.

THE COURT: The difficulty with you gentlemen seems to be you are satisfied with the language in the stipulation which was much more indefinite and uncertain than any language that is proposed in either of these findings.

MR. RICHARDS: I will say this, your honor please,

of course at the time of the stipulation it was understood, as we understand it here, that it was to include the waters of those springs and the springs that we had been using. We are using all the waters of those springs. That is all we want now, but when we come to putting it in the form of a decree, we want to put it so that it will be definite and adjudge something to us; not be so indefinite it will be meaningless. The question is whether under the language of the first draft it should be regarded as the water that runs through the pipe line, not specifying anything definite. The court might say it was meaningless. It was to avoid that construction of the decree I put the other in; then whether it is one foot, five feet or twelve feet, the language covers it, because it would be all the water flowing from those springs. The other was simply for the purpose of locating the springs. If there can be a better definition of the location of the springs, I should be glad to get it.

MR. HATCH: I call the court's attention further that they--

THE COURT: Let me ask, I understood you to say you made no objection to "e" as originally drawn. The substitute may be adopted if you make no objection to the fact that the springs that are included in your stipulation are the springs that arise and all of the springs that arise within this territory here.

MR. HATCH: But we do. Either I don't understand the court, don't understand the original "e" as the court understands it, because we do object to all the springs in that territory.

THE COURT: I think, gentlemen, that the reasonable construction to put upon this is to say you meant those springs within that territory, if that is the territory that is covered by your stipulation.

MR. HATCH: If the court please, our stipulation-- I don't know the territory is covered-- we stipulate as to the water and the springs, but I do not think we cover any territory, I don't remember.

THE COURT: No, you don't.

MR. HATCH: We do not cover any territory, but conceded them all the springs wherever located they had in their pipe line. They have interjected this territory into this, and we do not object--

THE COURT: The committee having this in charge injected that part of it.

MR. HATCH: I don't know, someone did, but if the language in "e" were all those waters now flowing from springs into said waterworks system except Yellow Jacket Spring, that fixes a right. Now, if it is not definitely located, if their springs are not definitely fixed, that are going into their system, they should not be permitted to take advantage of that neglect and acquire something largely additional to what they have ever appropriated or used or now claim the right to use under -- and you know what springs they are, according ~~to~~ to this testimony that never were in this pipe line, their own testimony. That is why we are objecting. Springs all along the course they never have had, and within this territory they never have had within their pipe line.

MR. RICHARDS: Judge, will you permit me, Mr. Swan has come to me twice and is here asking I shall explain the testimony you read, you interrogating him all over the field, as he puts it, cross examining him in regard to it, and the testimony that he gave you, as he understood it there, and understands it now, is that there is no water there to go -- within this territory that would go into our pipe, except that which has been excepted and is excepted.

MR. HATCH: As to that, this is, as I understand, the direct testimony of Mr. Swan. It is not cross examination. He was testifying on direct testimony when he made these statements, and it was with regard to a different subject matter, I take it, as to Provo River being a constantly increasing river, and he was testifying at that time to get all the water into the river he possibly could. May be that he was led into exaggerating the matter a little bit, but I do not believe he was. I think he told the truth.

THE COURT: The proposed amendment is allowed. Now, we will take up the matter of the appointment of the commissioner.

✓ MR. RICHARDS: I was going to say, so far as Provo City is concerned, we are well satisfied with the present officer, and are quite agreeable to his appointment for the ensuing year, and with the ~~sk~~ salary named in the tentative draft of the findings and decree.

MR. McDONALD: Have no objection, as far as I am concerned.

MR. EVANS: Agreeable to us.

MR. RICHARDS: I make it in the shape of a motion Mr. Wentz be appointed commissioner for the ensuing year at a salary of three thousand dollars, I think it is.

THE COURT: Are there any suggestions to the contrary, gentlemen?

MR. HATCH: We would second that.

THE COURT: The court will make such an order, unless some reasons are presented why it should not be done. Such an order may be prepared, and I will sign it before I sign the decree.

MR. EVANS: Including in that he may have such

assistants as may be necessary. ✓

MR. HATCH: If the court please, Subdivision "bq", on page 68 of the findings.

THE COURT: Charleston Irrigation Company.

MR. HATCH: Under the award to the Charleston Irrigation Company, there is the following finding:

"Said Charleston Irrigation Company shall have, and it is hereby granted the right -- (it is in the nature of an order as well as a finding)-- 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."

Now, if that shall be done, they should be placed then in the third division of Wasatch County, and they should be charged with the same burdens that other parties in this litigation are charged with; that is, their 17th class rights should be subject to the supplying of the quantities awarded to the people in the Provo division. In the division in which Charleston is now placed, that is, the second division of Wasatch County, they are permitted the 17th class rights so long as it is available, whether the plaintiff gets any water at all or not, but if they come below and put themselves into that portion of territory that is within the Third Division, they should be governed by the same rules the Third Division is governed, and parties below be supplied prior to their having the right to any 17th Class.

THE COURT: Who represents the Charleston people?

MR. BROCKBANK: Your honor please, according to the area of that country up there as they are divided up on page 29 of the findings the Charleston Irrigation Company and Sage

Brush Irrigation Company and Spring Creek Ditch-- all of their areas come below the Second Division, when it comes to that point. The Second Division says it shall include the area from and including what is known and commonly called the Hailstone Ranch down to and including what is known as the Midway upper dam. All the areas of these three irrigation companies is below the Midway Upper dam.

THE COURT: Where is the point of their diversion?

MR. HATCH: Wasatch canal and North Field all divert at the same point. Charleston is asking to come below the Upper Midway dam, and divert their water at a new point. The area of all of these lands lies below the Wasatch dam, because the lands lie below the dam or they could not be irrigated from water diverted at the dam. The Wasatch lands lie, much of them, immediately above the Spring and Sage Brush and Charleston. That is, by "above", I mean at the higher elevation in the valley. They are irrigated from Wasatch canal. Charleston Irrigation Company now diverts its river water from the Provo River, and is in the Second Division. So is the Sage Brush and Spring Creek, as to any waters they get from the Provo River. Charleston asks to come into the Third Division and divert its water which would materially affect the lower users, because they are diverting from the river water that is going down to supply Midway and others, and if there is a surplus, on down to us. If they come down there to build their dam, they should be put into the Third Class as to their 17th Class rights, and Third Division as to their 17th Class rights.

THE COURT: Is it your purpose to make a diversion in the territory described as the Third Division?

MR. BROCKBANK: The stipulation would indicate they were, but I understand the company claims water both out of the River and Spring Creek. They filed on Sprink Creek as early

as '88, and have not abandoned it, and I think as far as taking water out of Provo River is concerned, they could be limited. I think that would be the rule, but, as to the waters out of Spring Creek, I should think not, because they divert that water below the Upper Midway dam, and they should be governed by the rules on the Second Division as to the water from Spring Creek.

THE COURT: Wouldn't they be subject, Judge Hatch, to the limitations prescribed for the Second Division, if they take water out in that division?

MR. HATCH: They take it also from the Provo River and divert it into Spring Creek before they take it out of Spring Creek, and, as I understand, your Honor, the only reason they want to come lower down is because of the annoyance that they are under up in the so-called North Field interfering with their water and diverting the water-- what we call stealing it up there-- and they are carrying it in a channel from which many people in the North Field irrigate. They want to get a channel directly and specifically their own taken from a point on the river several miles lower down and where much more seepage and inflow has come into the river.

THE COURT: Your suggestion is if they do that as to that water, they ought to have the same limitation?

MR. HATCH: That all the others in that district have.

THE COURT: Then Mr. Brockbank suggests as to the water they take out in the district above they ought to be subject only to the regulation and limitations on the district above.

MR. HATCH: But they won't take any above when they commence taking it below, that is, no Provo River water, except as Spring Creek is a tributary of the Provo River, and has always been and was part of the Provo River at the time

they commenced to divert water.

THE COURT: In the decree I do not think it would be expected the court would decree what limit of water they should take out at the lower diversion with reference to their entire amount of water. They have a right to take it out. I do not see there is any difference between you gentlemen at all.

MR. MCDONALD: If you will notice the language of the proposed change, they are not to interfere with any existing rights.

MR. BROCKBANK: They are not to interfere with any existing rights, but arbitrarily they have been placed in the Second Division. It seems to me it is going to be difficult to make any changes in that matter.

THE COURT: It might be difficult to adjust if part of the water they take is subject to the regulation of the Second District and part of the water they take is subject to the regulation of the Third District, but I think as to the water taken out in the Third District, they should be subject to that District.

MR. HATCH: Your honor understands if they come below and take their ditch out of the Provo River at the lower point and come under the rule they can use the water whenever it is available at their point of diversion as is provided for them now they will have a 40 acre duty all summer, even where we get a 70 acre duty or not as the matter now stands, because the water will always be available for the 40 acre duty for them, together with their spring and seepage water if they take it out at the lower point. That is why I call the court's attention to it.

MR. CLUFF: All we suggest there should be some limitation in the language there so that it will be definite.

THE COURT: You have a physical condition where the limitation in the language won't affect it, will it, Mr. Cluff?

MR. BROCKBANK: Your honor, I don't know under what conditions this stipulation was made, and it seems to me there must have been testimony of some kind giving them that right to change their point of diversion. There has been no objection to it, there has been no motion filed, I cannot understand why they should be changed from the Second Division into the Third. It is prejudicing their rights materially, different to what has been allowed.

THE COURT: I don't remember, was this matter, was this right given them in the decision?

MR. HATCH: The original?

THE COURT: Yes.

MR. HATCH: I think not, and there is no evidence or stipulation upon which to base it.

MR. CLUFF: This is the first time it has appeared in this case.

THE COURT: If there is no evidence on the subject, and no stipulation, the court would hardly care to put in this provision just from such deductions as we are able to make from our general knowledge of conditions. I can readily see from what I know by observation of that stream that the quantity of water available at a point probably where you are seeking to make your new diversion would be very different from that where you take it now, and that water that comes in from accretion and various sources is water the people below have used up to the time you change your point of diversion.

MR. HATCH: We have no objection to their changing their point of diversion, if they are put under the rules that

should apply that we are supplied with 70 second feet of water, or 70 acre duty-- water on the basis of 70 acre duty-- before they can have any 17th Class right.

THE COURT: When you say "we" do you mean the plaintiff?

MR. HATCH: The plaintiff, that is the only person I represent.

THE COURT: For what quantity of land would they have a 70 acre duty?

MR. HATCH: As testified in the stipulation.

THE COURT: Is that stipulation you shall have that before the parties are entitled to--

MR. HATCH: No, the parties in the First and Second Wasatch Divisions may take the 17th Class right even though we don't get any water way down in Utah County, not only the plaintiff, but all -- and those in the Third Division in Wasatch County may take it only at such times as we are supplied with the quantity of water awarded to us and other people in the country. That includes all the users in Utah county, must have the water awarded to them before any 17th Class may be applied by the users in the Third Division. That is the division they propose to come into to divert the water under this finding. Being permitted to take it so long as it is available they would be under a forty acre duty the entire season, diverting their water from that point, whether we had sufficient water to irrigate our lands under the duties we have or not.

THE COURT: Then you have not stated it accurately, Judge Hatch. I think you may have made a slip of the tongue. In the Third Division, that is the one they propose to move it to.

MR. HATCH: Yes.

THE COURT: You stated they are entitled to it only when those below are supplied, is that correct?

MR. HATCH: Yes.

THE COURT: Then, if they are removed to the Third Division, and required to conform to the requirements of that division, wouldn't that cut them off from that when you didn't have it?

MR. HATCH: That would be all right.

THE COURT: That is what I understood you to suggest they should have, and I agree with you as to those matters.

MR. HATCH: I sometimes mix things up.

THE COURT: I could not understand why you should say if they were put under the rules of the Third Division they would be able to have a 40 acre duty all the season regardless of what you have.

MR. HATCH: No, if they take their water in the Third Division and are awarded rights in the Second Division as they are awarded them, and nothing qualifying it--

THE COURT: The court has asked them what objection they have to this, if they have any reason to suggest to the court why they ought not to be required to comply with the regulations with reference to the division in which they take their water. Isn't that what you wanted done?

MR. HATCH: Yes.

MR. BROCKBANK: Your honor please, we do not desire if they change their point of diversion to increase their rights at all. That is not the purpose. It is merely to make the diversion more convenient. Whatever regulation or

limitation they have by diverting at Charleston or the Midway dam shall be binding on them.

THE COURT: I don't know. I think possibly they have waived some rights if they take it out at the other point.

MR. BROCKBANK: It is only a matter of convenience, not an increase of water, but merely want to change the diversion, as a matter of convenience, not take any more rights and not take any more water.

THE COURT: Then there is nothing between you.

MR. HATCH: Yes, there is something material between us. The Reservoir Company would like to take all its water at the point of the mountain in volume and quantity, if it could get it, but they lose some in carrying it along. Now, Charleston wants to take its water at a certain point on the river below the point where they now take it. They are awarded certain rights in the point where they now take it, which is a 40 acre duty so long as the water is at that point, or so long as the water is available. Then they are permitted to change the point of diversion, and if it is changed, without changing that provision to take it so long as it is available, they have a 40 acre duty.

THE COURT: Are they entitled under the provisions of this decree to take water in the Third Division as long as it is available at the point of diversion?

MR. HATCH: No, but specifically they are parties.

THE COURT: What is the provision as you remember it, Judge, with reference to the time when they may take water in the Third Division in the 17th Class?

MR. HATCH: In the Third Division only at such times as those in Utah Valley are supplied with the quantities awarded to them.

THE COURT: Aren't you satisfied with that stipulation, I mean that limitation upon their right?

MR. CLUFF: We are, if the court please--

THE COURT: I mean the other side, I don't see why they are not.

MR. HATCH: Here is the stipulation:

"Whenever between May 1st and August 10th of any year the waters flowing in said river and the canals in the Provo Division exceeds in volume the ^{aggregate} ~~maximum~~ quantity to which the defendants in the Provo division are entitled, as hereinbefore stated, and the plaintiff is supplied with one second foot of water for 70 acres of land, that said defendants in the Third District of the Wasatch Division are entitled to such excess in addition to the 1st Class aforesaid set out in "a" above to a quantity equal to and commensurate with the 17th Class of the Second District of the Wasatch Division; and the same is herein denominated the 17th Class."

THE COURT: Isn't that satisfactory to you? If they are ~~subject~~ to that limitation, what more do you want? I do not understand you, I am free to say. Doesn't that limitation satisfy you?

MR. HATCH: Yes, that wholly suits us, but they have a special award.

THE COURT: What is that?

MR. HATCH: That is that they are awarded, and they are now in and diverting their water from a point in the Second Division.

THE COURT: They want to abandon all the rights they have in the Second Division and come into the Third, except some water from Spring Creek possibly.

MR. HATCH: If it were stated in that way, they were abandoning their rights in the Second District as to 17th Class rights--

THE COURT: No, the court will not put it that way, because I cannot compel them to abandon, but the court can say and it ought to be so drawn, one of the terms upon which they make the change in diversion is they shall be subject to the regulations that apply to the Third District.

MR. HATCH: We will be wholly satisfied.

THE COURT: I have wondered why you were not.

Now, gentlemen, there is another matter that was suggested the other day. There is occurring in these findings and in the decree many places a reference to the irrigation season, and non-irrigation season. There is nothing in the decree which indicates what that language means. It ought to mean something. Either designate what the irrigation season is, or strike out reference to it. It was suggested some application would be made to fix it. I think it was included in one of the motions by someone to designate the irrigation season.

MR. MCLANE: That suggestion was made by the Utah Power & Light Company. I am somewhat handicapped by not having been present at the principal trial of the action, and I do not know whether there is any testimony in the record as to the length of the irrigation season, that is, the period of the year during which water is used for irrigation purposes, but I would assume it was a fact of which the court could take judicial knowledge.

THE COURT: I think there was a great deal of evidence on that ranging from late in the winter, or early in the spring, until the last of November, if I remember right.

MR. MCLANE: Doubtless the quantity used after, say the 1st of October, was very much less compared with what was

used prior to that time, and of course in so far as any of the rights would conflict with the rights for power used continuously throughout the year, it seemed to us the decree should limit the season. Now, as a matter of concrete application to this case, there are only a very few rights which do conflict with the use of water by the Utah Power & Light Company. If I am summarizing them all correctly, they are simply the rights of the Provo Reservoir Company, represented by the so-called Dixon right, transferred right, which amounts to but a few second feet, and which, as I understand, were transferred from a point higher up the river, and the Heislet and Donnan, and it seemed to us there should be a limitation of the irrigation season particularly as to those rights and particularly in case of conflict between the power and irrigation uses. Then there is the right of the Provo Reservoir Company to 150 second feet, which I understand -- and I trust Judge Hatch will inform me if I am not correct-- has never passed to final certificate.

MR. HATCH: It has not.

MR. MCLANE: And consequently I take it is not finally awarded in this proceeding. Perhaps no specific limitation of that right should be attempted, but in so far as there are conflicting rights for irrigation uses as against power uses by the Utah Power & Light Company, I would think there should be a specific limitation of the irrigation season, a period of time during which they rights could be used.

MR. TANNER: Might I suggest, your honor, along the same line. I spoke to Mr. Story-- I am acquainted with the situation, the specific situation that was raised in the specific objection to the Dixon right and Wright Estate water right. The testimony has been in the upper country where these rights originated, irrigation season ranged from October 15th to November 1st. What I would like to ask the Judge is, if it

would be satisfactory if these two rights were limited to pass over the dam from April 15th to October 15th, which is the narrowest testimony as to irrigation season in the region where they originated.

MR. MCLANE: Trusting your word for what the evidence shows, but personally I don't know, I will accept the word of yourself and counsel that is what it does show, I would say that would be a satisfactory solution as to those rights,

MR. HATCH: I think that is approximately right.

THE COURT: 15th of April to 15th of September.

MR. HATCH: 15th of April to the 15th of October. I do not remember the testimony only as Mr. Tanner has stated it, but that is the irrigation season in that locality, generally claimed as such .

MR. RICHARDS: May it please the court, I am requested to say for Brother Ray, who is not here, that some of his clients would like the water as late as the first of November.

MR. HATCH: That is Timpanogos in Utah County.

MR. RICHARDS: I do not know the particular one, but goes on the question of the general irrigation season, 15th of April to the 1st of November.

THE COURT: Are there any other suggestions? Did you arrive at some understanding between you?

MR. MCLANE: There is no limitation, is there, in the decree as to the quantity of water which may be used after the first of October other than that which prevails from say the 15th of August or 1st of September? There is an increase in duty, I recall, from early in the season towards the 15th of August or the 1st of September, I have forgotten the exact date, and then the duty remains constant from that time until

the opening of the next irrigation season. Now, my thought would be that the water required for irrigation purposes after the 15th of September would be very much less than the quantity of water required from the 15th of August to the 15th of September, and the situation might be well satisfied by a general limitation of winter use, or use after say the 15th of September to a portion of that allowed between the 15th of August and 15th of September.

MR. RICHARDS: If the court please, I might suggest in that connection there ought to be a provision-- I don't remember there is one-- for water in the canals later in the season than the irrigating season for domestic purposes, watering of stock and such. I don't recall any general provision in the decree.

THE COURT: I do not think there is. That certainly would be true if there is incorporated in the decree a definition of the term "irrigation season".

MR. MCLANE: As I recall the decree, there is an absolute award of a constant quantity of water from a specific date, which I think is about the 15th of August, until the opening of the next irrigation season, and while I assume that any award is subject to the general provision of the law that the water must be beneficially applied, yet it leaves a pretty wide latitude to winter use for domestic and for other purposes; and so far as we are concerned the whole situation could be satisfied by a clause in the decree stating a definite proportion of the last quantity specifically awarded now to continue from the date which might be arrived at to the opening of the next irrigation season. I do not desire to be very insistent or technical in the matter, or deprive the irrigators if I could-- I cannot, but if I could-- to any water as it now stands, but there is a chance for a large duty of water, Mr. Murdock suggests as much as a 70 acre duty

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in Wasatch county from September 15th to April 15th, which of course would permit that county to be a lake throughout the winter time. Mr. Tanner suggests there is a provision in the decree--

MR. HATCH: Must be a beneficial use.

MR. MCLANE: This clause on page 57 of the findings paragraph 12, says:

"During the period of September 15th to April 15th of the following year, the parties to the above entitled cause in Wasatch and Summit Counties, and each of them, are entitled only to the use of such portion of the amounts heretofore specified as their necessities may require, not to exceed one second foot for each 70 acres".

Now, if I may call attention to another clause as typical of the adjudication to the Utah county users, on page 30, paragraph 58 of the findings we have from May 10th to September 1st a duty of 50, September 1st to May 10th a duty of 70; so it would seem that whatever the last date in the fall fixed is, that there is a constant maximum quantity of water prescribed from that time to the opening of the next irrigation season, and obviously the quantity specified is quite excessive; and where specific rights do conflict with the power rights, as in the case of the Provo Reservoir Company, it might in a season of low water result very much to the detriment of the Power Company.

MR. MCDONALD: If the court please, I was just talking to a delegation from Wasatch county, and they say there should be a provision for domestic use in the winter to take care of the animals, and there is some irrigating to November 1st. Not a great extent, but they irrigate some.

THE COURT: What suggestion do you make with reference to a provision that should be incorporated with reference to domestic use/? It certainly would not require water at

the rate of one second foot for 70 acres of ground that might be irrigated in the summer time or the cropping season, to supply water for domestic and culinary use in the winter.

MR. SOULE: Your honor please, in Summit County they water stock all winter from the canals.

THE COURT: I understand that is the universal custom, but I was asking as to a suggestion of the nature of the order that should be made with reference to that. You would not require a full canal of water, same as in the irrigation season probably.

MR. HATCH: Paragraph 124 would limit and regulate all of them under the commissioner. Although they are entitled to 60 or 70 second feet in their canal when they have use for it, it would be regulated only to what they had use for, by the commissioner under this paragraph of the decree, if anyone else is not wholly supplied with all they want.

MR. MCLANE: Might I make a suggestion? Page 74, paragraph 124 of the decree, there is a general limitation that the water be used for a beneficial use, and reasonably necessary for such use. If something to this general effect were added to that clause, "and that the watermaster herein provided for is authorized to enforce the provisions of this paragraph of the decree by reducing the quantities of water herein decreed during the non irrigation or winter season, when the waters are required for domestic purposes, or when a less use than that herein specified is adequate to satisfy all irrigation requirements"-- that is very poorly expressed just as I go along, but perhaps gives the general idea-- that might cover the situation.

MR. RICHARDS: I do not think there is any provision in the decree for the water that is distributed for domestic use, and I was just wondering what effect would be given to this.

The commissioner would be authorized to distribute, and left wholly to him to adjudicate and determine the rights. I just was wondering whether there should not be something more definite than this provision Judge McLane refers to.

THE COURT: I think in nearly every instance the lowest that is provided for for the irrigation season is continued through until the next spring. Is that not correct?

MR. BOOTH: Highest duty.

THE COURT: No, the lowest number of acres, highest duty of water.

MR. RICHARDS: He suggests the irrigation season should be defined. Then in the absence of some finding of the quantity that should go after that for domestic purposes, the commissioner would not have anything upon which to predicate.

THE COURT: I understand this to be a substitute for the suggestion of fixing the season, the termination of the season beyond which no water is awarded. This is merely a substitute for it.

MR. MCLANE: That is correct.

THE COURT: With that added, the substance of the suggestion made by Judge McLane, with that added to paragraph 124 of the decree, is it the view of the counsel generally that would take care of the matter?

MR. HATCHER: I think it would.

THE COURT: It seems to me it would, and that may be added to that paragraph, the substance of it, if it meets with the approval of the counsel.

MR. CLUFF: If the court please, there is one other thing I would like to call the court's attention to. On

page 7 of the findings-- I don't know whether it is very material or not, but thought I had better call attention to the fact that the title of the case does not include the name of James Amicone, Alice Rambaud, William Cluff, S. S. Cluff, Jr., J. A. Baum, Elmer Baum and Lafe Baum. There are certain defendants mentioned there and in the findings and decree their names are taken care of, but in the title of the case their names do not appear as defendants. I call the court's attention to the fact. I think it is because those defendants were brought in after the original complaint was filed.

MR. BOOTH: Isn't it customary to leave the title as it in in the court?

MR. CLUFF: I suppose ought to be some mention made of them being brought in after.

THE COURT: Were they brought in by some order of the court?

MR. CLUFF: Yes.

THE COURT: It would be complete. As to that my view of that matter is-- comes up a great many times-- my view is it is not very material. You may take an order adding them parties to the suit, and their names by adding to the title, or the record being complete as to their being brought in by subsequent summons, you may rest without doing anything. I do not think it affects the rights any way.

MR. CLUFF: Now, there is one other matter I would like to state at this time that the record may be clear, and counsel for the parties may understand my situation. I formerly represented the Provo Pressed Brick Company. In 1918 that company went broke, and its property was all taken over by the Provo Commercial & Savings Bank under foreclosure of

mortgage and the company then ceased to exist any more, never did redeem its property, and later there was a company reorganized, took over the property of the Brick Company from the bank and Mr. Belmont, who formerly was a member of the Provo Pressed Brick Company, talking to me last summer regarding this case, informed me that he had arranged with Mr. W. W. Ray to look after the interests of the new company in relation to this water right, and, of course, after that, thinking that I had nothing more to do with that phase of the case, I was retained by the Provo Reservoir Company to assist them in other cases and in this case also, in so far as their contention did not conflict with any of the rights of the clients I had formerly represented; so that I would like the record to show and court to understand I am associated now with the Provo Reservoir Company in this case.

THE COURT: There is one other matter, the matter of the assessments or adjustments of costs of the maintenance of this matter as imposed upon the Power Company. Some one moved, I think it was the City, moved to make an adjustment of that matter.

MR. EVANS: I would like to ask Mr. Wentz what his opinion is about the distribution of these costs as they have been made in the past, whether right or ought to be adjusted. He probably knows more about it than any of the rest of us.

MR. WENTZ: I would like to say this. It was suggested about what time is taken up with the Power Company. At that time I had not had time to look it up, I couldn't say exactly what it would be.

MR. MCLANE: I suppose it is proper for me to say a word. I talked to Mr. Wentz about this a few moments ago in the ante room, and he said that there has been a good deal of excess expense incurred during this past year in connection

with the drafting of the decree and the findings, and various other work of that kind which had been done partly in his office, in which he had had a stenographer employed; and I know of my own knowledge that the Power Company has taken a good deal of the commissioner's and court's time in threshing out various matters with the Reservoir Company last year or so. I also know, as does everybody, whether it is a fact of record or not, that the Power Company's flume has been under process of repair and reconstruction in the last couple years, and now is a very different affair than the flume which was there prior to the last season. I understand from Mr. Wentz that the Provo Reservoir and Provo City have paid about ten dollars a month more the last year than they have ever been assessed before for this extra work. Now, I am perfectly willing to suggest on behalf of the Power Company that our assessment for 1920 on account of this extraordinary expense be increased in the amount of I suggest a hundred dollars to cover its proportion of this extra labor which has been done. As to the assessment hereafter, my understanding of the decree is that the court at the time of appointing the watermaster each year will fix the assessment and will make any changes which should be made. I would suggest the apportionment be left as it has been for the year 1921, and during the year 1921 that the operating conditions existing, which will exist for several years in the future-- the question as to whether hereafter the power company should bear any greater expense or not should be determined when the assessment for 1922 is made. I suggest this as an offer of adjustment and compromise rather than as a definite proposition.

MR. RICHARDS: May it please the court, the objection having come from Provo City, I am advised the city is paying fifty dollars a month as against fifteen a month paid by the power company, and it is the opinion of the city officials that the power company is receiving just as much advantage,

just as much service on the part of the commissioner as the city is, and either our assessment ought to be fifteen dollars or their ought to be fifty. I submit that to the consideration of the court.

THE COURT: Any other suggestions?

MR. MCLANE: I have always felt there should be a difference between consumers and non-consumers.

THE COURT: There is always a difference between those two classes of use.

MR. HATCH: I understand my client has been paying fifty dollars a month, besides paying in addition for a caretaker at the reservoir. It does not appear to me to be an equitable distribution. I suggest the whole matter be left to the court after consultation with the Commissioner and after appointing him for this year, as to how the assessment shall be levied to meet this year's expenses, and that thereafter it be annually fixed.

THE COURT: Very well, that may be done, and the court will incorporate in the order when it is prepared appointing the Commissioner the apportionment of the expenses for the year. That is upon the Power Company. There is no question as to the others. I do not know anything about what has been done with the others except the basis which is in the decree.

MR. HATCH: Ours are only irrigation rights.

THE COURT: There is a formula provided for determining what that is.

MR. RICHARDS: In the absence of Brother Ray, I am asked to say for them they have been paying seven hundred and seventy-five dollars, paid it last year, which is approximately sixty-five dollars a month, and they insist that it is dis-

proportionate to the service they are getting as to the amount assessed against the Power Company. They asked me to say this for them.

THE COURT: When you say Mr. Ray's clients, do you mean all of them?

MR. RICHARDS: I accept the suggestion of the court. This is the Provo Bench, I do not know about the balance?

MR. HATCH: There is a difference as to the different power rights. For instance, here is Brother Murdock awarded a power right, he takes no water at all. I do not think he is taxed at all, because he does not require any service of the Commissioner, but Heber City has not used any water under its power right during the past season. I do not know whether they have been taxed or not, but they retain their rights and they ought to be taxed a nominal sum, in any event. Heber City Mills take their water. I do not know the commissioner ever visits to measure the quantity going or not going, or ever will, unless some complaint is made. The service required I think should bear the burden of the commission.

THE COURT: Now, gentlemen, is there anything we have overlooked that ought to be taken care of at this time?

MR. EVANS: Just one suggestion. After these amendments are incorporated in the findings and decree, and decree is signed, suppose there should be some motions for a new trial, would they be heard by your honor?

THE COURT: I am inclined to think so. I think the jurisdiction of this court and power of myself sitting as a judge, extends only to such matters supplemental to this decree as affect it directly. That is, signing a bill of exceptions, if an appeal should be taken, hearing of motions for a new trial or for a modification, but aside from that, I think my powers under this stipulation will cease immediately

upon the signing of the decree. For instance, if some person violated some of the terms of the decree, I would have no power to issue a citation to punish him. I would have no power to consider any report by the commissioner or any changes in the detail matters, but the only thing-- my judgment the only thing I would have any power to do would be those matters which are included in an appeal if an appeal was taken-- the hearing of a motion for a new trial that would be. I do not think I would have any power to do anything else. So the reason I suggest these other matters is that we may have them all disposed of before I sign the decree, because I will decline to hear anything after that upon the theory my power has ceased, except it might be hearing of a motion for a new trial or settlement of a bill of exceptions.

MR. HATCH: I understand your honor would have power to modify on motion.

THE COURT: IF may seasonably, I take it so, any of those matters. I do not think my power or jurisdiction continues with reference to this case except merely those matters incidental to making final the decree.

MR. HATCH: The reason I suggested what I did, it is very probable there will be some typographical errors and probably some omissions or maybe some rights wholly left out. In the Fulton decree, in the decree itself, two of the principal irrigation companies were left entirely out, and have never yet been put in. They are in the findings.

MR. SOULE: Wouldn't it be well to have the decree as drawn up for signature served upon counsel before it is signed so we can all go over it again?

THE COURT: I don't know.

MR. HATCH: I would suggest to the court also that these amendments as allowed by the court, changes, that Mr.

Wentz, as commissioner of the court, be permitted to make the changes and re-write the decree under the direction of the court, and then it will be done. The committee, it seems, that was heretofore appointed by the court would not get together to even pass upon it as a committee after it was drawn, and my suggestion is in order that it will be done and be done within a reasonable time.

MR. EVANS: I might suggest this, so far as the committee is concerned. It was impossible to get them together. I tried time and time again, and when one of the committee was at liberty the others were tied up, tied up for as much as five or six weeks in the trial of cases, and if we had depended on that committee to write these findings and decree, they never would have been written in this world.

THE COURT: I think the suggestion is a very good one.

MR. RICHARDS: That is exactly why I made the statement I did the other day, so there would not be any misapprehension, and again, in case I have not made myself plain, nothing I said the other day was intended to be uncomplimentary to Mr. Wentz or Mr. Thompson. On the other hand I think they are entitled to a great deal of praise for the manner in which it has been presented, thousand and one details, and, as Brother Evans has said, we never would have been able to check out all these five hundred individuals as they did. It would have cost a large sum of money, and I think we did a great deal better by doing nothing about it and letting them do the job.

THE COURT: This decree and findings may be amended in that way, and Mr. Wentz may have charge of it.

MR. MCLANE: Pardon one additional suggestion in connection with paragraph 124. The following paragraph 125 is an injunctive paragraph, says in effect all the parties are enjoined from in any manner or at all interfering one

with the other in the full, free, and unrestricted use of the quantity of the waters of said river awarded to them, and from in any manner, or at all, interfering with the distribution of such water by the commissioner to be appointed by the court.

I am going to suggest there should be added to that the general injunctive clause against waste which is common in decrees of this kind, and which read in connection with the suggestion I made as to paragraph 124, would be an effective limitation upon excessive use during the winter season, and would enable any of the parties to appeal to the court as your honor suggested, in the event of violation of the decree in that respect, as well as in other respects; and if it meets the approval of the court, and if there is no objection, I would like to suggest to Mr. Wentz, or whoever has charge of engrossing the decree, the inclusion of a clause against waste in paragraph 125, together with a clause restricting use during the non-irrigation season to necessary beneficial use.

THE COURT: You may do that.

If there is nothing further, this department of the court will be adjourned without day.

with the other in the fall, 1924, and anticipated use of the
 quantity of the water of said river wanted to them, and
 from in any manner, or at all, interfering with the distribution
 of such water by the commission, to be specified by the court.
 I am going to suggest there should be added to that the
 general injunctive clause against waste which is common in
 decrees of this kind, and which read in connection with the
 provision I made as to paragraph 134, would be an effective
 limitation upon excessive use during the winter season, and
 would enable any of the parties to appeal to the court as
 your honor suggested, in the event of violation of the decree
 in that respect, as well as in other respects; and if it meets
 the approval of the court, and if there is no objection,
 I will like to refer to Mr. Jones, or whoever has charge of
 enforcing the decree, the inclusion of a clause against waste
 in paragraph 135, together with a clause restricting use during
 the non-irrigation season to necessary beneficial use.

THE COURT: You may do that.

If there is nothing further, this department of the court
 will be adjourned without day.

#2888
 IN DIST COURT
 STATE OF UTAH
 FILED
 SEP 24 1924
 W. M. Hales Clerk
 E. B. Hastings Deputy