

MR. A. C. HATCH: I now offer on behalf of Judge King and the plaintiff here Exhibit 194, which is a stipulation. I will read it into the record as well as file it if the court will permit. The title of the cause. It is hereby stipulated and agreed by and between the plaintiff and the defendant Wilford D. Wright and J. W. Allen, that a decree be made and entered in said cause containing the following terms, to-wit, that the defendant Wilford D. Wright is the owner of twenty-five acres of land referred to and described in his answer on file herein, and the defendant J. W. Allen is the owner of five acres of land referred to in his answer on file herein. That upon the said land of said J. W. Allen a spring or springs known as the McAfee springs rise. That said springs flow in a general southwesterly direction, and in a channel which connects with the Provo river. That at a point approximately twenty rods from the head of said springs and upon the said lands of said J. W. Allen, a dam was constructed many years ago by the predecessors in interest of said J. W. Allen and said Wilford D. Wright, and by means of said dam the waters of said springs rising above said dam were diverted from the said channel and used for the irrigation of said five acres of land now owned by said J. W. Allen, and said twenty-five acres owned by said Wilford D. Wright. That of the five acres now owned by said J. W. Allen three acres were and are irrigated by flooding the water over the surface and two acres by subirrigation. That said lands so owned by said J. W. Allen and said Wilford D. Wright for more than forty years last past have been irrigated during the irrigation season of each and every year from the said spring and from water taken therefrom at the dam aforesaid. That all of the water flowing to said dam was diverted during the irrigation season by said defendants and their predecessors in interest, and has been used for more than forty years last past upon said five acre tract of land and said twenty-five

acre tract of land, and to the extent and in the manner above provided. That said lands were rocky and gravelly, and require irrigating for the purpose of growing crops thereon. That said defendants, J. W. Allen and Wilford D. Wright are entitled to maintain a tight dam at the place aforesaid during the irrigation season of each and every year, and to divert all the waters flowing to said dam from said McAfee springs above the said dam, and to use the same upon said parcels of land above referred to and in the manner referred to, and that in addition to said right said J. W. Allen is entitled to pump from said springs above said dam sufficient thereof for domestic, culinary and stock watering purposes to be used at his home, yard and corrals, situated about thirty rods easterly from said spring, the same to be used for such purpose during the entire year. That the irrigation season shall extend from the first day of May to and including the 15th day of October of each and every year. That during the non irrigation season all of the waters of said spring except ~~ix~~ such as is required by said J. W. Allen for culinary purposes and stock watering purposes aforesaid, shall be permitted to run down the channel of said springs and into said Provo river. That during the irrigation season defendant J. W. Allen shall be entitled to the use of all of said spring above the said dam for a period of two days and nights, and the defendant Wilford D. Wright shall be entitled to the use of all of such springs at said dam for a period of ten days and nights, that is to say, as to the use as between said Allen and said Wright, said Allen is entitled during the irrigation season to all of such springs at the dam one-sixth of the time, and said Wright is entitled to all of such springs at the dam for five-sixths of the time, less such quantity as may be required by said Allen for domestic, culinary and stock watering purposes to be used at his home, corral and sheds, situated at the place herein referred to.

The water used for irrigation as above stated shall be appurtenant to the thirty acres of land herein referred to.

Signed Joseph R. Murdock, President Provo Reservoir Company.

Albert L. Booth, one of the attorneys for Provo Reservoir

Company, W. D. Wright, J. W. Allen, William H. King, attorney

for Pioneer Irrigation Company, T. W. Allen, J. H. Murdock,

Samuel McAfee, Arthur D. Allen and J. W. Allen. We offer 194.

THE COURT: It may be received.

MR. A.C. HATCH: We offer 195, which is a stipulation between the plaintiff and the defendant Pioneer Irrigation Company, a corporation, T. W. Allen, John H. Murdock, Samuel McAfee, Arthur P. Allen and J. W. Allen. It is hereby stipulated and agreed by and between the plaintiff and defendants Pioneer Irrigation Company, a corporation, T. W. Allen, John H. Murdock, Samuel McAfee, Arthur P. Allen and J. W. Allen that a decree may be made and entered in said cause containing the following terms, and providing as follows: That the Pioneer Irrigation Company and its stockholders are the owners of the lands referred to and described in the answer of said defendant aggregating 455 acres. That said lands are irrigated by means of dams and canals and from water taken from Provo River through said canal. That said dams and canals were constructed more than thirty years ago by the predecessors in interest of said Pioneer Irrigation Company and its stockholders, and said defendant corporation and its stockholders and their predecessors in interest for more than fifty years last past have used during the irrigation season of each and every year sufficient of the waters of said river for the irrigation of said lands. That said defendant J. W. Allen is the owner of 52 acres of land described and referred to in defendant's answer herein and he and his predecessors in interest for more than fifty years last past have used of the waters of Provo river by means of a dam and ditch known as the Murdock-Allen ditch, which connects with

Provo river sufficient of the waters of said river for the irrigation during the irrigation season of each and every year of said fifty-two acres. That said John H. Murdock is the owner of twelve acres of land referred to in his answer on file herein. That he and his predecessors in interest for more than fifty years last past have used of the waters of Provo river by means of a dam and said Murdock-Allen ditch sufficient thereof for the irrigation of said land during the irrigation season of each year. That Samuel McAfee is the owner of thirty-nine acres of land referred to in his answer on file herein, and Arthur P. Allen is the owner of twenty acres of land referred to in his answer on file hereing. That T. W. Allen is the owner of forty-six acres of land referred to in his answer herein, and J. W. Allen is the owner of seventy-five acres of land referred to in his answer on file herein. That said four parcels of land are irrigated through what is known as the Allen-McAfee ditch, that more than fifty years ago the predecessors in interest of said J. W. Allen, Samuel McAfee, Arthur P. Allen and J. W. Allen appropriated of the unappropriated waters of Provo river sufficient thereof for the irrigation of said parcels of land, and during the irrigation season of each and every year since then said defendants and their predecessors in interest have appropriated through said ditch sufficient of the waters of said river for the irrigation of said tracts of land. That all of said lands herein referred to require irrigation for the production of crops. That the predecessors in interest of defendants more than fifty years ago appropriated of the unappropriated waters of Provo river sufficient for the irrigation of said lands, and by the means of said ditch and dams connected therewith defendants and said predecessors in interest have, during the irrigation season of each and every year since said appropriation diverted sufficient of the water from said river for the irrigation of

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said lands. That the irrigation season as applied to said lands commences April 15th, and terminates October 15th of each and every year. That the duty of water for said lands herein referred to is one cubic foot of water per second for sixty acres of land. That the waters to which the defendants, including the stockholders of said Pioneer Irrigation Company, are entitled, shall be measured and distributed to each of them and to said stockholders at the lands of said defendants, and said stockholders, and in order that such measurement and distribution shall be fairly and properly made, said defendants shall keep said ditches in a reasonably good condition of repair. Dated January 24, 1917. O. K. Joseph R. Murdock, President Provo Reservoir Company. Albert L. Booth, one of the attorneys for Provo Reservoir Company, William H. King, attorney for defendant Pioneer Irrigation Company. T. W. Allen John H. Murdock, Samuel McAfee, Arthur P. Allen, J. W. Allen. We offer this.

THE COURT: It may be received.

MR. A. C. HATCH: Judge King left the city last night, and handed those to me and asked me to present them.

MR. THOMAS: Now in behalf of the water users in--

MR. A. C. HATCH: Mr. Barrett is here now, if the court please.

MR. THOMAS: Let me finish with this presentation. I wish to offer in behalf of the waters users of Summit county a tabulation showing forty-eight entries, being a part of the stipulation made and entered into at Heber, and referred to in the Heber stipulation, a copy of which has already been served upon the other side.

MR. A. C. HATCH: If the court please, we have not as yet accepted that as a part of the stipulation, not having had an opportunity or time to check it up since it was presented to us. It was handed to us since the beginning of this session of the court, and I believe it to be correct, but until we check it up with the original, or until it is testified to--

MR. THOMAS: Well, it has been testified to, all these items were covered by the testimony entered at the last session of court held in the court house. That was in December.

MR. A. C. HATCH: Now, Mr. Thomas, did you make this tabulation yourself from the testimony?

MR. THOMAS: I did not, but I gave the testimony from this tabulation. This was tabulated prior to that time, not in this particular arrangement, but the arrangement of which-- I have a copy from which this was taken, so that the evidence does cover these particular items and the particular classes herein given, and in the amounts of water claimed and the number of acres irrigated. That was testified to by Byran Mitchell, Thomas and Atkinson and James Prescott in December last.

THE COURT: This may be received subject to your right to strike from it any item you find is not in accordance with the evidence given, or that you are not willing to concede.

(Exhibit 196)

MR. THOMAS: May it please the court, at the last hearing when Mr. Soule, my associate in the Summit county matter, presented testimony as to the Washington Irrigation Company he promised to have here the proper certificates from the office of the State Engineer. He has advised me he has not been able to get them, and I shall ask leave to file the certificates of appropriation for the Washington Irrigation Company for applications 2812 and 2813. That with the testimony that is in will complete the entire evidence.

THE COURT: For the Washington Irrigation Company?

MR. THOMAS: For the Washington Irrigation Company, that is as to the reservoir rights, your Honor.

THE COURT: Have you something else we can take up. Mr. McDonald, have you anything?

MR. McDONALD: I have nothing but ^{the} stipulation, your Honor. Until that is disposed of we cannot tell where we are at.

THE COURT: Mr. Huffaker?

MR. HUFFAKER: I am in the same fix, your Honor.

THE COURT: Then, if that stipulation is agreed to, you have no evidence?

MR. McDONALD: I have two or three little items.

THE COURT: You had better put them on now, because if that stipulation is agreed to, there will be no further time for evidence. Of course, if it is not agreed to the court will have to take the evidence that otherwise will be obviated by the stipulation, but if you have some evidence that will accompany the stipulation, you had better put it on now.

MR. McDONALD: We can put it on, but if the stipulation is not agreed to, it will be of no effect.

MR. A. C. HATCH: Mr. Wentz is testifying in the other court, and said he could not present that matter until four o'clock.

MR. RAY: No objection to it going in the record as an exhibit.

MR. A. C. HATCH: Mr. Cluff probably would want to question him.

THE COURT: Do you wish to?

MR. CLUFF: What is that?

MR. A. C. HATCH: You understand Mr. Wentz is preparing a tabulation of the water actually used by the Provo Pressed Brick Company.

THE COURT: From his report.

MR. A. C. HATCH: That can be introduced in evidence?

MR. CLUFF: Oh, yes.

MR. A. C. HATCH: Then it can be introduced by consent of all parties when prepared, particularly with the consent of Mr. Cluff, who represents the Provo Pressed Brick Company.

MR. CLUFF: I should want to cross examine him a little bit on it probably.

THE COURT: If there is nothing else the court will not remain until four o'clock, if there is nothing else except that matter.

MR. JACOB EVANS: If the court please, the stipulation that was entered into by the Wasatch people is apparently not signed by more than probably one-third or one-half of the attorneys of record in this case, and I think there has been some misunderstanding concerning it, and that if the court could see its way clear to adjourn the hearing to a day certain some day next week, in all probability in the meantime whatever disagreement there is between us, which I rather think is more apparent than real, we may be able to get together on it. It is manifest that even though the stipulation is binding upon the persons who have already signed it, there are a great many persons who have not signed it.

THE COURT: My recollection with reference to that is that there were. I don't know. There may have been a few that were not present at the time the stipulation was entered into in open court. The signing of the stipulation does not

amount to anything, is not necessary so far as those persons present and agreed to it as it was read into the record in open court. That would be my view of it. I merely make that suggestion so that you may consult the record and see who were present at the time. It is those people who are bound, not merely those who have signed this paper.

MR. McDONALD: I will say in connection with that I have the same understanding and under the suggestion of Mr. Evans I have not tried to get anybody only the attorneys who were not here.

THE COURT: That may be examined, and I will be glad to come back for a day at some time that is convenient, so you may have this matter straightened out and know what the record is.

MR. JACOB EVANS: I again call your attention to the provision in the stipulation which was read by Judge Hatch the other day, Section 33. It is understood that the parties to this stipulation are all of the parties diverting water from the Provo river at and above the Midway Upper dam and this stipulation is not intended to affect any water right below said dam. Now, the question is if they agreed to that, all the parties down here, all the parties to the proceeding agreed to it, and it is binding upon any of the parties except the parties above.

THE COURT: Certainly I take it there is no question about that. If this stipulation is as I understand it mere fact parties have said it does not affect anyone down here would merely be a statement that would be nugatory, I take it, because it would be apparent it would not have any effect and would not have any effect -- the language is such it would have no effect unless you would say and admit that the awarding of water, establishing of rights to use water above that point did not affect these people down here at all, if it established those rights up there. I merely suggest this view

of it so that you may govern yourself in regard to it. If it establishes those rights and the people down here are not affected by the establishing of those rights, of course, that is all right, but if they are, if they claim any interest, this stipulation of course, fixes their rights as well as those above, and your statement there it does not would not have any effect, because it would merely mean this is a stipulation entered into and don't mean anything by it.

That is about what the language interpreted would be. I take it the court would not put that construction on it because that would destroy the stipulation as a stipulation at all, and the court would put any other construction that was reasonable upon it rather than one which would destroy its force entirely.

MR. JACOB EVANS: I stated here the other day so far as I was concerned, this stipulation was presented to me to be signed by Mr. McDonald with this statement that the stipulation was prepared by one of the attorneys for the plaintiff, and that it was prepared and understood and agreed to all along the line by the plaintiff's attorneys.

MR. RAY: Will you permit a suggestion?

MR. JACOB EVANS. Yes.

MR. RAY: That matter has been gone over, and it seems to me quite improper when we are trying to stipulate a matter to attempt to get the court to assist us in stipulating.

MR. JACOB EVANS: I think that is true.

MR. RAY: It has been suggested by the court, and I think yourself, we find what the record on this is, and if there are differences that can be adjusted, then we hope we will adjust them, and if they cannot be adjusted, and anybody denies the binding force of the stipulation that is a matter upon which we are all entitled to be heard, and ought to have some notice of intention to deny, and I suggest this, we ought not to be consuming time until we have exhausted our resources in that respect.

MR. A. C. HATCH: I didn't understand, in fact I didn't hear what the court said with regard to the stipulation. I was giving all the attention I could, but I would like to have the reporter read what the court said with regard to it so that I may fully understand it.

THE COURT: Very well, the reporter may read it.

(Remarks read)

MR. A. C. HATCH: If the court would permit me just a word in regard to that.

THE COURT: Certainly, anything to be gained by it.

MR. A. C. HATCH: Of course, we contend that it means just what it says, and we have made probably twenty stipulations here as between ourselves and certain other parties, and we do not pretend that those stipulations are binding upon anybody but the parties whose rights are fixed as between themselves by those stipulations. For instance, this morning we filed one fixing the rights as between the plaintiff and the Pioneer Ditch Company, and several other parties. The stipulation was read in open court and is now a part of the record. It does not, as I understand it, bind anybody except the parties who have stipulated. Probably nobody else questioned the right of the Allens and Pioneer Ditch Company to the use of water as we have stipulated they may use it as against us. Now, I was present at the taking of the stipulation in the record, and I think I suggested that it be read into the record, because of the time that it would be necessary to typewrite it and sign it and present it; the time when it was agreed upon section by section, as between the parties who were stipulating as to their rights, it would be finished, and there would be no necessity for any signing, and that plan was adopted. When it was finally closed there was one paragraph I never did at any time understand that it fixed any right as against the users of water in Utah county, or below the Midway Upper dam.

MR. RAY: Judge Hatch, would you object to a question

there?

MR. A. C. HATCH: No.

MR. RAY: With the consent of the court, it seems to me, Judge, you are arguing a matter upon which every counsel here would like to be heard at length when it is an issue, and other counsel for plaintiff has suggested between now and next sitting of the court we could likely arrange this so that the question of this stipulation will no longer be an issue, and it seems to me it ought not to be the subject of argument in advance of such a conference.

MR. THOMAS: I fully agree with Mr. Ray in that attitude.

MR. A. C. HATCH: The court has virtually passed upon this stipulation, as I understand it, and I think that we should state our position in relation to it at this time. The Wasatch county users, as I understand, none of them who take water below the Midway dam ever have construed this as fixing the right of the users above as against their rights.

MR. McDONALD: Judge--

MR. A. C. HATCH: Pardon me just a moment. I will make my statement clear. There is an arbitrary line there drawn by which the users across that dam have a ten acre duty, and the users below that line are fixed under stipulations already filed in the court at a sixty acre duty regardless of the flow of water in the river, and regardless of the so-called reservoir conditions up there, and at least three weeks ago I suggested to Brother Thomas that he put on testimony as to his clients in Summit county, so as to have something upon which the court might base a decree as to their right as against the users below the Midway Upper dam, and I am sure that had I understood it to mean that it fixed the water rights of those people as against the plaintiff, we would have protested it at the time.

THE COURT: Now, is there any other evidence to be introduced?

February 20, 1917.

MR. RAY: May it please your Honor, in order to get the matter before counsel and court in pursuance of the arrangement made at the last session of the court here, counsel for the respective parties to this action met here on the 10th inst, with Mr. Davis and took up the stipulation which had been a source of some controversy, and amended it. At the time we left most of the counsel had assented to the provisions of the stipulation, and my understanding was finally any objections to the stipulation as then framed, they would be communicated to Judge Thurman, as the Chairman of the meeting, and we would be notified of any proposed amendments desired. As representing the Provo Bench Canal Company and the Timpanogas Irrigation Company of this county, I have examined the stipulation and am ready, if it is satisfactory to the other people, to have it made a part of the record of this court.

MR. A. C. HATCH: It is satisfactory to us.

MR. THOMAS: My associate, Mr. Soule, representing the Summit county users, was present, and advises me that the matter is entirely satisfactory to him. It is also satisfactory to Provo City and to L. L. Donnan.

MR. WAHLQUIST: If the court please, it is entirely satisfactory to the Sunrise Irrigation Company, the Midway Irrigation Company and other clients that I represent.

MR. WILLIS: If the court please, as I understand it, Section 33 provided for, should have provided for all parties as Section 33 did. As I read the stipulation I will say first in regard to the Heber Light & Power plant, it is satisfactory, but as I read section 33 in connection with other sections, I cannot help but view it in the light that it gives to the users above the Midway upper dam the right to take all of the waters of Provo river, regardless of the rights of those below the Midway upper dam, and as I represent clients there, who are among the very earliest to appropriate water from

Provo river, even to the time of the settlement of the Heber Valley, I don't think that it would be right to give to those above the Midway upper dam, and even to the Provo Reservoir Company, as it is set forth in here, a seventy acre duty, before those who are prior appropriators below the Midway upper dam have any rights to the river. We are perfectly willing to accept any proposition that will give to us the rights or the waters of Provo river that have come to us in the last eight or ten years below the Midway upper dam, but should they be privileged to put in a tight dam, cement dam, laid on bed rock, it would materially shut off the people and the users below the Midway upper dam, and we think no decree should be entered that would in any way allow that to be, as to the waters above the Midway upper dam, and use of them except putting in of a tighter dam than they have heretofore, would be perfectly satisfactory to us. They can put in a dirt dam, such dams as they have been doing for the last eight or ten years, and we would be perfectly satisfied with it, but we could not accept any provision-- and it seems to me 33 gives them the right over prior appropriators, including the Provo Reservoir Company, to a seventy acre duty, regardless of their priorities in appropriation, and if counsel could agree that that might be taken care of in some way, giving to them the use of the waters of Provo river above the Midway upper dam as has been by practise for the last eight or ten years, that would be perfectly satisfactory.

MR. THOMAS: Do you withhold your assent to the stipulation?

MR. WILLIS: I would unless we could agree to some provision that would not allow them to put in tight cement dams, and whut off the water.

MR. A. C. HATCH: Provo Reservoir will agree they have such use as they have had in the last eight or ten years.

THE COURT: Judge Hatch, do you think that language

would be definite enough?

MR. RAY: Twenty years from now it wouldn't mean anything.

THE COURT: Does it mean anything now. It doesn't mean anything to the court, because I don't know what their use has been last seven or eight years.

MR. THOMAS: Of course the users below could not consent to any indefiniteness of that character.

MR. WAHLQUIST: If the court please, Mr. Willis leaving before we got to that section, this clause was put in with the understanding he had assented to the fourth line of the stipulation as proven at the trial.

MR. WILLIS: That I think was put in there to take care of the rights I represent in the Heber Light & Power Company, and that is satisfactory. I will say this your Honor, I had not seen this stipulation in any manner, shape or form at any time except in this way, Judge Thurman sent to Salt Lake to me what he said was a copy of a stipulation, except with a few changes affecting the Timpanogas Irrigation Company. That is the only stipulation that I saw. I don't think that counsel should ask that any provision be decreed to the upper users, that would take away from the lower users who are prior appropriators of water that that they have been using.

THE COURT: Does this do that?

MR. WILLIS: I read section 33 that way.

MR. RAY: I had not so read it your Honor. If I had I should not have consented to it.

MR. THURMAN: Let me ask a question, how much do your clients claim that you--

MR. WILLIS: Their rights have been stipulated heretofore, and they have had in the last ten years. Midway upper dam and also Midway dam, put in such a dirt dam as they were able to put in, we don't object to that; sufficient water

has gone under that to satisfy all we would need, that we are entitled to, even though it does not exceed a sixty acre duty, but to put in a tighter dam and shut off--

MR. THURMAN: I was thinking it might be reached this way. They have rights there acknowledged by stipulation, to say that is the dam should be so improved or changed or tightened as the case might be, as to deprive them of that right, then take the right above the dam.

MR. RAY: Just what is the location of your right in the canyon?

MR. WILLIS: I represent the most of the lands from the Midway upper dam down to the Wright ranch. There are some few interests I do not, may be half a dozen interests, but aside from that I represent some three thousand acres from the Midway upper dam down to the Wright ranch, and among them are some of the earliest appropriators in Wasatch county. This stipulation says that this shall apply to this stipulation, and does not say anything with regard to the other stipulation. It has been heretofore stipulated between the users below the Midway upper dam, and I think some provision should be made that the users below the Midway upper dam should have the rights they have had in the last eight or ten years. If there is no water comes from below those dams as the natural reason of damming the river off as heretofore, then we are willing to take our chances on that, but if there is any water comes we want it.

MR. THOMAS: Permit an interruption, how much water have you had that is coming under the dam?

MR. WILLIS: We have had a sixty acre duty in the low--

MR. THOMAS: How much water?

MR. WILLIS: I could not tell you that because I never figured it up in second feet, but enough to serve some three thousand acres of land on a sixty acre duty.

MR. RAY: In the low water?

MR. WILLIS: Yes.

THE COURT: Did you mean seeped through the dam?

MR. WILLIS: Underneath, it goes through the rock bottom underneath.

MR. RAY: Mr. Willis, what proportion of that water seeps under the dam, and what is lateral seepage?

MR. WILLIS: That I could not answer, Mr. Ray. I think Mr. Wentz if he was here could do it, I cannot.

MR. THURMAN: I don't see this interferes with your rights.

MR. WILLIS: If it does not I have no objection, but if it does I would not like to be estopped from claiming a right, such as we have used in case of putting in cement dams.

MR. THURMAN: All parties below the Midway upper dam in this stipulation, are entitled to water according to what the court may find, and you have stipulated your rights among yourselves there.

MR. WILLIS: If the court shall so hold that will be satisfactory, but it is ambiguous to me.

MR. THURMAN: This proviso it seems to me is meant to protect everybody below the Midway upper dam, provided between April 15th and May 15th of any year it becomes necessary to supply the parties to this action using water (reading). That would seem to cover a month in there, and you are protected just the same as everybody else below.

MR. WILLIS: If you so interpret that and the record shows that will be satisfactory, for we so understand it.

MR. THOMAS: Is there any doubt in your mind this paragraph does not reach every party to the stipulation equally?

MR. WILLIS: Yes. Well not that paragraph alone, but other paragraphs in connection with that I think does do it. If it is understood it does take care of them according

to their rights, why that is all we ask, and if counsel concede it and the record shows it, we are satisfied with^{it} your Honor.

MR. WAHLQUIST: That is the plain language of the provision.

MR. WILLIS: I don't so read it.

MR. A. C. HATCH: We concede it.

THE COURT: You concede that is what it means?

MR. A. C. HATCH: Yes sir.

MR. WILLIS: That is satisfactory then.

THE COURT: Was the decree in this case of the Wasatch Irrigation Company against Edward M. Fulton offered in evidence?

MR. THOMAS: Yes, your Honor, I presented that.

MR. MCDONALD: Your Honor please, there was one paragraph we put into the stipulation at the time with the understanding I should reach certain parties and report to Judge Thurman before this sitting, but I suggested to one member who was here personally at the time to take the matter up and then let me know so that I could report to Judge Thurman and have the matter settled, if possible, before the court convened this morning, but they did not report to me until this morning, and, if your Honor could give us a few minutes. It is a paragraph we want to reach among ourselves that we did not settle last meeting.

MR. RAY: Which paragraph?

MR. MCDONALD: 34. I could call attention to what these people suggest and what Mr. Wentz recommends that the paragraph be amended so as to read as follows: I will read the whole paragraph. "It is further stipulated and provided that the Sage Brush Irrigation Company, Spring Creek Ditch Irrigation Company and Charleston Irrigation Company, through its upper canal shall not be entitled to more than one second foot of water for"-- strike out sixty and put in the word fifty is the way I have it amended; that is, I am suggesting

these acres from July 5th to August 10th of each year, and the sixty acre duty from August 10th until September 15th of each year, if there is no objection to that.

MR. THURMAN: Let me ask a question. That gives to your company there a lower duty than any company in the valley.

MR. MCDONALD: I don't know as to that. It seems they irrigate some grain. I talked the matter over with Mr. Wentz, and they have a great deal of trouble to get it irrigated and cannot do it with less than this quantity of water.

MR. THURMAN: Without more information than we have I think we cannot agree to that, we cannot see any reason why, without some showing there should be that distinction made in favor of these companies.

MR. MCDONALD: Only information I can give you is Mr. Wentz. You can talk it over with him.

MR. THURMAN: Isn't it a fact also you have a better duty, a lower duty, by reason of your situation with reference to the situation there later in the season than any of the other companies?

MR. MCDONALD: I understand that may be true with the increase of seepage from above, but that is a thing they want to take care of in the stipulation.

MR. RAY: Judge Thurman, will you permit a suggestion. This water is most of it seepage water which comes in from Spring creek, Daniels Creek and Late creek, and not a part of the original river water. Now, what I am trying to arrive at is whether or not it would become a part of the general supply of that valley and if it is, my thought upon that proposition is that if there were added to the suggestion of Mr. McDonald the further provision that that duty should obtain if it were the same duty being drawn by the other users in the valley. Then it would not hurt anybody.

MR. A. J. EVANS: It wouldn't do any good, either.

MR. RAY: This would be the fact, Mr. Evans, under the provision after May 15th, they may go down to a duty of 40, but they may be up to a duty of 70. Would the other users in the valley object when they are on a duty of seventy? Won't that reduce them to eighty by giving to Mr. McDonald's client a duty of fifty?

THE COURT: The court will take a short recess.

(RECESS)

MR. RAY: So far as I have been able to interview or hear expressions from the other parties in the case we are all willing to be bound as among ourselves by this stipulation except Mr. McDonald, who thinks as to this particular interest there should be some little advantage given on account of the conditions which they claim exist, and I speak now for myself and for as many as I have spoken to that we are willing, if it can be done to accept it, and as to that particular interest, if your Honor wants to hear proof, it might not take long to do it, and let your Honor find the fact whether it is a proper duty or not.

THE COURT: With reference to any claim that is not included in the stipulation the court will have to take the evidence, of course.

MR. RAY: Does your Honor see any difficulty to the rest of us subscribing to this stipulation, and permitting the interests of Mr. McDonald, who asks for a different duty, than the stipulated duty, and my clients are not interested in it particularly, finding from that.

THE COURT: I see no difficulty.

MR. THURMAN: I don't think there is any. I think we can do this, we can agree and let Mr. Davis make record of the fact, we can agree in open court as to the rest of it that

we will be bound and the court may find on that fact, and we will be bound by that finding as men are generally bound in court.

THE COURT: Are all the parties to this action represented here so that they all will be bound except Mr. McDonald?

MR. THURMAN: I have not seen Judge Booth,

THE COURT: Yes, he is here.

MR. RAY: I will say as to the interests represented by myself and the firm of Rawlins, Ray and Rawlins, we are satisfied with the stipulation and subscribe to it, and ask that our consent to the stipulation be entered in open court.

MR. JOHN E. BOOTH: I make a similar statement in behalf of all parties I represent except John D. Dixon. He requests especially I should not consent to it for him, but for all the others I consent to it.

MR. THURMAN: You made that exception the other day.

MR. JOHN E. BOOTH: Yes, I did.

MR. A. C. HATCH: He has not made his proof, has he?

MR. JOHN E. BOOTH: Yes.

MR. THURMAN: On behalf of the Timpanogas Irrigation Company and Extension Company, defendants that I represent, we consent to the stipulation and subscribe to it, and are willing that the court may find as to the --

MR. A. C. HATCH: The plaintiff accepts and subscribes to it.

MR. McDONALD: I will say, your Honor please, I will consent and accept of the stipulation for all parties which I represent both in Utah and Wasatch counties except the Sage Brush Irrigation and Spring Creek Ditch Irrigation Company. That will eliminate everything in that valley up there except this one question.

MR. THOMAS: On behalf of Provo City we accept the

terms of the stipulation. On behalf of L. L. Donnan I accept the terms of the stipulation, on behalf of the South Kamaa Irrigation Company and Washington Irrigation Company and various users in Summit county represented by myself and associate Mr. Soule, we accept the terms of the stipulation.

MR. ROBINSON: If the court please, on behalf of the Upper East Union Canal Company and John W. Hoover, we consent to the stipulation and subscribe to it.

MR. CHASE: On behalf of all the clients I represent I accept it and subscribe to it.

MR. WILLIS: On behalf of all the clients that I represent I accept the stipulation with the admission made this morning considered in connection with it.

MR. WAHLQUIST: On behalf of the Sunrise Irrigation Company, I accept the stipulation. On behalf of Jake Bates I accept the stipulation, on behalf of the Midway Irrigation Company, both as to its upper canal and its interest in the Island ditch, I accept the terms of the stipulation and on behalf of parties that I represent using waters below the Midway upper dam, without naming them, I accept the terms of the stipulation.

MR. THURMAN: Is there a duplication of some kind of the Sunrise?

MR. WAHLQUIST: There is in the stipulation as written, there is a duplication of 144 hours, but I presumed at the time of the argument I would call the court's attention to that fact. There is a duplication there.

MR. THURMAN: You consent that may be corrected?

MR. WAHLQUIST: In paragraph 11 I think that may be stricken out, because it is taken care of in paragraph 35. I will say I wrote Mr. Davis and called his attention to that immediately when I got home from the meeting on the 10th, but he had written it before he got my letter. Paragraph 9 may be amended by striking out subdivision D to avoid duplication,

and further, if this is the proper time Mr. Willis represents an interest of six acres that is included in the total acreage of 3585 acres controlled by the Midway Irrigation Company. That is what you want me to call attention to?

MR. WILLIS: Yes.

MR. WAHLQUIST: As named in the stipulation?

MR. WILLIS: At the former hearing in this court the question arose whether the six acres of the John Kummer estate was included within the stipulated thirty five hundred acres to the Midway Irrigation system, and Mr. Wahlquist representing the Midway Irrigation Company concedes it is included within that acreage.

MR. THOMAS: At a late hour last night Mr. Soule advised me he had not yet received the data from the office of the State Engineer which we agreed to have herelative to the formal proof of the appropriation of the waters of the Washington Irrigation Company on the Big Elk reservoir. That was agreed to. I ask we have leave to file that when we receive it. Will there be any objection to that?

MR. A. C. HATCH: Mr. Thomas, do you represent the interests Mr. Corfman did in the Knight Woolen Mills?

MR. THOMAS: No, I have been asked to appear in arguement for them, but those interests are now represented by Messrs, Cheney, Jensen & Holman.

MR. RAY: Their consent does not appear here is what I was calling attention to to Judge Hatch, and they are claiming important rights.

MR. THOMAS: I am going to take the responsibility then, may it please the court, and if my authority will not be supported, I will immediately notify all parties thereto, but with this preliminary statement on behalf of Cheney, Jensen & Holman who are now representing the rights formerly represented by Mr. Corfman in their behalf and with this statement I accept the ~~xxx~~ terms of this stipulation and subscribe for

them. I am very certain they will accept the terms.

MR. RAY: I am too. I have talked to them about it.

MR. THURMAN: Mr. Ray, do you represent the Timpanogas Canal Company?

MR. RAY: I do, and included them.

MR. JOHN E. BOOTH: Mr. Cluff is not here, I think he is engaged in the other court.

MR. THURMAN: There is a little matter of tabulation relating to the Provo Pressed Brick Company that was to be put in.

THE COURT: Mr. Robinson, I think has some matter take a few minutes.

MR. ROBINSON: Yes, a few minutes. Just as to the plaintiff in rebuttal of some of the evidence put in.

MR. THOMAS: Before taking that up, it occurs to me Major Young was representing some mortgaged interests here. I will take it upon myself to see him and have a formal acceptance of the stipulation and have it filed.

MR. RAY: Huffaker.

MR. THOMAS: Yes. Mr. Stewart I understood from Mr. Soule was here last week and agreed to those terms.

MR. RAY: Yes, he did. I rode up with him.

MR. THOMAS: For the purpose of record, gentlemen, we can enter Mr. Stewart's acceptance to this, I am doing this upon the statement of my associate, Mr. Soule.

MR. A. J. EVANS: He was here and stated that.

MR. A. L. BOOTH: How about Mr. Story?

MR. RAY: I can say for Mr. Story, whom I have represented in every way a couple times that he stated to me that the stipulation was satisfactory to him.

MR. CHASE HATCH: Judge Shields was present at the meeting and agreed at that time to the terms of the stipulation.

MR. THOMAS: Mr. Story has stated in substance to me the same thing Mr. Ray has just uttered.

MR. WAHLQUIST: If the court please, before taking up anything else in this first line of the first paragraph we find the words that as to priority of right the findings and decree in the Fulton case shall govern. The reason of putting in the words finding and decree in the Fulton case, the findings of the court was that the Sunrise Irrigation Company had certain rights but through an oversight of the party drawing the decree they were not named in the decree. Now, the decree is in evidence, but that does not show their right, and I will ask, unless counsel present will stipulate here, that they are entitled to the four second feet for two hundred and forty acre duty, I would ask later to supplement the proof by filing a certified copy of that portion of the findings in the case so that the court may have evidence to base the findings in this case.

MR. THURMAN: Is there anything out of the way in moving the court find either the findings or decree?

MR. WAHLQUIST: Can we agree it was in the findings without filing a certified copy?

MR. THURMAN: It is my recollection it is in there.

MR. WAHLQUIST: Yes, but they are not offered in evidence.

THE COURT: I think they had better be offered in evidence.

MR. WAHLQUIST: If I may have that right.

MR. RAY: May I ask the nature of the evidence to be introduced?

THE COURT: Mr. Hatch suggested Mr. Shields was here, Mr. Shields telephoned me a few days later and said the parties had agreed to the stipulation at Provo on the 10th, but he would not sign it. Now, I take it what he meant was he would not agree to it, so I doubt whether we can consider Mr. Shields--

MR. A. C. HATCH: He has put in his proof.

MR. CHASE HATCH: I was simply stating the understanding I got from talking to him after the meeting.

THE COURT: He didn't give any reason, he was in Park City and called me up from there and talked a moment.

MR. THURMAN: If his evidence is in, of course the court can find on that.

THE COURT: Now, some question was asked as to the nature of the evidence.

MR. ROBINSON: It is just some rebuttal evidence as to Mr. Tanner's testimony, condition of the Upper East Union canal on certain dates. That is the only evidence we have. We think it does not involve anyone but the plaintiff.

THE COURT: Mr. McDonald, when do you desire to introduce your evidence on the issue relative to the Sage Brush and this other canal company?

MR. MCDONALD: I have consulted the parties interested, and they say they could not be prepared under fifteen or twenty days.

THE COURT: Is the evidence such in its nature as to require the attendance of all the other parties, Mr. Ray and Mr. Stewart?

MR. MCDONALD: I think there is nobody interested except the plaintiff.

MR. RAY: That is my understanding.

THE COURT: I will fix a time then that will suit the convenience of the plaintiff and Mr. McDonald, without reference to the other parties in the case. I will hear your evidence now, Mr. Robinson, if you are ready with it, and we can determine before we leave.

MR. MCDONALD: I will suggest this for the information of the court and those present, that we shall offer some testimony as to the loss of the water of the Provo Reservoir Company before it reaches the Wasatch dam, and I have asked a number of times relative to offering suggestions to the court

by way of stipulation as to the distribution and water commissioner, and division of the county into districts and so on, because there is a difference as to the necessity for a commissioner, his service, time and so on, and unless we can agree on that, we shall offer some evidence along that line relative to the regulation and distribution of the water.

THE COURT: Parties will take notice of the suggestion of Mr. McDonald. Now, Mr. Robinson, if you have your evidence available, we will hear it.

MR. RAY: May it please your Honor, if there is nothing before the court, I make this suggestion, that the reporter who forwarded copies of the stipulation to which we have been making reference to the various attorneys, take the original of that copy if he has it, and transcribe it into his record as an exhibit as the stipulation in this case with the change noted as to striking out of paragraph D of Section 9.

MR. WAHLQUIST: And you offer it?

MR. RAY: Yes, it is not an exhibit, it is a stipulation.

THE COURT: Is there some part stricken out?

MR. THOMAS: Subdivision D of paragraph 9.

THE COURT: Then that is practically all that we have to do except to fix a day on which Mr. McDonald will introduce his evidence, and day for the arguments in this case.

MR. MCDONALD: If your Honor please, since offering the suggestion this morning, I have been going over this matter with the parties interested and it seems in view of the fact they entered into the stipulation last summer, and the arrangement that was made, they made no soil tests, they made no preparation along that line, and, of course, the ground at this time is frozen, so that that would be difficult, and we might be somewhat handicapped if we should proceed to take testimony without first preparing some soil tests. We therefore suggest the cause be continued until August for the taking of testimony as between the plaintiff and the Sage Brush and Spring Creek Irrigation Companies. That would give us an opportunity to make some soil tests and experiments by way of actual irrigation.

MR. A. J. EVANS: No frost now under the snow, is there?

THE COURT: It will be before August. I dislike to continue the matter until August, because this evidence ought to be taken before the argument is had. I was going to suggest, Mr. McDonald, that unless this evidence is of sufficient importance so that the parties would like sometime after it

is in to prepare argument in reference to it, I will fix the same time, or a couple days before the argument, and let you introduce your evidence first, and proceed with the argument right after that. Next month in April certainly you will be able to make soil tests, because the frost will be out of the ground surely.

MR. THURMAN: Let me say in this connection so that it might not be objected to later, inasmuch as there will be a little evidence taken because of the absence of Mr. Cluff, we have a tabulation relative to the Pressed Brick Company that we cannot put in. He might want to ask a question or two about it. We want to reserve the right.

THE COURT: You may offer that at the same time Mr. McDonald offers his evidence.

MR. A. L. BOOTH: I was going to say in relation to the soil, I don't know how it is in Wasatch County, but in my lot here in the coldest weather I had occasion to dig under the snow, and there is no frost. This morning I did the same thing, and there is no frost.

MR. McDONALD: Our water pipes three feet under the ground up there have been freezing on us.

MR. A. C. HATCH: If the court please, the frost will be out of the ground in April, and we should not prolong it longer than that.

MR. McDONALD: The circumstances here are somewhat peculiar. There is a given plat of territory, and certain stream of water goes into it for irrigation purposes, but none passes out of it except percolation. There is no surface channel that carries any water from this territory that is irrigated from these springs, and our purpose in offering a suggestion as to the time was that we might have Mr. Wentz and other competent persons ~~see~~ actually apply, or see the water applied to the land, and then see that it is not wasted, and test it out, which seems to me the best kind of evidence in a case

of this character, and for that reason I offer the suggestion that the matter should go over until it could be tried out in the presence of Mr. Wentz, who is an officer of this court, or any other person we might select as an engineer.

MR. WILLIS: May it please the court, unless these parties show here they have been misled in some manner to their detriment, I do not think this trial should drag along to give them an opportunity to make tests. They have been two or three years. Now, if they have been misled in any way, led to believe, in other words, they might have a certain kind of stipulated duty, and there has been some one going back on that, and they thereby have allowed the time to pass by to make demonstrations and experiments, then it would be a different thing, but there are many of us that are interested in having this matter settled, and now to give these parties, on a bare statement they want until next August, or some other time to make soil tests, and to apply the water and see what their beneficial needs are, it is not right to the balance of the litigants in this case. That is my view of it, and I think it ought not to be unless there is such a showing that they have been misled, and thereby were precluded from making what they should have made in the time that this case has been standing.

THE COURT: Gentlemen, I will hear suggestions when you want to argue this case, and possibly after hearing those suggestions we may determine when is the best time to take the evidence.

MR. THOMAS: Not before the first of April.

MR. THURMAN: I would prefer not earlier than that.

THE COURT: Aside from the experiment of applying water to the land, you can make all these tests before the middle of April?

MR. MCDONALD: I think so.

THE COURT: Soil will be in condition to make your

soil tests?

MR. MCDONALD: I think so.

THE COURT: Howlong will it take you to introduce the evidence that you expect to introduce, how many days would you want?

MR. MCDONALD: It should not take more than two days I don't think.

MR. A. D. BOOTH: You mean altogether, or just yourself, or including the cross examination?

MR. MACDONALD: Just outselves.

MR. THURMAN: That seems like reopening the case. Of course, it is not closed.

MR. A. C. HATCH: After three years.

THE COURT: I don't understand this is altogether new. I am not disposed to grant the request for this matter to go over into the late summer, I am inclined to think the parties interested require this should be decided if we possibly can decide it, for this year's irrigation season. I will fix the time for the argument any time in April that is satisfactory to the parties. I want to accommodate as many of the counsel as I can, and I think that will enable you to make your soil tests.

MR. MCDONALD: I think we can make out soil tests. Of course, your Honor understands we entered into the stipulation in August that we thought settled this case. We were content with it, but the others were not.

THE COURT: I will make it the middle of April, if that will be satisfactory to the parties.

MR. A. C. HATCH: Mr. McDonald, were you clients satisfied with that August stipulation?

MR. MCDONALD: Yes.

MR. A. C. HATCH: We are satisfied with it.

MR. MCDONALD: No, you folks have added to it.

MR. A. C. HATCH: As far as you were concerned.

MR. THURMAN: We cannot have the argument before the evidence is in.

MR. THOMAS: Our experience has been instead of stipulation more time will be saved to have the court fix a time for hearing.

MR. WILLIS: We may be able to stipulate before that time.

THE COURT: Yes.

MR. RAY: I would like to suggest the regular Federal Grand Jury is the second Monday in April.

THE COURT: Would you rather, Mr. McDonald, for the court to come down the week before and hear your evidence?

MR. MADONALD: Yes.

THE COURT: Then I will take that matter up on the 12th, that is Thursday, and give the parties the rest of that week to finish up this evidence, and this adjournment then may be until the 12th of April, at which time put in such evidence as you have and the argument set for the 16th, and, I desire *to suggest to the counsel when you present your argument it will be a great aid to the court if you will present in writing just a brief summary so the court may have after the argument is over all what you contend the evidence entitles your clients to.*

MR. WILLIS: Would that include stipulations?

THE COURT: Yes.

MR. WILLIS: There are so many interests here that I take it the counsel should present what they are entitled to under the stipulation.

THE COURT: It is going to be considerable work to find all your stipulations unless you refer to them in same way. Each attorney ought to indicate to the court what he contends their clients are entitled to.

12:00 NOON, RECESS TO 10:00 A.M., APRIL 12, 1917.

MR. HUFFAKER: If the court please, I served notice of a motion to be heard this morning. At this time I shall ask that be continued until the Midway Irrigation Company is ready to put on testimony, because I may not want to urge it.

MR. A. C. HATCH: It is the motion by Midway Irrigation Company allowing them to repudiate the stipulation entered here on the 20th on its part, Mr. Wahlquist representing the Midway Irrigation Company.

MR. HUFFAKER: That is the one I have in mind.

THE COURT: What is there to be presented this morning?

MR. THURMAN: The court desires from us a written statement filed I understand of the facts we rely upon and propose argument to. I am not so sure about that. We cannot wait until the time set for arguments before hearing this evidence.

MR. STORY: I misunderstood the court if that was what he desired. What I understood was you did not desire the argument of the case in writing, but a statement of the amount of water each party claimed.

THE COURT: That would be disclosed by your pleading. Of course, you must make your claim in the pleading. I wished a statement from each party what they claim the evidence entitled them to in this case.

MR. STORY: And argument on the evidence.

THE COURT: I want some reference to the evidence which you contend supports your claim to a judgment so that I may have with me in my investigation the aid of your contention with reference to what the court ought to find, and why the court ought to find it. What the evidence in your judgment justifies the court in finding in your favor. I think that is the way I stated it before.

MR. STORY: I think it will take four or five days anyway, your Honor, to get all the information or all the records of those dates.

THE COURT: Can you have that by Friday of next week?

MR. STORY: I think as far as we can get it, before then,

THE COURT: Then we might adjourn to take that testimony on Friday of next week, and at that time we can determine when the argument can be had. I will come here at that time. Now, that disposes of that matter. There are some other matters, I take it, evidence was to be introduced on today.

MR. McDONALD: Your Honor please, we have two or three

items relative to distribution and regulation of water relative to Wasatch canal, to seele their rights, and probably will be some evidence as to the Spring creek and Sage Brush, and I would like to have the record show at this time Mr. W. W. Ray is associated counsel.

MR. RAY: For the Spring Creek, Sage Brush and Upper Charleston.

MR. JACOB EVANS: Just a moment, before you go into that matter, where will this testimony be taken next Friday, here or Salt Lake?

THE COURT: I had expected to come here to take it.

MR. JACOB EVANS: Mr. Story suggested taking it in Salt Lake City.

MR. SORY: It will be more convenient for us to have it there, but I do not wish you to put yourselves out for my convenience.

MR. THURMAN: We will try and determine during the noon hour whether it will be heard here or Salt Lake.

MR. RAY: The vigor of counsel has made us inclined to consult with them relative to the rights involved with the Sage Brush, Upper Charleston and Spring Creek. During the last hearing I talked with Mr. Murdock several times about it, and I thought might result in some change. If we could talk with Mr. Murdock and his counsel for a few minutes now, it might be more convenient if the court would adjourn until one, but I merely suggest that to counsel.

THE COURT: Are there any other matters aside from the matter you refer to to be taken care of?

MR. MCDONALD: Yes, Your Honor, we are prepared to take evidence relative to the items I suggestion. That is, as to the distribution of water and regulation of water and water commissioner.

THE COURT: How long will that take?

MR. MCDONALD: Oh, an hour, probably.

THE COURT: And is that the only matter to be taken up today?

MR. MCDONALD: Outside of the Sage Brush and Spring Creek.

THE COURT: What I was asking for was to know whether it was best to adjourn to one o'clock, as suggested by Mr. Ray. Then we will have plenty of time this afternoon to take this testimony. Now, if there is nothing else that can be taken up, with profit, the court will adjourn until one o'clock.

MR. A. C. HATCH: We have had some two weeks to talk this matter over, and have not been able to accomplish anything.

MR. RAY: We are willing to proceed then, but we have talked to Mr. Murdock.

MR. A. C. HATCH: Anything Mr. Murdock agrees to do is satisfactory to me.

MR. RAY: It was at Mr. Murdock's suggestion I made that.

MR. A. C. HATCH: Then I will withdraw any objection.

THE COURT: The court will take a recess to one o'clock.

11:00 A.M., RECESS TO 1:00 P.M.

MR. RAY: The plaintiff company and the Sage Brush Irrigation Company, the Spring Creek Ditch Irrigation Company, and the Charleston Irrigation Company have had some differences as to the provisions of Section 34 of the Stipulation heretofore entered into in this court. They have adjusted those differences and reframed Section 34 to express their present stipulation upon that. The stipulation is not signed, but I desire to present to the clerk a copy of the stipulation and consider it read in open court and stipulated in open court, their

counsel being present.

MR. A. C. HATCH: It being a matter, I understand that affects only the plaintiff and the several companies defendant mentioned by Mr. Ray, and does not in any manner affect the original stipulation filed herein as to any other parties.

MR. RAY: Not at all.

MR. A. C. HATCH: And with that understanding we agree that it may be admitted as the settlement of the matter as between ourselves. That then will conclude everything as between--

MR. RAY: That includes everything on that. There is a matter which Mr. McDonald mentioned as to losses in transit in the transfer of waters of the plaintiff company in Wasatch county.

MR. A. C. HATCH: Has Mr. McDonald anything to offer on that?

MR. RAY: I understand so.

MR. MCDONALD: Yes, we have some evidence.

THE COURT: The matter of the Spring Creek Ditch Irrigation Company and Charleston and so forth, has been stipulated by stipulation, so that you may proceed with the matters you have.

MR. HUFFAKER: If the court please, just a moment. I take it all parties to the former stipulation agree to that one also, even these that were not parties to it.

THE COURT: Agree to what?

MR. HUFFAKER: To the former stipulation.

MR. RAY: Oh yes, we now subscribe for the three other companies to the original stipulation as modified by section 34.

MR. JACOB EVANS: As I understand it, this stipulation has been signed and entered into by all the parties.

MR. RAY: That is the understanding.

That the following amendments were duly made to the said stipulation;

Paragraph 9, amended by striking out subdivision D, to avoid duplication.

Paragraph 9, subdivision A, amended to ~~x~~ read as follows: "The Stewart
Company
Ranchers sixteen and two-thirds second feet for the irrigation of one
thousand acres of land.

(And copy stipulation on page 3600-5)

3600-5

The following is a true and correct copy of the amendment to Section 34 of the Wasatch county stipulation last above referred to:

"In the District Court of Utah County, Utah.

Provo Reservoir Co., Plaintiff,

vs.

Provo City, et al, Defendants.

STIPULATION.

Section 34 of said stipulation shall be amended to read as follows:

It is further stipulated and provided that the Sage Brush Irrigation Company and the Spring Creek Ditch Irrigation Company shall not be entitled to more than one second foot of water for each fifty acres of land from July 5th to September 15th of each year, said waters to be measured at the measuring weir of said companies' canals now located west of the Rio Grande Western depot at Heber City, Utah; and that the Charleston Irrigation Company through its upper canal, shall be entitled to a duty of one second foot of water for sixty acres of land measured at the lands from July 5th to September 15th of each year, and

Provided further, that said three companies, to-wit, Spring Creek Ditch Company, Sage Brush Irrigation Company and Charleston Irrigation Company, through its upper canal, shall have said duties at all times when available as against

plaintiffs; and that the said companies shall at all times

capacity of our canal.

THE COURT: Very well.

MR. MCDONALD: I mean the Wasatch Irrigation Company. Wasatch North Field and Charleston Upper Irrigation Company are one institution in reference to the distribution of water.

JOHN H. CLEGG, called by the defendant Wasatch Irrigation Company, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. McDonald.

Q Are you an officer of the Wasatch Irrigation Company?

A Yes sir.

Q What office do you hold?

A I am president of the company.

Q Acquainted with the Wasatch Irrigation Company canal?

A Yes sir.

Q You may state whether or not the Wasatch Irrigation Company or the North Field Irrigation Company and the Charleston Irrigation Company divert water at the same point?

A Yes sir, they do.

Q And you may state the capacity of the canal where this water is diverted?

A Of the three or the Wasatch?

Q Sir?

A Of the three canals?

Q There is only one point of diversion, is there not?

A Yes, as they come from the river.

Q At that point what is the capacity?

A Oh, it is a great big slough of river. Where we divide it is maybe three hundred second feet possibly.

Q What is the capacity after you divide?

A Well, the capacity of the North Field, I guess, the way it is usually, may hold one hundred fifty or more feet.

Q The Wasatch?

A The Wasatch to its full capacity would hold about one hundred and twenty second feet.

Q Now, relative to the Wasatch canal, how long have you been acquainted with it?

A Oh, for ever since the first water was run in the canal.

Q How long ago is that?

A I believe it was about '75, 1875.

Q Has it been used continuously ever since?

A Yes sir.

Q How much water each season do you use in the Wasatch?

A I could not tell from that time to this.

Q Can you give approximately the amount?

A No, we use about, for the last twenty years possibly, over a hundred second feet.

Q During what period of the year?

A Well, it would be, it would depend on the season, we have used it as long as it was in the river. to get there. We put a tight dam across and taken out--

MR. A. C. HATCH: I cannot understand the purpose of this. We have stipulated so far as the parties before the court are concerned as to the rights of all the parties diverting water at or above the Wasatch dam, Midway Upper dam. It seems to me it is simply putting matters into the record here uselessly.

MR. MCDONALD: No, there are parties to this action who have never consented to the stipulation, a good many of them, who are not even represented by counsel, and have never consented.

MR. A. C. HATCH: Have they ever appeared in this case?

MR. MCDONALD: I think not.

MR. A. C. HATCH: They should have been served with

summons and defaulted, if they have not appeared by counsel.

MR. MCDONALD: Some may have and some may not.

MR. A. C. HATCH: Do you know of any who have not? We will default them now.

MR. MCDONALD: I know of some that were served. I was going to suggest one, I have forgotten his name on the river bottom. There are some who have not been served, who are interested in the water. Of course, they would not be bound.

THE COURT: I was wondering, Mr. McDonald--

MR. A. C. HATCH: We went carefully through the record and defaulted every person who was served with summons and had not appeared by counsel in the case.

THE COURT: I was wondering what parties you had reference to, that were not bound by the stipulation. If there are any that are not bound, we ought to know it.

MR. MCDONALD: Probably that is right, your Honor. I don't know of any who have not been defaulted.

THE COURT: Those that were defaulted, of course, are out of the case.

MR. MCDONALD: With that understanding we will not put in the evidence.

MR. HUFFAKER: Under that view we would all have to put in proof.

MR. HUFFAKER: I suppose I ought to withdraw that motion of mine so as to clear the whole thing.

THE COURT: You may withdraw it.

MR. HUFFAKER: I ask permission to withdraw the motion to set aside the stipulation as far as the Midway Irrigation Company is concerned.

THE COURT: You may do so.

MR. RAY: I desire to move now that pending the further hearing in this case the order made last year as to Mr. Wentz for commissioner continue. Mr. Wentz is serving rather tentatively now.

THE COURT: An order may be entered similar to the one made last year with reference to Mr. Wentz acting as commissioner, until the final decision of the case unless there is some protest made to that. If there is, I will hear it.

MR. A. C. HATCH: Will it require a formal order prepared and filed?

THE COURT: I think it should be. Those matters are always the subject of misunderstanding unless there is some order.

MR. HUFFAKER: Now, if the court please adjourning to the 20th to hear the argument?

THE COURT: No, the adjournment to the 20th is to hear the evidence that may be introduced when Mr. Story furnishes the data he was asked for, and any evidence supplementary to it, and I will say to any of the parties if, through inadvertence, they have overlooked anything, it will be permitted at that time. That does not mean I am throwing down the bars for the introduction of evidence generally, but in case any party has overlooked anything, the court will come here to take that evidence. I think it will be better to do that, so that all parties will be here. My idea is to have the argument in Salt Lake City, and on the 20th we will fix the time for the argument definitely.

Court will stand adjourned until the 20th at ten o'clock.

3:35 P.M., RECESS TO 10:00 A.M., APRIL 20, 1917.

MR. A. C. HATCH: If the court please, Mr. Wahlquist asked me to offer for him paragraph 17 of the findings of fact in the case of Wasatch Irrigation Company et al, against Edward Fulton, et al, in the decree introduced in this case. The decree does not mention these two parties, Midway Irrigation Company or Sunrise Irrigation Company, but the findings of fact determine they are entitled to so much water, and it is not contested by any of the parties, so far as I know, and I offer a certified copy of the paragraph 17.

THE COURT: It may be left with the reporter.

(Exhibit 200)

THE COURT: What particular companies does that affect?

MR. A. C. HATCH: The Midway Irrigation Company was awarded five and a half second feet of the waters of the Provo river during the normal flow, and the Sunrise Irrigation Company four second feet of the water of the river during the normal flow thereof, and the Midway Irrigation Company five and a half second feet of the waters of said river above the plaintiff's canal, so long as the equivalent, or greater amount of water flows in the said river above the head of plaintiff's canal from what is known as the Ontario drain tunnel, that is five and a half second feet of tunnel water. I will say in ten minutes we will be ready to proceed with the evidence that the court adjourned for the purpose of hearing at this time. We only got yesterday-- I did not see them until this morning-- the whole of the sheets, and our engineer will be through checking. He was practically through when I left the office.

May 3, 1917. (Salt Lake City.)

The following conversation occurred during the argument of the case by Mr. Ray.

MR. RAY: As I understand, Mr. Thomas, while as a matter of law the plaintiffs in this case were not bound by res gesta by the old decrees, the old decrees were founded in fact on the appropriation and were notice to all the world of the existence of a specific claim and the right to the use of a specific amount of water. Is that your contention. I understood from Mr. Thomas in conversation with him out of the court room, to admit that with that notice to the plaintiff and with that notice to this defendant that whatever this court shall find in this case to be the right of Provo City as against this plaintiff, it will measure its full right, being a prior right, is the right which it has to the use of water as against this defendant. Is that right, Mr. Thomas?

MR. THOMAS: Yes. Pardon me, I don't know I quite understand your last statement. Did you refer to both your clients?

MR. RAY: That is in the adjudication as to your right and interests, are all measured by such basic right to the use of water and your primary right.

MR. THOMAS: Yes, I understand.

July 27, 1917.

THE COURT: Gentlemen, I am ready to hear anything that is to be presented.

MR. A. C. HATCH: We were noticed, if the court please, of a session of court cited by Messrs. Coleman and Tucker to the Provo Reservoir Company and A. L. Booth, one of its attorneys. You will please take notice (Reading). We were served with this on the 25th. Of course, if the court please, we feel that this court has jurisdiction to direct the commissioner as to the distribution of the water under this motion, but we do not feel that the court has any jurisdiction as to the enforcement of any decree heretofore entered in the case, but the court has jurisdiction over the river and over the commissioner for the distribution.

MR. TUCKER: If your Honor please, in making this motion Provo City has hesitated. They realize that it is important not to disturb the general order of things, especially in the middle of an irrigation season, and they also realize that it is important not to change the personality of the commission, but we have come to the stage here where something has to be done. We have hesitated, and the matter is acute for Provo City. Now, we understand that the present water commissioner is working under a stipulation which was entered into in the spring, or early summer of 1916 between the parties to this action. That stipulation was entered into for one year. When it was mentioned at the beginning of the year 1917 that the matter of the appointment of a water commissioner, it was our understanding that the old stipulation should bind until some formal objection was made, and we have hesitated in making that objection, but we have now been forced to it.

THE COURT: Have you some motion to make, or what is the form of this?

MR. TUCKER: We have made no motion in writing, but

we wish to move the court, and we base this motion upon this understanding, we understand that the Morse decree, the old Morse decree, is binding upon the parties under that decree until it has been set aside in some way. We understand that the plaintiff in this action has taken the burden of showing that the water as decreed under the Morse decree is not being beneficially used, but until the plaintiff does show that and until there has been a determination of the court that the water is not being beneficially used, then the parties to the old Morse decree are bound only by that old Morse decree, and they are entitled until the new decree is rendered, to the water granted under the old Morse decree.

THE COURT: I have had the impression, I may have been wrong, but I got the impression there was a stipulation under which the water was being distributed, or was to be distributed pending this case, the determination of it. I was surprised when I received the communication the other day, and upon which I set the hearing for today. Isn't that the fact?

MR. TUCKER: There was a stipulation, as I just said, entered into in the spring of 1916. That stipulation was very broad. It practically placed everything in the power of the commissioner, in the hands of the commissioner, to decide as to necessities, and if the commissioner refused there was left the option to object. We are making that objection, but we are not making that objection under that stipulation. We are making the objection as if that stipulation were not in force, because we understood that stipulation to bind only during the year 1916. When the matter of the reappointment of the water commissioner was brought up last spring, ⁱⁿ 1917, we understood that the water commissioner would be reappointed, and the old stipulation would be binding only until an objection was made. That was the agreement under which we have been working. Now, we do not feel that that stipulation

is adequate. We feel that-- or a stipulation under which we have been working places practically no restrictions, and gives no guide to the water commissioner. We realize that the water commissioner is energetic and very capable, and we do not doubt his integrity for a minute, but we do feel, and are thoroughly convinced that the water commissioner is convinced that as to certain rights in this case that the water commissioner is in effect taking sides and he sees only one side of this case, and we ask that some order be made which will in some way guide the action of this water commissioner for the rest of this year.

MR. RAY: Have you a copy of that stipulation Mr. Tucker?

MR. TUCKER: Yes, here it is. Now, that stipulation was re-written this year, and I understand it is a direct copy of the stipulation which was entered into in 1916.

MR. RAY: Has your Honor a copy of the stipulation there?

THE COURT: I brought what I thought was a copy of the stipulation. I have a stipulation of 1914, and I thought I was bringing the stipulation of 1917, but I find it is a different one.

MR. TUCKER: I might say we have never seen this stipulation until just yesterday, when we got a copy from Mr. Wentz. We did not know there was any stipulation for this year. It seems Mr. Wentz, or someone made a copy of this stipulation and filed the same. The files are in Salt Lake City, and we inquired concerning it a week or so ago, and could not find it.

THE COURT: I have all the files, but I brought what I thought was the stipulation, but when I got it here I find I brought the stipulation of 1914 by mistake, rather than the one of 1917, which was a copy, as I understand it, exactly of the year 1916.

MR. A. C. HATCH: Of course, if the court please, until they set forth what they want we cannot-- we don't know where we are at. We don't know what there is to meet until there is something--

THE COURT: I do not just understand myself what is asked. You want now to depart from this stipulation.

MR. TUCKER: Yes, your Honor.

THE COURT: For what reason, how do you expect to be relieved from the stipulation?

MR. TUCKER: We don't recognize that stipulation as binding us, the stipulation for the year 1917.

THE COURT: Why?

MR. TUCKER: The only way in which we ever entered in to the stipulation was at the time it was mentioned this spring. It was then stated by the court, as we understood it, that the stipulation would simply be binding, should let it run as a working agreement until some objection was made. Now, at that time we had in mind making objections to the appointment of the water commissioner, but under that understanding we let the matter rest, and now our position is this. We ask the court to make an order directing his commissioner to distribute water in accordance with the terms of the Morse decree, which is the only thing which we recognize as binding upon us, and we wish to limit that to this extent, we feel that we are entitled to all that, but, we wish to see that we receive our proportion of the water of Provo river, according to the terms of the Morse decree until the river--

THE COURT: I think, Mr. Tucker, if you will permit this suggestion that we are proceeding now in a way not to make any headway at all. I think the court would have to require that you reduce to writing and file some application of some kind so that there might be something as a basis of whatever we might do. I think the court would hardly take the time and expect the counsel for the interests to be prepared

to meet something that is indefinite.

MR. TUCKER: If your Honor can give us five minutes, we will write the motion out.

THE COURT: I think you had better do that, then all counsel will know just what you claim.

MR. RAY: I have had no notice at all of the demand of this petitioner.

THE COURT: As I understand your position it is this, Mr. Tucker, that at the time this stipulation was entered into it was understood it was to be a stipulation only so long as no one objected, is that the idea?

MR. TUCKER: That was our idea of it.

THE COURT: And that you could abrogate it at any time without giving any reason for it, is that your understanding?

MR. TUCKER: Our understanding of it, it was scarcely a stipulation, that it was simply a working agreement.

MR. RAY: Wouldn't that be a stipulation?

THE COURT: I don't know. You may make your motion in writing and the court will take a recess for a few minutes.

MR. RAY: Prior to that, may I make one suggestion, if this is to be a working agreement it provides in itself the methods for appealing from the action of the water commissioner, how it should be called to the attention of the court.

(RECESS)

MR. TUCKER: Your Honor please, this is the position of Provo City in this matter. We understand the so-called stipulation of 1917 to be nothing more than an order of court based upon the stipulation of 1916, and we at this time wish an amendment of that order of court. We are satisfied with the order in so far as it appoints Mr. Wentz as water commissioner, but we are not satisfied with his distribution under that

order, and we ask that the orders be so amended as to conform to this motion. This is the motion. Provo City, a defendant herein, moves the court for an order directing the water commissioner of Provo river, to distribute the water of said river in accordance with the terms of what is known and referred to in this case as the Morse decree with the exception that at all times when said river measured at or near the mouth of Provo canyon is flowing more than three hundred cubic feet per second said defendant shall receive 1.3525 per cent of three hundred cubic feet per second. Now, the defendant Provo City is entitled under the Morse decree to .3525 of all water flowing in the river over three hundred second feet. We ask for nothing more, for no quantity greater than that percentage of that three hundred second feet which would amount to practically 100 second feet per second, and in making this motion we consider that Provo City and other defendants who were granted water under the Morse decree are still governed by that Morse decree, unless they have stipulated their rights away. We do not consider we have stipulated our rights away, and therefore the court, in making the order must be bound by the terms of that Morse decree until some other instrument or some other decree is rendered.

MR. RAY: May it please the court, the notice of this hearing was served on me but yesterday. The court certainly had the right here to make an order, protem order pending the final decision of the case, and, as I remember it the stipulation of 1916 became the order for the distribution for the commissioner for the year 1917, on suggestion of counsel in open court, and the order of the court. Now, it seems to me that Mr. Tucker's motion here merely involves ~~another~~ a final decision of this case at this time. It would, if it meant anything other than the stipulation of 1916 and 1917 that the commissioner use his discretion within certain limits in

the distribution of the water, first meeting the interests of the primary users and then whatever the rights of subsequent users might be as stipulated in the case, and to vary from that would involve an order based upon the testimony in this case and not a hearing at this time involving new matter pending final decision, and it seems to me that order could not be anything other than the very basis under which the commissioner is now operating.

MR. A. C. HATCH: Of course, until now we had nothing to form any opinion in regard to what was desired by Provo City. The 3525 claimed by it as against the plaintiff, of course, we object to. That is what really is the basis of our suit. We say they should have such water as is necessary for their uses, but no more, and if they take that proportion of the water it will practically leave us dry, as I understand the situation, and unless they need the water they are not entitled to it.

MR. RAY: They do not state in their motion they do need it or have not sufficient?

MR. A. C. HATCH: There is nothing before the court now, as we view it, to decide. They are not here claiming that the distribution by the commissioner has not supplied them with all they need. They are simply claiming they are entitled under the Morse decree to that water whether they use it or whether they don't use it. Of course, we contest that. They are entitled to nothing except that which they economically apply to beneficial purposes. There is nothing in the motion, as I understand it, that would justify the court in making any order then in relation to the matter. We understand this morning that the river is flowing at the mouth of the canyon over 450 feet, and they are asking for Provo City 161 second feet.

MR. TUCKER: No, you didn't understand the motion. We ask for .3525 of 300 second feet. That is the maximum

quantity Provo City will receive, that is practically 100 second feet.

MR. A. C. HATCH: When they are claiming there is an excess over and above 300 second feet they are entitled-- that is what counsel stated-- .3525 portion of it. Now, when there is an excess over 300 second feet we claim the right to some of that water. The Morse decree, I think, in effect says that 300 second feet supplied the necessities of those parties, and then it gives the balance practically to anybody who will take it.

MR. TUCKER: Your Honor please, we are asking for our proportion only of three hundred second feet of water. The motion especially limits our request to that, although we feel we are entitled to .3525 of the entire flow of the river over three hundred second feet, but we concede we cannot use 165 second feet beneficially and we are not trying to work hardship on anyone, but we take it this is our legal position: The Morse decree was rendered in 1902, that gave Provo City, as a defendant a certain amount of water. The burden of proving that that water was not beneficially used was upon any party who contested the rights of Provo city. The plaintiff recognized that burden and began this suit. Until this suit is settled by final decree the burden is still upon this plaintiff to show that we are not using our percentage of this water beneficially. Now, the final decree has not been rendered, and therefore there has been no decision by a competent court that we are not using our water beneficially, and we are therefore entitled to what the Morse decree gave, now, our asking for what ~~the~~ was given us under the Morse decree is simply to obviate the taking of evidence at this time. We take it if we proceeded under this order of course we would have to prove-- I think we can prove without any doubt, but it would take sometime to prove that Provo City necessarily needs and can beneficially use more water than the commissioner has

been distributing to her, but we wish to obviate that question, and, if the court will make an order directing the commissioner to distribute water according to the Morse decree, it will obviate making that proof at this time.

THE COURT: Anyone else have any suggestion to make? I do not think, Mr. Tucker, the court can, under the circumstances make any order without something further being presented to the court. The situation, as I find it is, that you entered-- all the parties to this action entered into a stipulation in 1914, in reference to the distribution of the water pending the trial of the case. In 1916 that stipulation was practically renewed. Some slight changes in it, but in substance it was just the same as the 1914 stipulation. This year, at the close of the hearing of this case, taking of testimony, based upon those stipulations, the court made an order which was in effect the same as the stipulation. Now, without giving any reason for it, you come into court and ask the court set aside the order the court made, and ask to repudiate the stipulation you have entered into, and which has been binding since 1914. Now, the court cannot very well do that. An order ought to mean something, stipulation ought to have some binding force, and unless some reason is shown to the court why the court should set aside the order made, the court ought not to do it. The suggestion you make with reference to your contention as to your rights might bear upon the fact that the stipulation was a wise thing to enter into, because there was a controversy and still is a controversy between the several defendants and the plaintiff among themselves, but until that controversy can be finally determined by the court, you entered into a stipulation which would provide-- not along the lines of the contention of either party-- for the supplying of your demands for water.

MR. TUCKER: I am not acquainted with the stipulations. It was my understanding as gleaned from the officials of Provo

City that the stipulation had been made merely from year to year,, and that in 1916 a stipulation was made for that year only.

THE COURT: That is true.

MR. TUCKER: And that stipulation would not bind us for 1917.

THE COURT: That is true.

MR. TUCKER: And not being bound by that stipulation we are bound only by the former decree of the court.

THE COURT: You were not bound by that stipulation until you were bound by the action of April 12th, 1917. You are bound by that action until in some way it is set aside.

MR. TUCKER: What action was taken on April 12, 1917/

THE COURT: Here is a copy of it.

MR. TUCKER: That is the order.

THE COURT: Yes, that order was made by stipulation of all the parties, all of the parties stipulated that order should be made.

MR. TUCKER: We maintain we were never a party to that stipulation.

THE COURT: Now, I will hear you upon that. If you move to vacate this order that was made upon the stipulation of the parties upon the ground you were not a party to the stipulation, of course, I will hear you. If you were not a party, you are not bound by it. If you were not a party to it, the court will not hold you.

MR. RAY: I think, your Honor, I might refresh Mr. Tucker's recollection on that. With all parties present, somewhat over the protest of Provo City, I moved Mr. Wentz act as commissioner, and Provo City was present by its counsel.

MR. TUCKER: Your Honor please, you will remember under the protest of Provo City it was understood that was not to be a binding stipulation and it was noted by the court this will be simply an order which will be a working agreement

until some objection is made. Now, we understood there was no solemnity of a stipulation in that, and we were not bound by any stipulation, and now I ask-- I suppose it will be in order then for us at this time to ask this order be vacated.

THE COURT: I will hear any motion you desire to make, Mr. Tucker.

MR. TUCKER: We therefore move that the order of court made on April 12, 1917 be vacated so far as Provo City, so far as Little Dry Creek, so far as Smoot Lumber Company, so far as E. J. Ward & Sons, so far as Excelsior Roller Mills Company, and so far as Provo Ice & Cold Storage Company are concerned, and that an order now be made by the court in conformity with the motion which I have just made.

MR. JOHN E. BOOTH: If the court please--

THE COURT: I don't care to hear from anyone in opposition to this yet, there is nothing before the court.

MR. JOHN E. BOOTH: There is an explanation I wish to make.

THE COURT: In support of this motion, or one equivalent to it?

MR. JOHN E. BOOTH: Yes.

THE COURT: You may proceed.

MR. JOHN E. BOOTH: Your Honor will remember there has been so little controversy between the people I represent and the plaintiff, that I did not attend court, frequently wasn't there all the time. I think this is the first time I knew this 1916 stipulation was in force, and I supposed that it had expired by its own limitation, and it was the theory of our answers and almost without exception stipulations corresponding thereto, that the Morse decree is what we supposed we were working on and should get our proportion of the water under that decree, as we had no notice at all of this matter of 1916 being in force, but it occurred to me if there are over four hundred second feet of water there ought not to be any

scarcity to anybody, and if we could get ours according to the stipulation that we have we are going to be satisfied under that theory of the distribution.

THE COURT: Mr. Tucker, you don't give to the court in your motion any reason why the court should set aside the order the court made. The court cannot, just because someone comes to the court and asks the court to set aside an order made a part of the record do so. You state no reason in your motion why the court should. If you have some reason why the court should set aside that order, you ought to state it in your motion.

MR. TUCKER: We base our motion to set aside this order upon the records in the case, which show, I think, that Provo City was no party to any stipulation upon which this order was based, Provo City and the other defendants which I have named, and we base the motion upon the fact that they were not parties to any stipulation upon which the order was based, and upon the further fact that the order is injurious to the defendants who have been named by me.

THE COURT: You may proceed then. I will hear your evidence on that subject. First, as to the fact you were not a party to the stipulation. If you are basing that upon the record-- on the face of the record, you are bound by the stipulation, of course, because it is so recited in the order, by stipulation of the parties. Now, you are seeking to be relieved from that because you say in substance that that was inadvertently made, I take it in the order, that you were not a party to the stipulation, you did not consent to it, and I will hear what you have to present in support of your position that you were not a party to this stipulation.

MR. TUCKER: Would it be proper for me to take the stand as attorney who would have made such a stipulation for Provo City? I do not know how to prove this thing scarcely.

THE COURT: I am sure I don't know just how you

would do it.

MR. TUCKER: We have never seen this order until yesterday. We were not-- we did not understand it was based upon any stipulation. According to the agreement in court, we understood it was to be simply a working order which could be objected to at any time, and we have. We made an objection to this by letter, and are now following out that objection here. Now, if your Honor wishes to hear testimony as to the injury which this order is doing Provo City, we are prepared to put that testimony on at present.

THE COURT: How long will it take you?

MR. TUCKER: Well, it will depend upon how much we want. I have here twenty or thirty witnesses whom we can put on the stand. I think we could prove injury to Provo City by putting a few of them on, and by the water commissioner himself.

THE COURT: Now, Mr. Tucker, the difficulty I see in determining how we shall proceed is because of the fact that you have not outlined very carefully or particularly just what the situation is. I do not know yet what you contend the situation is except you have stated in general terms that the order is injuring Provo City. Now, it does not appear from any statement you made there is no water available that could be given to Provo City that is not being give, or they have not been given all the water that the commissioner could have given. I do not know just what you contend, because you have not set it out here and the communication that was sent signed by Mr. Goddard, if I remember correctly only suggested that the canals of the Provo Reservoir Company and Provo Bench Canal were running full. Now, it might be they were running full capacity and might be there was water they had stored, which would more than supply that amount, and none of the water that you were entitled to running in it. I don't know just what you are opening up. The reason I am making

this suggestion is not in any way of criticism, merely so I may know the range of any inquiry we may start upon and see whether we have time to hear it and can hear it.

MR. TUCKER: The reason this has not been more definitely presented is we did not know our position, at least, we took a different position entirely from what has been taken here. We did not understand we were bound in any way by any stipulation. We simply came here to object to the present distribution, and to move that the distribution should be made according to the Morse decree, which we maintain is the only thing which binds the parties to this action until the new decree is given regardless of whether there is excess of water or not.

MR. A. C. HATCH: How do you claim we are bound by the Morse decree, we were not parties to the Morse decree, we are not bound by the Morse decree.

MR. TUCKER: You are not bound by the Morse decree, but Provo City receives under the Morse decree certain percentage of that river. It makes no difference to us where the rest of the water goes, and until that Morse decree is set aside, and until the burden which the plaintiff has assumed to show the water is not being beneficially used is definitely proven, we are bound by the Morse decree only, and we are entitled to the water that was decreed under the Morse decree, and that is the order which we ask the court to make, not being bound by other orders. Now, we take it that the court is empowered to make orders in a case of this sort concerning working arrangements, but if those orders are against former decrees and if they are injurious to a party, we take it they should be set aside. Now, we take it this order is clearly against the Morse decree. Take judicial notice of that, and we now are willing and ready to show that the order which your Honor has made has injured this defendant and these other defendants, and if you require evidence of

that sort-- now, in our motion we did not feel any evidence would be necessary, that as soon as the parties to this action who claim water under the Morse decree objected to the order of the court, the court would then give them water according to the Morse decree.

MR. A. L. BOOTH: Do you take it that the Morse decree, if it should be enforced and deprive the plaintiff of all and any water regardless of whether it was used beneficially or not, could be invoked here at this time on your motion?

MR. TUCKER: Certainly do. We claim a proportionate right was established in the Morse decree giving to Provo City a certain quantity of water, and giving to other defendants. This plaintiff has come in to set aside that Morse decree by showing these defendants are not using that water beneficially. The presumption is they are using the water beneficially until it is shown otherwise. Now, the plaintiff has realized that position, and they have come in to show that, they have taken the burden of proving it. Until they have proved that, and they have not proved it until another decree is rendered, we are entitled to our position under the Morse decree.

MR. A. C. HATCH: Of course, if the court please, it goes without question that Provo City cannot use the water for a beneficial purpose-- I do not think it requires any proof-- that is awarded under the Morse decree at certain times of the year at least, when there are several thousand second feet of water running down the river Provo City cannot use the portion of that water they claim, and when there is a river full of water running down into Utah Lake they cannot. The canals of the city would not begin to hold the proportion they are here claiming, and now, until some showing is made I cannot understand that the court can set aside the order made.

MR. RAY: May I make one suggestion?

THE COURT: Yes.

MR. RAY: On behalf of my clients I object to the introduction of any testimony upon behalf of the petitioner on the ground that in their main case they litigated the question as to the necessities of Provo City, as to its areas, its municipal and irrigation interests. It will be admitted in court here as to the amount the commissioner is now distributing to them, about ninety second feet, and I think that upon that it is a question for the determination of the court as to whether pending the litigation that meets their necessities or whether--

THE COURT: Where do you get that?

MR. RAY: I say it will be admitted. I assume that is what they are getting, whatever the commissioner states they are getting. I ~~xxxx~~ object to general testimony as to their necessities at this time. I do not object to testimony what they are getting. I assume that will be admitted, but as to their necessities that is a part of the case which they took some weeks to prove. There is no testimony, of course, what they are getting, but the testimony whether or not what they are getting meets their necessities is a question of the main case, which has been gone into for weeks, as to the different quantities of water necessary for Provo City. I further object to it upon the ground the order of the court is binding upon the parties until they show they were not parties to it.

THE COURT: Mr. Tucker, were you in court when this order was stipulated for?

MR. TUCKER: I was, your Honor.

THE COURT: Then the court overrules your motion to vacate this order upon the ground you were not a party to the stipulation, because if you were in court and made no objection to the court entering this order at the time, I take it you

consented to it.

MR. TUCKER: Your Honor, I appeal to the record of this matter then. We were in court and were ready to make our objection, but under the statement of the court this order was not made under any stipulation and we feel that the record will show that and it was simply to be made as a working agreement, working arrangement until some objection should be made by some party, and it was understood definitely at that time, and we feel the record will show it. As Mr. Ray pointed out, Provo City was there ready to object and we would have objected at that time, if your Honor had not made the statement which you did. That was my definite understanding and we appeal to the record on that point to outline our position if the record upholds us and shows we were not by stipulation a party to any order of this sort.

THE COURT: What record do you expect to present?

MR. TUCKER: I understand the stenographer took notes of the proceeding.

THE COURT: I have had him look all through those notes and do not find any proceeding of that kind. I was wondering what subject you were presenting. I do not think it is very material anyhow. If this order is not correct, if you did not stipulate to this order, and it is a proper order to be made the court would make it now, if it was a proper order to be made, so I overruled it upon the ground you were not a party to it. I do not think a party ought to permit orders to be made and entered of record with the idea they do not mean anything. If the court made any suggestion at all along that line, it was inadvertently made. I certainly would not suggest the court should make orders and place on the record, and at the same time they would not mean anything, or be orders, because that would be an anomalous thing to do, but if, under this order, you are not getting what the court thinks you ought to have, the court will modify the

order.

MR. TUCKER: Then I take it under the ruling of the court we will be bound by this order as if we had stipulated away our rights under the Morse Decree.

THE COURT: No, I don't think so, I wouldn't take it so.

MR. TUCKER: I cannot see then your Honor, how we can get away from the Morse decree until the new decree is entered if we have not stipulated away our rights, until it is shown we are not using our water decreed to us under the Morse decree beneficially, we cannot see how we can get away from that Morse decree. We are ready to prove now we have not been getting the water which is decreed to us under the Morse decree. Now, that will obviate the necessity of putting on all of these witnesses to show the necessities of Provo City.

THE COURT: I did not exactly see the situation in the same light you do with reference to that. The situation as I see it is this. A decree was rendered in 1902 which is referred to as the Morse decree. Certain distributions were decreed in that decree. Following that there was another decree by Judge Chidester sometime afterwards, which is some slight degree modified that. In this suit the quantities of water awarded are attacked by the plaintiff. The plaintiff was not a party to the suit in which the Morse decree was entered save indirectly, having purchased some water rights which were decreed in that suit, having succeeded to certain interests, would be bound possibly to that extent, but otherwise not at all. Now, a controversy has arisen between the plaintiff and some of the defendants, and between some other defendants and the remaining parties as to the rights to this water. You are now standing before the court and contending the court ought to, pending the determination of this case, permit you to have all of the water you claim you are entitled

to under the Morse decree. The other parties might, in the absence of any modifying order or stipulation, contend the court ought to give them until the determination of the case, all that they claim, but pending the determination the court in all cases such as this is compelled to make a tentative order an order that is in force until the case can be decided. Very rarely the court would make that order along the line of the entire claim of any of the parties, but endeavor to supply as near as may be the necessities of the parties. Now, the court will not grant your motion upon the ground that you are entitled, pending the determination of this case, to have enforced in your favor the decree which was rendered, so your motion, so far as based upon that, will be overruled, but the court will make such order, if the order has not been made, as will, as far as the court is able to do it, do justice between all these parties until the case can be decided, merely for temporary purposes. That is what this order was. It was merely a temporary order. Now, if it does not embody what ought to be done, the court will modify it, and the only motion the court will entertain at this time is a motion directed to that particular question. If this order is not right, if it ought to be in some respects modified, it is giving an undue advantage to some and working an undue hardship upon others, the court will consider it. The court would not want you to take the time here to go into evidence that you are suffering for water. That is not the question at all. Everybody else may be suffering for water. I don't know as to that, but the question before the court that the court will hear you upon and determine, is the question whether under this order, being a temporary order merely to tide over the situation until this case can finally be determined and final decree entered, what distribution ought to be made by the commissioner. That is the only thing the court wants to hear, Mr. Tucker, not as to the ultimate rights,

because we went into that for months. Whether you were entitled to the water given you under the Morse decree is a matter the court has to determine finally, and the only thing now the court in the exercise of its power would do at all, would be to make such order with reference to the distribution of the water temporarily as the necessities of the several parties and justice between them might require.

MR. TUCKER: Your Honor please, then I suppose it will be necessary for us to show at this time the relative quantities of water which have been received by different parties during the recent past, and I cannot see though how we can obviate putting on evidence showing the necessities of those parties. Now this order puts everything practically in the hands of the commissioner. It is up to him to decide. As we have stated, we feel the commissioner has ability and he has integrity, but we do feel that he is prejudiced, and we feel that under his decisions we have not been getting what we require and absolutely require. Now, if the order can be so amended and changed as to in some way direct the commissioner to give us more water, that is all that we need.

MR. A. L. BOOTH: If the court please, I suppose you are familiar with the notes that were served on us.

THE COURT: No, I am not.

MR. A. L. BOOTH: Judge Hatch read it, and I will read it again. This was served on us on the 25th of July. Provo Reservoir Company and A. L. Booth, one of its attorneys: You will please take notice that on Friday, the 27th day of July, 1917, at ten o'clock A. M., in the rooms of the Provo Commercial Club (Reading). Now, that is all the notice we have had to be here, that they were going to ask for an order determining the distribution of water in Provo river for the remainder of the year 1917. Our understanding is this order has already been made on the 12th of April, 1917. Now, there is nothing else before the court, so far as we

understand it. Counsel for Provo City says that the commissioner has been showing partiality. They do not state so in their motion, or they were going to take up that question at this time at all. They merely say they are going to ask for an order determining the distribution of the water for the remainder of the year, and the court now finds that order has already been made, so that it would seem to us there is nothing before the court at all, having found the order has been made which they say they were going to ask for this morning. They do not complain in this notice of the conduct of the commissioner. They do not say they are not getting enough water, they do not say there is any hardship being worked upon them at all. There isn't any complaint of anything only they are going to ask for this order, and having got that, it seems to me that is all we are here for.

THE COURT: We are not making much progress in this matter.

MR. TUCKER: Your Honor please, then we will put on witnesses now to show the distribution of water of Provo river during the immediate past, and also show the distribution in Provo City, and we will attempt briefly to show that the water which has been distributed to Provo City has not been sufficient to meet the needs of Provo City. We take it under this notice that line of evidence cannot be objected to. The order itself, which we were not aware of at all when we made the notice, provides no definite time. Matters of this sort necessarily require a short notice, and we consider this notice is sufficient to place all parties upon their guard as to what is to be proven. We are asking for an order distributing the water in Provo River for the rest of the year, and the evidence which we will put on would necessarily be put on in asking for that sort of an order, and if there is no objection at this time, we will call Mr. Wentz as the first witness.

T. F. WENTZ, called by the defendant Provo City, testifies as follows:

DIRECT EXAMINATION by Mr. Tucker.

Q Give your name, please?

MR. RAY: Your Honor please, I object to the introduction of any testimony here unless it be directed to the question whether or not the commissioner is violating the order of the court of April 12th. Upon the question of the general necessities of Provo City and different parties to this action, as announced by Mr. Tucker, I object to the introduction of the testimony. That matter has been gone into in the main case.

THE COURT: I take it from Mr. Tucker's remarks he intends this as sort of appeal from some decision Mr. Wentz has made with reference to the distribution provided for in this order. Is that correct?

MR. TUCKER: That will have to be our position now. Our original position was on the Morse decree and that is not tenable as you have held, our position must be a modification or appeal from this order, and we have made demands upon Mr. Wentz in accordance with this order and appeal from his decision.

MR. RAY: To that I have no objection.

THE COURT: There has been no suggestion this order is not in itself a fair and just order. You do not attack any particular provision in the record, but you do contend Mr. Wentz, under this order has not treated you fairly.

MR. TUCKER: That is correct. I take it if we prove our contention that some modification will be made in this order to the commissioner, which will remedy the situation.

THE COURT: Probably some additional order will be made, whatever order is necessary will be made.

Q Give your name, please?

A T. F. Wentz.

Q Are you the water commissioner of Provo river?

A Yes.

Q Under order of this court? A. Yes.

Q If you have it, will you please give the flow of water in Provo river from July 16th to the present time, daily flow throughout at the mouth of Provo canyon?

A I have the measurements only, total as measured at the several stations on the diversions. Some are near the mouth of Provo Canyon, and some are near Provo City. They are near the first lateral that is taken out from the canal.

Q I take it that you measure all diversions from Provo river, and any other amount left in the river after those diversions are made and add them together?

A Yes.

Q You may give those measurements, please, Mr. Wentz, the sum total of the water in Provo river on these dates as determined from these measurements?

A July 16th, 519.

17th, 495,

18th, 483,

19th, 469,

20th, 457,

21st, 430,

22nd, 415,

23rd, 418,

24th, 415,

25th, 418,

26th, 417,

27th, 432.

Q What time of day were these measurements made?

A Beginning in the morning, the total measurements are made beginning in the morning about seven o'clock, and extending over the east side until about one or two o'clock, then on the west

side during the afternoon.

Q Made about the same time every day though?

A Generally speaking, yes. Of course there is not a total measurement made on all of these each day. Number of them are made and the others are calculated from the gauge readings on the river.

Q Now, you may give, if you can, the diversion by-- the amount of water diverted by the different defendants and by the plaintiff on the days which you have just read.

A I haven't them on all the days.

Q How many days have you? We would like included in those defendants Provo City, Provo Bench Canal and the Provo Reservoir Company, the plaintiff, and Little Dry Creek, Upper East Union Canal, Timpanogas Canal?

A July 16th, Provo Bench Canal, 124.80. 15 second feet of this is Provo Reservoir Water and is carried through this canal Provo Reservoir Canal, 118 second feet.

Timpanogas Canal, 22.57.

Upper East Union and Faucett Field, 24.72.

Upper East Union 24.11.

Provo City, assuming the water works as 8 second feet, was diverting a total of 100.04 second feet.

Little Dry Creek, 10.96.

Fort Field, 3.62, and 4 second feet going by the Fort Field dam down the river bed to the lake.

July 19th, Provo Bench Canal, 107 second feet, of which 15 second feet is Provo Reservoir water.

Timpanogas Canal, 21.50,

Upper East Union and Faucell Field, 19.20.

Provo City, assuming the water works at 8 second feet, 92.64 second feet.

Little Dry Creek 7 second feet.

July 20th, Provo City measured in the early morning, between six and seven, total of 88.12 second feet. In this amount the

water works is assumed at 8 second feet, and Tanner race, which is unsettled that time of day, is assumed at 10 second feet approximately as found the day before.

Q Excuse me, let me interrupt there. Is this on July 17th now?
A July 19th. July 23rd, Provo Bench Canal 113.88, of which 12 second feet is Provo Reservoir water.

Timpanogas 16.87 second feet.

Upper East Union and Faucett Field, 19.04 second feet.

Provo City, assuming the water works at 8 second feet, 84.99.

Little Dry Creek 6.42 second feet.

Fort Field, 3.50 second feet. This was raised 2-1/2 second feet, making 6 second feet. Little Dry Creek was raised 2-1/2 second feet, making nine second feet.

On July 25th, Provo City, taken between one and two P. M., and assuming the water works at 8 second feet, had 87.82 second feet.

July 26th, Provo Bench 102 second feet, of which 12 second feet was Provo Reservoir water.

Provo Reservoir Canal running 90 second feet.

Upper East Union and Faucett Field, 22.20 second feet.

Timpanogas 17.10 second feet.

Provo City, assuming the water works at 8 second feet, was 93.88 second feet.

Little Dry Creek 6.42 second feet.

Fort Field 3 second feet.

Q How much of the water--

A I have one for this morning.

Q Does that cover all these?

A July 27th, taken between six and seven this morning.

Q All right.

A Assuming the water works at 8 second feet, and assuming the Tanner race that is not settled until about ten o'clock, the same as it was yesterday, because the gates were in the

same adjustment, and same amount of water was flowing from the City creek over the by pass to the river, the total is 85.64 second feet. That is what the city is drawing this morning. I might say on the 432, that is caused by the stream in the upper valley last night and passed the gauge about seven o'clock below the mouth of the canyon at the time these measurements were made. The river normally in this valley this morning is about the same as yesterday, 417 second feet.

Q The water which you have stated has been going to Provo Reservoir Company, how much of that water is storage water?

A Nine feet.

Q How much of it is water owned by Provo Reservoir Company by former decreed rights?

A The Blue Cliff right and Dixon right.

Q About how much is that?

A 3.65 second feet.

Q How about the Ontario?

A I am holding the Ontario water in the upper valley.

Q Is the flow of Provo river practically constant now during the day? A. Yes.

Q Is the flow of water to Provo city practically constant?

A Yes.

Q Your measurements were taken, your measurements for Provo City were taken what time of the day?

A The first was taken from twelve to three in the afternoon, second from six to seven in the morning, third eleven to twelve in the forenoon, fourth one six or seven in the morning, fifth one eleven to twelve in the morning, the sixth one, one to two in the afternoon, the seventh one, three to four in the afternoon, and the eighth one six to seven in the morning.

Q All the water turned to Provo City is turned in the City creek, is it not?

A Except the Tanner race and water works.

Q And where does Tanner race get its water?

- A Directly from the river, northeastern part of the city. Water that rises in the river bed below the mouth of the canyon, except the night flow, part of the Factory race flow at night is diverted to the Tanner race.
- Q Now, there is as much water flowing into City Creek at night as there is any time, is there?
- A Practically the same thing, unless some slight change on the gates made during the day, but those changes are very light.
- Q Who makes those changes?
- A I make them.
- Q No one else can make them?
- A No.
- Q Can anyone make a change on Provo Reservoir Company gates besides you?
- A Yes, they could make a change on that, but there is a very small flow going by that time.
- Q Then your measurements--
- A And on the Provo Reservoir, we have a register on the Provo Reservoir, automatic register, and those gates have never been changed I know of, except when I have authorized it, or been on the ground and made the change myself.
- Q Then your measurements during the day time of Provo City's proportion of water are fair measurements, you take it?
- A Yes.
- Q Do you know anything regarding the distribution of water to the different pipes of Provo City?
- A No, I don't have anything to do with that, that is left up to the city officials, I simply make a measurement of the total they have in their canals at the several stations and they make the distribution between the canals themselves.
- Q On or about the 23rd of July, Mr. Wentz, did you order the water master of Little Dry Creek Irrigation Company, or anyone to tear out a dam or dam gate across the river which diverts the water into Tanner's race?

A No.

Q That dam was never torn out by your order then?

A No, I took part of the dam out myself, enough to let two and a half second feet by, but never ordered the water master to tear it out.

Q You don't know, as a matter of fact, Tanner's race was left absolutely dry, practically dry for two days there?

A No, the race was running all right when I was there in the afternoon, when I made the observation, and again about three or four in the afternoon, and was running a good stream in the evening when I passed over it going home.

Q You read the gauges, didn't you, which are on the city canals, which go to the different portions of Provo City?

A I read the gauges only on the East Union, Factory race, City race and Tanner race.

Q That is the only way you have of determining how much water Provo City is getting, isn't it?

A That is the way I do determine it.

Q And therefore, when you said you didn't know anything about the distribution to these different parts of the city, you were mistaken, weren't you?

A I didn't say I didn't know about the distribution, I said I didn't interfere with that distribution, it was made by the water master. I take it simply as I find it there.

Q But you know what those readings have been, don't you?

A Yes.

CROSS EXAMINATION by Mr. John E. Booth.

Q Like to ask just one question. The totals that you give in the river, Mr. Wentz, as you measured them, would be considerably larger than the actual water in the river, would it not?

A Yes, there is some flow below the mouth of the canyon, inflow, and maybe some loss. I am unable to say what that difference is.

Q You could not say how much more?

A No, we haven't a station at the mouth of the canyon.

CROSS EXAMINATION by Mr. Robinson.

Q Have there been any complaints made by the officers of the Upper East Union Canal Company?

A No written complaints. I have seen the watermaster several times a week and inquired how he was getting along, and so on, but there have been no complaints to amount to anything. They always ask for more generally. That is one of the traits of a water master. Saw him yesterday afternoon, asked him how he was getting along, he said getting along fine, said he had, I think, three or four more days on his grain, and like an extra flow to push that through and get through. After that he would get along nicely.

A He requested he have a little more water for a few more days?

A Yes, as I understood him. They have had some changes on their schedule taking it to the lower end, and some difficulty that way, and he wants enough for the next three or four days, and I told him we had plenty and I would give him some last night or this morning, but I have not been able to do that.

Q You intend to turn some more water in his canal?

A Yes, there isn't any question about the amount of water, anybody wants more water and needs it, glad to give it to them, haven't any insufficient supply.

Q So you will turn more water into this canal right away?

A Yes, I expect to.

REDIRECT EXAMINATION by Mr. Tucker.

Q May I ask if requests have been made to you during the last week or so from Provo City for more water?

A Yes.

Q Did you comply with those requests?

A No, I told the city I would give them, between eighty and ninety second feet, and I considered that a great deal more than they could use. The city has been short, for instance,

we have six or eight second feet going out of the waste gate from City creek that runs constantly there since the river went down.

Q What do you mean by going out of the waste gate?

A Going out of the waste gate this side of the mouth of the canyon into the river bed.

Q Could Provo City utilize that water?

A They could utilize it if they turned it into the creek.

Q Would you authorize them to turn that water into the creek?

A I have requested them to close those gates several times.

Q And they have not closed them?

A No sir, they were still running yesterday.

Q Still they are asking for more water all the time?

A Yes sir.

Q Do you mean the gates near the Provo Pressed Brick yard?

A No, the waste gates just below the mouth of the canyon.

There are two gates, one just below the road that goes west across the canyon, and one down k just below the settling basin, also a stream coming out near the settling basin.

Q What inquiry have you made as to whether the water Provo City is getting is sufficient?

A I have observed the crops, and I know the area that has been stipulated by the parties in the case that Provo City irrigates.

It would be impossible to use the water I am giving them on that area.

Q Have you made any actual examination of the land to the east and south of Provo City within the last two weeks, what crops there are?

A I don't remember whether it has been in the last two weeks, but they may have been burning up. In the last two weeks we had water going to the lake, plenty of it, until the 14th. May have been conditions before that they were burning up.

Q I mean since the last two weeks?

A I have been over the system once, but I don't know what it was at this time.

- Q You cannot say what date that was?
- A No, I don't remember what day. I have been over part of the system on the west side and north side, over that yesterday.
- Q How far south on the west side have you been?
- A I went down to about 6th South on my trip over, that was a week or ten days ago.
- Q At that time the crops were in good condition from the standpoint of irrigation, were they?
- A Well, except a few dry spots that had been burned early in the year.
- Q While water was running to the river, of course, you would give Provo City as much as she asked for, wouldn't you?
- A I didn't have any control of it, I didn't put any restrictions on Provo City carrying all their canals could hold, if they had that disposition. I wanted to add two or three thousand second feet of water going to waste.
- Q How could they utilize that water without your authorization, don't you have to turn it into their canals?
- A No.
- Q They could just help themselves?
- A Yes sir, same as everyone else on the river does.
- Q There would not have been any objection/~~to~~^{from} the water commissioner?
- A No, would have been glad to have them do it.
- Q That condition existed up until how long?
- Q Up until the-- on the evening of the 13th at eight P. M. there was still 20 second feet of water going straight through to the lake.
- Q Up until that time they could have gotten all the water they wanted? A. Yes sir.
- Q Do I understand you there has always been eight second feet going to waste some way, which Provo City could have gotten if they had desired to?
- A Yes, six or eight second feet.
- Q That is the condition today?

A That was the condition yesterday when I went over the system.

Q And there would not have been any objection from the water commissioner if they had taken that amount?

A They have been instructed to close those gates.

Q Who did you instruct for the city?

A Mr. Thompson, and at the time we were finishing the dam at the mouth of the canyon either Mr. Thompson or Mr. Peay, I think they were both there when we were finishing the dam at the mouth of the canyon.

Q Is it a very difficult matter to close those gates?

A No, on one of them, the upper one is the end of the plank broke off, will need a new plank there, and some straw and dirt piled against it. The lower one there ought to be some filling against the plank there.

Q Have you any explanation of the fact these people were asking you for water all the time, and at the same time there was this six or eight feet going to waste they could have gotten by practically no effort, been easier to have done than for you to have given them water?

A I don't understand your question.

Q Can you explain the situation of Provo City asking for water, as you have testified they have asked, and at the same time there was six or eight second feet of water going to waste, which they could have gotten by a small amount of effort?

A No, I cannot make any explanation of those things.

THOMAS C. THOMPSON, called by the defendant Provo City, testifies as follows:

DIRECT EXAMINATION by Mr. Tucker.

Q What is your name, please?

A Thomas C. Thompson.

Q Where do you live?

A Provo.

Q Have you any official position?

A Water master of Provo City.

Q Do you have charge of the distribution of water to the different parts of Provo City? A. Yes sir.

Q That water is delivered to you by Mr. Wentz, the water commissioner? A. Yes sir.

Q You have just heard Mr. Wentz testify regarding a certain six or eight second feet going to waste down the river, have you not?

A I heard him say something about it.

Q Have you any explanation to make regarding that?

A I don't know where they are, I don't know where it is at.

Q Has Mr. Wentz ever instructed you to take six or eight second feet of waste water and put down the gate that you can recover six or eight second feet of water which is now going to waste?

A No sir, he mentioned it though up there when we were putting in the dam, and me and Ferguson went down and fixed it. It was just as much to the Upper East Union, and just as much to the river bottom to fix that as it was to us, so me and Ferguson went and fixed it that time. That was right when we got the dam finished across the river.

Q You would say there is no water going to waste now?

A I don't know, I have not been there since that, to that waste gate, so I cannot say.

Q Have you made requests of Mr. Wentz for water?

A Yes sir.

Q At those times did he mention anything about this waste water?

A No sir, never been mentioned since.

Q What has Wentz told you when you have asked for water?

A Why, the last time I asked for water he said he had sent 35 second feet down.

THE COURT: That he had or would?

A That he had.

Q Did he mean 35 additional second feet?

A Yes sir.

Q At what time was that, do you remember?

A I don't remember the day, I think it was somewhere about the 23rd, I believe, 22nd or 23rd; that was about it, I think.

Q Are you acquainted with the flow in City Creek both night and day?
A. Yes sir.

Q Do you know whether there is any fluctuation in that flow?

A There is.

Q You may explain that fluctuation?

A I have got the gauge reading from the 20th of July up to the present time, to this morning.

Q Do those readings show the comparative flow in City creek for night and day?

A It shows it evening and morning, and sometimes middle of the day, sometimes three measurements, sometimes only two, but every day.

Q What time in the morning?

A Generally somewhere about six o'clock in the morning.

Q What time in the evening?

A About five.

Q Do those measurements show that there is a smaller or larger quantity of water flowing in City creek in the night than in the day time?

A Yes sir, about nine o'clock at night it goes down nearly half, goes back anywhere between six and six thirty in the morning.

THE COURT: You say it is reduced about half?

A Very close to it.

THE COURT: Do you know what the occasion of that is, what causes it?

A No sir, I don't.

Q Are you at present getting the water out of the Factory race at night and distributing it to the other parts of the city?

A Yes sir.

Q How long has that custom been in force this year?

A How long?

Q Yes.

A The custom?

Q About how long have you been doing that this year?

A Since the 20th.

Q Since the 20th of July?

A July, yes sir. We did it a couple nights, I think it is the 17th was the first that we commenced. I can tell. There was a few days I had no weirs and I could not take the measurements until I got the weir in, because I had no meter. There was no use taking measurements at the one or two without I took them all, and that is the reason I kept no record. On the 20th day of July--

Q Where did you have no weirs?

A In the Union.

Q Now, what do you do with the water, the night water, after you have turned it out of the Factory race; what becomes of it?

A We divide it in the Union and City creek, or Fifth West, whichever you call it, and any to spare, it goes to the Tanner race, but there has been many a night there was none for the Tanner race.

Q That means you distribute all water going down City Creek to the East Union--

A Divide it as near equally every night as we possibly can between them two.

Q And what is the capacity of the Union?

A About thirty-three to thirty-five second feet.

Q Then how much-- have you your gauge readings since July 20th?

A Yes sir.

Q As to the distribution? A. Yes sir.

Q These various systems? A. Yes sir.

Q Since that time there have been weirs?

A Yes sir.

Q In all the ditches. You may give those to the court now, please?

A July 20th, only took one in the evening at 5:31 P.M. That was the day we put in the weir in the morning, so I just read them in the evening when I went up to change. I had in the City race at 5:45 P.M., 1.14.

Q What does that mean?

A I had in the Union 1.01.

Q Is that the gauge reading?

A That is the gauge reading, yes sir.

Q Have you figured that in second feet?

A Mr. Swan has figured it in second feet, I haven't, there was two second feet and a half, as near as I could guess at it, going down to the Tanner Race. There was one foot, one second foot going down the Mill race-- Tanner race, at 6:10 P.M. 48 gauge reading. .

Q We won't have these readings now then if you have not figured them in second feet, we will get them in second feet.

A Mr. Swan has the same gauge reading, and worked out in second feet.

Q Mr. Thompson, ~~you~~ do you know as a fact as to any waste water which has flowed through Provo City and on into the lake during the past period from July 16th to the present?

A No sir.

Q You don't know?

A No sir, I know of none.

Q And would you know of any if there had been some?

A Well, there has been a few times I have watched very close. There has been a few times on these little ditches early in the morning probably run for half an hour, these little ditches, these little town ditches some fellow has missed, or something, but take the canals outside, I have never found a drop in the east part of town, and it has been very seldom I have found any in the small ditches, but it has happened occasionally there has been a little going down.

Q How many assistants do you have who do nothing but give their time to the distribution of water in Provo City?

A Just myself and one deputy.

Q You do nothing but see this water is not wasted and is properly distributed?

A Yes sir.

12:00 NOON, RECESS TO 2:00 P. M.

THOMAS C. THOMPSON - - - -

DIRECT EXAMINATION by Mr. Tucker continued.

Q Mr. Thompson, have you measurements of the canals of Provo City for the dates July 23rd, 24th, 25th and 26th?

A Yes sir.

Q And by adding those measurements together you would get the entire amount of water received by Provo City on those dates?

A Yes sir.

Q You simply have those measurements in terms of gauge heights?

A Yes sir.

Q Will you give them to us now please, as rapidly as you can?

A 23rd and 24th?

Q 25th and 26th, those happen to be the dates for which Mr. Wentz has given definite reading.

A July 23rd, 5:15 A. M., Factory race, 2.07; City race at 5:30 A. M., .64; Union at 6:24 A. M., .66; Tanner race at 6:40, .53, taken by the water peg. Then in the afternoon--

MR. RAY: I don't think Mr. Wentz gave any measurement for the 23rd. Gave 21st, 25th, 26th and 27th.

A I understood him to give measurements for the 23rd, 25th and 26th.

MR. RAY: I have no objection to it.

A In the afternoon at 5:16 P. M., Union .98; City race 1.19, at 5:37 P. M. one second foot going down the Factory race,

Tanner race .47 at 6:07.

Q Give those readings quite rapidly, please?

A Change the 24th Union .79 at 5:37 A. M. Factory one second foot at 5:45 A. M. City race .68 at 6:09 A. M.; Tanner race .36 at 6:31 A. M.; July 24th, 1917.

Q You may omit the 24th. Mr. Wentz gave us no measurements that date.

A That was the 24th, you want the 25th?

Q Yes.

A Union .58, 6:34 A. M.; Factory race 2.20 at 6:38 A. M. That would be 70 over the gauge.

Q What does that mean?

A Be 70 over the gauge. The reading was 2.20, but it takes 150 before it goes over the gauge, and I just read it as I got it. It means 70 over the gauge.

Q All right.

A City race .86 at 6:52 A. M. Then in the afternoon on July 25th at 4:59 P. M., City race 1.32, Union 1.06 at 5:13; Factory race 2 second feet; Tanner race .46 at 6:02. You want the--

Q 26th now.

A At 6:05 A. M. Union .72; Factory race 2.22, that would be 72 at 6:09 A. M. City race .98 at 6:18 A. M. I haven't got the Tanner race that morning. Then in the evening on the 26th, Union 1.05 at 5:45 P.M., one second foot in Factory race; City race 1.27 at 5:56 P.M. I haven't got the Tanner race, Mr. Peay took that.

MR. TUCKER: Your Honor please, we would like to call Mr. Swan who has computed these amounts, for the moment, and have these amounts put before the court in terms of second feet. You may leave the stand, Mr. Thompson.

GEORGE C. SWAN, called by the defendant Provo City, testifies as follows:

DIRECT EXAMINATION by Mr. Tucker.

- Q What is your name, please?
- A George C. Swan.
- Q Do you hold any official position?
- A City engineer of Provo City.
- Q What is your profession?
- A Civil engineer.
- Q You have testified before in this case, have you not?
- A I have.
- Q Did you hear the figures just given by Mr. T. C. Thompson, preceding witness?
- A I did.
- Q Did you write them down?
- A I had them already down, I checked them as he read them.
- Q Have you computed the amount of water in second feet flowing in the various streams in Provo City in ~~accordance~~ accordance with those measurements?
- A I have.
- Q You may give the total flow of water received by Provo City on the dates July 23rd, July 25th and July 26th, as computed by you?
- A I wish to make one amendment. On the afternoon of July 26th I did not have those figures. I have not computed those, the rest I have.
- Q All right, give the rest.
- A On July 23rd, the Factory race--
- Q Just a moment, I asked for the total given to Provo City?
- A Total in the morning was 59.09 second feet.
- Q Excluding the water works?
- A Excluding the water works. The water works not included in here. These measurements include only the canals given by

Mr. Thompson. On the afternoon of July 23rd, 60.25 second feet, on the morning of July 24th, 38.35 second feet.

Q That was on the morning?

A 38.35 second feet on the morning of July 24th.

Q We just wanted July 25th?

A Mr. Thompson gave that measurement July 25th, morning measurement assuming 46 second feet, which was the amount in the afternoon for Tanner race, it is 65 second feet.

Q You should have said 4.6 second feet for Tanner race, shouldn't you?

A Forty-six hundredths gauge height for Tanner's race. That was the gauge height in the afternoon of that day, no measurements were taken in the morning, I understand. On the afternoon of July 25th, 27.75 second feet. The morning of July 26th there was no quantity given for Tanner's race, but the other three canals' total is 65 second feet.

Q Excluding Tanner's race?

A Excluding Tanner's race, for which no measurement was given. Water works is not included in any of these measurements.

CROSS EXAMINATION by Mr. Ray.

Q Mr. Swan, can you state whether or not there is a leak around the East Union weir?

A Around the East Union weir?

Q Yes.

A Or the Factory race?

Q The East Union weir.

A I don't know of any leak around the East Union weir.

Q Do you know whether there is one?

A I cannot say positively. That is, as I understand you mean around the weir board inside of the canal?

Q Yes.

A There is no leak around the outside, they may be around the weir board.

- Q You made no allowance for that if there was such?
- A I made no allowance.
- Q What leak is there around the Factory race weir?
- A About one second foot.
- Q Have you made any effort to determine accurately how much that leak is, or is that just an estimate?
- A That is just an estimate.
- Q Might it be as high as three second feet?
- A I haven't seen the Factory race when it was turned out, and I am taking Mr. Thompson's estimate for that leak.
- Q Of that you have no personal knowledge?
- A Of that I have no personal knowledge.
- Q And in these figures do you make any allowance for leak around the Factory race weir?
- A I did.
- Q How much?
- A One second foot.
- Q Around the East Union weir?
- A I made no allowance for any around the East Union.

CROSS EXAMINATION by Mr. John E. Booth.

- Q You have the ordinary weir measurements in each of these canals, do you?
- A All except the City race.
- Q What kind of a measurement do you have for that?
- A On the City race we have the flume and gauge in the flume. I rated the City race on July 18th, and found that the gauge readings and the quantity flowing would practically check the rating on the City race of last year, and used the rating curve which I made out last year, for determining the quantity in the City race.
- Q Do you know whether your measurements are made at the same point as those of Mr. Wentz?
- A I know that my measurements are made at the regular rating

station, and that as I understand Mr. Wentz' testimony is the point at which he made his rating.

Q You don't know how to account then for the difference between the amounts you found and those Mr. Wentz found on the same day?

A Only that they were taken at different times during the day, and the quantity was different.

Q The quantity would not vary that much naturally, would it, just in the daily fluctuations?

A The fluctuations are very great in there, as I understand it, and from what I have observed last year, I noted greater fluctuations than that.

Q They must have been caused, however, by some one taking water out above, or turning some in above, don't you think?

A I don't know what was the cause, may have been combination of causes. The total fluctuation on the whole system, that is of the natural flow of the river, falls on Provo City, under the present system of distribution, of which testimony was given in the last hearing, and all the fluctuations on the whole system falling on Provo City it may be an accumulation of all the fluctuations on the whole river, together with any interference there may be on the ditches.

Q The time when Mr. Thompson measured though wasn't very long from the time when Mr. Wentz measured in some instances, was it?

A I don't know except from the testimony that Mr. Wentz has given as to the time he made his measurements, about three o'clock in the afternoon. Some of these measurements ~~xx~~ as testified to by Mr. Thompson, were made at five o'clock in the afternoon. Time given by Mr. Thompson shows the time at which he made the measurements, and Mr. Wentz stated his measurements were made, as a general rule, about three or four o'clock in the afternoon.

Q How do you explain the whole of the fluctuation to fall on

Provo City; you say Provo City must stand all of the decrease each day, as I understand it, and then it gets all of the benefit of the increase, is that right?

A The gates at the head of the other canals are so set that in case of an increase in the water the gates form an orifice, and the increased inflow is not in proportion to the head on the stream, the head over that orifice, and as a consequence it throws the fluctuations away from the gates, and that is the case on each of the other canals, all of them having their gates set to take a practically constant stream through the orifice of a given size. It throws it away all the time and the increase in quantity is thrown away from those gates, and they take very near the same quantity, practically the same quantity when the water is up as they do when it is down, and all the difference is transferred to the city race and falls on Provo City, and if the measurements are taken at Provo City when the quantity is the greatest, then when that drops off Provo City is the loser, and that appears to be the case right along.

Q As I understand you the increase goes to Provo City as well as the decrease falls on the city under these conditions?

A Yes, but the increase in measurements are generally coming along apparently at the time of day Mr. Wentz is taking his measurements, and the decrease generally comes at a time at the balance of the day. In other words Mr. Wentz starts out to distribute the water and measure from the upper end, and he comes along down the canal and measures each of them and adjusts their gates as he comes down, and driving around, and when he gets down to Provo City and drives around and gets to the gate at Provo City, why, the water is down there and he measures it while it is up. If he has followed it through and adjusted it he measures it while it is up and then if there is any interference or any fluctuation, why, it is a shortage instead of an increase.

Q Suppose Provo City should put in gates similar to what these other companies have, couldn't you regulate this condition just as well as the other companies do?

A No, because we don't get the water to bring it up to that.

Q Why couldn't you arrange your gates so that they will take this constant flow just as the same as the West Union, for instance, or the Big Bench or Timpanogas?

A We could if they would turn the water down to us and allow us to turn the over flow down the river. If they would turn sufficient quantity of water down so that we could have our gates set to take just the quantity we needed and allow the surplus to go on down the river, we could do that, but the others being ahead and they have everybody to throw that on to, they can do it and we cannot.

Q Don't you tap the river up higher than some of the others?

A Most of the others who get water from the river with the exception of the East Union or the West Union canal are supplied largely by seepage, practically all by seepage, and only the West Union takes that quantity, and that is regulated by the gates in the river above the head of City creek, which divides the water there and turns the water down into the river channel.

Q What about the Timpanogas?

A Timpanogas takes water above the head of City creek.

Q And the Big Bench?

A The Big Bench takes water above the head of the City.

Q How far above?

A Well, it is very close, the Provo Bench is just above the West Union headgate, that is the gate in the river that controls the West Union and Provo City, the City creek takes off-- generally run the dam across, and the set of gates that run across the river just below the Provo Bench canal and West Union gates are set to give just a certain quantity there, and all the other is thrown over to the other gates.

- Q It would be merely a matter of arrangement, however, to put your gates in the same condition as those others, wouldn't it?
- A It would, as I say, if they would arrange to give us the quantity of water which would supply us, but as we do not get the water we cannot turn it in. If we set our gates to take what we want, and if the water don't come there to furnish what we want, then we cannot regulate our gate so as to increase the quantity of water in the river.
- Q But the commissioner does turn down the amount to you that he has testified to, doesn't he, at the gates?
- A I don't know, we don't receive it if he does.
- Q You don't know whether people take it out between the mouth of the river and your headgates?
- A I do know there are a number of ditches down there, the Upper East Union takes out of City creek just very close to the head, and the river bottoms takes out on the road--of the City creek between there and head of the city canal.
- Q And they are under regulations, aren't they?
- A They are supposed to be under the regulations of the commissioner, not under our regulation.
- Q Now, the Upper East Union takes out down below you, doesn't it?
- A No, it takes out of City creek above the city creek; it takes out of the same channel as we take out of below where that channel leaves the river, and above where the head of our canals and measuring devices are.
- Q Why don't you regulate them so these fluctuations would go on to the Upper East Union, part of them?
- A The regulation is not under our charge, it is under the charge of the commissioner.
- Q The commissioner doesn't fix the headgates, does he, build them?
- A They are built under the instructions of the commissioner, and he controls the adjustment of those gates.
- Q So that every bit of the difference up and down falls on Provo City, you say?

- A Practically all of it, there is a slight difference in increasing the head of the orifice, but the difference is very slight.
- Q You think the result of that is you get less water than you would if you had a constant stream, the same as these other people do?
- A It has so proven during the last three years.

RE-CROSS EXAMINATION by Mr. Ray:

- Q Mr. Swan, isn't it a fact that the commissioner has so adjusted the gates that the Provo Bench Canal takes half of the shock of these variations?
- A I don't know, I haven't visited the head gates very frequently, but judging by the results to us, the shock appears not to have been distributed this year any different from what it was last year.
- Q Are you able to say the gates are not so adjusted that that shock is distributed between the Provo Bench and the City equitably?
- A I couldn't say right now as to what is the condition.
- Q As a matter of fact, there are no adjustments of headgates made on the day the commissioner makes measurements, is there, Mr. Swan?
- A As I have understood, any time that the commissioner-- he would make adjustments whenever he found in his judgment adjustments were needed, whether it was the day he was making the measurements or any other day.
- Q You are not able to say, however, that the commissioner makes both adjustments and measurements at the same time, are you?
- A I have not followed the commissioner around to determine just what is his procedure, we leave that to him.
- Q Your measurement included nothing for the city water, that is, the water that is in the city system?
- A No, they did not include what was in the city system.
- Q Were all of these measurements made above your first diversion

point?

A They were made at the head of our canals.

Q Above your first diversion point?

A The first diversion point that is in the control of the city.

THE COURT: Do I understand from that there are some diversions above that are not under the control of the city?

A The River Bottoms, East Union and others made from City Creek.

THE COURT: And above where you measure?

A Above where we measure.

THOMAS C. THOMPSON recalled.

DIRECT EXAMINATION By Mr. Tucker, continued.

Q Having heard the difference in measurements between your's and Mr. Wetz's, can you account for those differences in measurement of water received by Provo City?

A Why, it goes off every night, and it hardly ever returns in the morning until about six thirty to seven o'clock, one morning didn't return until nine o'clock.

Q Now, is it a fact of your own knowledge, and of your own observation there is less water usually in the City creek at night than in the day time?

A Yes sir.

Q And you make your measurements before the increase?

A As a rule, yes sir.

Q Now, regarding this six or eight feet of waste water, that Mr. Wentz spoke of this morning, you heard that testimony, didn't you?

A Yes sir.

Q If that water did go around the city's dam and out of City creek and into the river, what would become of the water?

A It would go right down the river channel and commingle with the seepage water for Tanner race and Little Dry Creek, if there

is any.

Q Have you had more than sufficient water in the river during the past twoweeks to supply Tanner Race?

A No sir, we haven't had enough most of the time.

Q Now, as I understand it, you make as near an equal distribution as possible between the four distributing systems in Provo City of all the water received by you?

A Yes sir.

Q You never give it all to one system for a little while and then all to another one?

A No sir, I base my distribution on acreage that I have to irrigate.

Q Have you had complaints of irrigators within the last two weeks?

A Yes sir.

Q As to insufficiency of water?

MR. RAY: Object to that as irrelevant and immaterial.

THE COURT: Objection sustained.

CROSS EXAMINATION by Mr. John E. Booth.

Q How far is it from this waste gate that has been talked about to the head of Tanner race down the river?

A Why, it would be about three miles, I would judge, I guess be four miles down along the way the river winds around.

Q Most of the water would sink then, wouldn't it?

A There is seepage all along springs up, all the way through.

Q You think that it is not any more economical to bring this down the City race, this six or eight second feet?

A Yes, I think it would be if it was there, but I didn't know it was there.

Q Have you followed the City creek up to find out if there are diversions that should not be taken out between the mouth of the canyon and your head?

A I don't know, there is eighteen or nineteen, but I cannot tell which ought to be and which should be.

Q You never have got a schedule from the commissioner?

- A No sir, that is strictly up to the river commissioner, I wouldn't know which had a right and which had not.
- Q I think you said you had not been to see whether this waste water was going since the day you and Mr. Ferguson shut it off?
- A It is off in a kind of a bend in there and I never thought there was anything-- because me and Ferguson went down and fixed it the day we put in the dam, and I never heard more of it.

REDIRECT EXAMINATION by Mr. Tucker.

- Q You have made trips to the head gates at the mouth of Provo Canyon frequently, haven't you, to see where the water was?
- A I made one the night of the 23rd of July.
- Q Did you learn on that trip anything regarding where the water was?
- A It was not in City creek, I know that. I went up as far as the Olmsted at the county road bridge there, and got off at 11:15 when I was there, and very little water in City creek.

WALTER PEAY, called by defendant Provo City, testifies as follows:

DIRECT EXAMINATION by Mr. Tucker.

- Q Give your name, please?
- A Walter Peay.
- Q Do you hold any official position?
- A Deputy water master.
- Q Are you acquainted with the distribution of water to the Provo City system from City creek?
- A Pretty well.
- Q How much experience have you had with it, acquaintance had with it?
- A Nine years.

Q Do you not have anything to do with that distribution?

A Yes sir.

Q What is that?

A Regulation of water to each canal night and morning.

Q Have you been in a position and known the relative quantities of water flowing in City creek at night and during the day time?

A I never measured it myself, that is up to the engineer and water master to do the measuring.

Q Have you made observations of it ?

A Oh yes.

Q What would you say from your observation was the relative quantity flowing in City creek during the night time and during the day time?

A Well, from the time we started this year changing the water from the Factory race out to the farms, we haven't had much more at night than we had in the day time, except the night of the 24th. Since the night of the 24th we have had more.

Q What do you mean you haven't had much more at night than day time?

A Well, less water at night than in the day time.

Q You mean after turning the water out of the Factory race you haven't had very much more water in the other three laterals than you had in the day time, even with the water out of the Factory race?

A. No sir.

Q That is what you mean?

A Yes sir.

Q Now do you know about how much water there is flowing in the Factory race in the day time?

A No sir, I never kept any track of that at all.

Q But you would say that there is about as much less in the City creek at night as there is flowing in the Factory race during the day time?

A Yes sir, I will tell you what I go by. I have an eight inch plank-- I have two eight inch planks at the brick yard where I

turn all the water out of the Factory race. After I turn the Union flow then take the balance and turn it to the west side of town, there are two eight inch planks. When I first change it it runs to the top of the two eight inch planks. After it has been changed for an hour or two it runs down to pretty near eight inches.

Q Do you know regarding the distribution of water as to whether the water is distributed about equally between the three distributing systems of Provo City?

A We distribute that according to the number of acres each one is irrigating.

Q When you turn the water out of the Factory race at night, how do you distribute that extra water?

A Divide it amongst the three different canals.

Q You never give all of it to one canal?

A No sir.

THE COURT: Mr. Peay, do you know what occasion causes the difference in the flow of water from the night and day flow?

A No sir, I don't know.

CHARLIE D. BROWN, called by the defendant Provo City, testifies as follows:

DIRECT EXAMINATION by Mr. Tucker:

Q What is your name?

A Charlie D. Brown.

Q Where do you live?

A Provo Bench.

Q What are you engaged in now?

A At the present time I am working night shift at the Provo Pressed Brick yard.

Q Are you acquainted with the flow of water in City creek during

the night and day time?

A Not during the night and day, no sir. I have noticed it considerably at night.

Q What time do you go on shift?

A Seven o'clock.

Q What time do you go off shift?

A Seven o'clock.

Q In the morning? A. Yes sir.

Q What is your work with the brick yard?

A Burning firing kilns.

Q Do you have anything to do with this water?

A Use the water to run the dynamo to light up the yards.

Q Do you have an hydraulic dynamo?

A Yes sir, and have water wheels.

Q Will you explain to the court the relative amount of water that goes through your brick yard during the time that you are on shift, is there more at twelve o'clock at night say than at seven o'clock in the evening?

A No sir.

Q What is the comparative quantity?

A The water begins to drop about ten o'clock at night, and drops down from then on until about three in the morning, and about four I turn the lights off. From then on I don't take any notice of them, but the water drops down on the wheel.

I have it turned for one hundred volts at eight o'clock and by twelve it will drop down from ten to twenty-five, have as low as fifty volts.

Q Have you always had enough water to run your dynamo?

A No sir, I have had to shut the dynamo off two or three different occasions.

Q When were those occasions?

A I cannot give you the exact date, for I didn't keep track.

Q Tell us about when they were?

A Around about the 20th.

Q 20th of this month? A. Yes sir.

Q All the water that doesn't get through the East Union Canal must go through your brick yard, is that right, if it goes down City creek?

A Yes sir, I think all the water goes down City creek goes through there.

CROSS EXAMINATION By Mr. Ray.

Q Mr. Brown, when did you first notice a fluctuation?

A The first that I noticed was about the 16th.

THE COURT: Of this month?

A Yes sir.

Q As a matter of fact, didn't you complain about the fluctuation during the period of high water?

A No sir.

Q You didn't? A. No sir.

Q Did you notice them at all during the period of High water?

A No sir.

Q And you say last few days you have noticed that since the 24th?

A The last two nights there has been practically no difference, very little.

Q Constant stream last two nights?

A Just about.

Q When you noticed this fluctuation at night have you ever observed whether there are any diversions on City creek between the point at which you use it and its intake from the river?

A No sir.

Q You have made no investigation of that?

A No sir.

JESSE CURTIS, called by the defendant Provo City, testifies as follows:

DIRECT EXAMINATION by Mr. Tucker:

Q What is your name?

A Jesse Curtis.

Q Where do you live?

A Provo.

Q What is your business?

A Foreman for the Provo Pressed Brick Company.

Q Have you had any occasion to observe the quantity of water flowing in City creek, comparing the night flow with the day flow ?

A. Yes sir.

Q You may state the result of your observations?

A I have noticed some change from the 17th until about the 23rd, one night in particular my boiler man wasn't there, I watered the horses at ten o'clock, I was up at five next morning, and there was just about half the amount of water in the race at five o'clock in the morning there was at ten o'clock the night before.

Q How did you observe this fluctuation, did you have any way of measurement?

A I could see it on the bank where the water had been up to where the horses all went right out into the creek, wasn't only half the distance up on their legs in the morning as it was the night before, that is what drew my attention to it so strong.

J. I. JACOBSON, called by the defendant Provo City, testifies as follows:

DIRECT EXAMINATION by Mr. Tucker:

Q What is your name?

A Jacob I. Jacobson.

Q Where do you live?

A Provo City.

Q What is your business?

A Farmer.

Q Are you an irrigator under the Provo City system?

A Yes sir, have been for fifty years.

Q Where do you own land?

A Down-- I own some under the Scott ditch and also under the Fourth and Fifth ditches going down 5th West.

Q In what portion of the city is that?

A Southwest portion.

Q When do you have your turn for irrigation?

A Why, at various times, under the Scott ditch I irrigate Monday nights.

Q What time?

A Why, it is in the night from six to sometime after midnight.

Q Did you irrigate your land on last Monday night?

A No sir.

Q Why didn't you?

A I was there to irrigate, but there was no water.

Q Did you irrigate your land on Monday night the 16th of July?

A Yes sir.

MR. RAY: Just a minute, I object to this class of and testimony as irrelevant, immaterial, whether a particular irrigator on particular times had sufficient quantity of water. It opens up the entire case, The only question here is whether the commissioner is turning a sufficient quantity of water to Provo City to reasonably meet its necessities during the period from now to the final determination of this case.

THE COURT: What do you contend for this evidence, if the court admits it. The witness has already answered the question, said there was no water there, what do you claim for it?

MR. TUCKER: We simply want to show by a number of witnesses, make them as few as we can, that there has not been sufficient water in Provo City during the last two weeks to properly irrigate the land of Provo City. The only way we can show that is by showing individual irrigators have not been able to get their water during their turn.

THE COURT: If that is the way you are going to show

it objection is sustained. I do not think it would show it at all.

MR. TUCKER: We have shown, I take it, and can show that the water under the Provo City system has been properly distributed, and if, under a proper method of distribution individual irrigators cannot get their water, then I feel that the evidence clearly shows a necessity for more water. We can go more fully into the method of distribution here, if your Honor desires that.

THE COURT: No, all I want to know particularly is what you have got, what water is being taken. I think the court has sufficient knowledge to determine if you have enough if the court knows what it is. You have evidence the amount of water is not normal and fluctuates. Before we get through the court would like to know what is the occasion of that, but I don't think the court can take the time -- I imagine it would take three or four days to take such evidence as you have outlined-- the quantity of water there is in the river available, and the quantity given to the city for use, and then, of course, the responsibility rests upon the city distributors to distribute it properly, but we have page after page, day after day of evidence right along the line that you have suggested, what quantity of water is necessary for the city during the low water stage x for sprinkling purposes and city uses and for the irrigators and the quantity of land. That was agreed upon, I think, by a measurement made by Mr. Stewart, as to the entire quantity of land including all lands that might be covered by houses, so that I have all that evidence, and think I have it in my mind sufficiently so that if you can arrive at the quantity of water definitely that comes, and as to its being constant, I think the court would be in a situation to determine whether you needed more or not. Any further questions?

MR. TUCKER: Of course, if your Honor please, we

have figures before us, and it may be possible by figuring to show we are getting water down here, but the fact whether we are getting the water that we need can be shown by these farmers; these irrigators, are clamoring for water, and this water is being distributed as well as we possibly can distribute it, and still we haven't enough. Now, of course, we have put evidence of this sort in the case before, and I can see that it would take a day or so, it will take more than a day or so to get all our evidence in now as to lack of water already this summer, and I don't know what to say.

MR. A. C. HATCH: It would mean simply when you get through we would have the right to rebut it, of course.

MR. RAY: Be a retrial.

MR. A. C. HATCH: It means retrying all the issues of this case as to the necessities of Provo City, and there can be no end to it.

THE COURT: Mr. Tucker, I wanted to give you every opportunity to show what the situation is, if there is any necessity now for an order on the commissioner to change his method of distributing water temporarily, I want to make such an order if there is a necessity for it. I want to give you every lattitude to determine that, but I fail to see the necessity of going into the individual necessities of each irrigator.

MR. TUCKER: If your Honor please, I think we have produced some evidence to show that the measurements as given by the commissioner may be at fault, and this evidence would go to show that at night time, this man irrigating at night, Provo City is shorter of water than in the day time, that of the night irrigators is shorter than the day irrigators. I suppose the evidence on that point though is sufficient. I feel as the court feels, we should not go into this.

THE COURT: It seems very clear in the present condition of the evidence that is true, that the supply of water

is not much more than fifty per cent in the night time of what it is in the day time. I expect to hear some explanation of that further from some of the witnesses, but the difficulty, Mr. Tucker, with reference to this evidence, if we assume this witness would testify that he was very short of water, and did not have any, that would not mean anything unless every irrigator upon that stream was put upon the stand to testify whether he was taking an excess quantity or not. You see, in order to make the evidence of any value whatever, you have got to examine every irrigator. We haven't time to do that. So that I was merely suggesting you approach this matter from some other standpoint if you can.

MR. TUCKER: I feel, under the circumstances, that we may rest our case right here. This is the only evidence we can put in as to the shortage of water. We can show that the water is distributed as well as we know how and under that proper distribution, we can show that numbers of men are suffering, but that evidence, as you say, has gone into the court before.

THE COURT: And it would not have any effect or value unless you, of course, put in the negative evidence. Any cross examination of this witness?

MR. RAY: No.

A. L. PENROD, called by the defendant Provo City, testifies as follows:

DIRECT EXAMINATION by Mr. Tucker.

Q What is your first name?

A A. L. Penrod.

Q Where do you live?

A Provo City north town here.

Q What is your business?

A Farming.

- Q Have you any especial connection or acquaintance with City creek near the point of diversion of the East Union canal?
- A Well, I do some watering up in the river bottom there.
- Q You may explain what watering you do up there?
- A Well, I water there about every-- I think it is nine or twelve days, somewheres like that, and find sometimes that City creek has been pretty short, while other times it had sufficient in it.
- Q Do you have charge for Provo City of a certain small district up there?
- A Small district.
- Q Where is that district?
- A Right here in the north end, just south and little east of the brick yard in there.
- Q And where do you irrigate from?
- A From the East Union.
- Q And can you state as to the difference in quantity of water flowing in City creek during the night time and day time during the past week or so?
- A No sir, I cannot.

MR. TUCKER: We rest.

T. F. WENTZ, recalled by the defendant Provo Bench Canal & Irrigation Company, testifies as follows:

DIRECT EXAMINATION by Mr. Ray

- Q Mr. Wentz, you have heard the testimony relative to the fluctuations in City creek between the day and night flow?
- A Yes.
- Q Have you ever made any measurements to determine whether or not there was such fluctuation?
- A I have observed the two registers every morning on the - - every morning I am here, not in Heber. The register on the Provo Bench and one on the Provo Reservoir canal. One at the Provo Reservoir draws direct from the river natural flow, and

Provo Bench draws from the tail race of the Olmsted plant, and City creek draws both from the tail race and small quantity down the river, and there isn't any difference at the head of City creek between day and night flow. Provo River is a constant stream all the time, doesn't jump up or jump down. On the two twenty-four hour readings every hour, it only varied one hundredth of a foot, or three second feet.

Q It was your intention in measuring the quantity which you did to Provo City to give to it a constant flow of the quantity turned in?

A Yes, constant flow and gates are adjusted to divide the shock with the other canals of the city.

Q If there is any such variation as that recorded it would have been your intention to correct it at all times if called to your attention?

A In the flow we do not make any change of the gates only aim to divert some from the Provo Bench, moving the gates probably tenth of a foot or vice versa.

Q Mr. Wentz, is there any possibility of such a fluctuation in the quantity of water flowing in Provo river?

A There isn't any natural condition of that kind at all.

Q So that the loss of water is by diversion if there is such loss as reported here?

A Yes, there may be some change by some diversion along the stream between the head of City creek and the brick plant.

Q Now, as to the shock caused by the operation of the Olmsted plant, and fluctuations in the river, state whether or not that is wholly absorbed by Provo City?

A No, it is not. I can show how those gates are arranged, and how they have been operated. City race diverts both from the tail race of the Olmsted plant and some flow down the natural bed of the river through the mouth of Provo canyon. Below the Olmsted plant in the tail race Provo Bench diverts its quantity of water and has two vertical lift gates. The west one of

these gates is lifted clear of the water, six to ten inches clear of the top of the water, and left free and blocked there and nailed. The east gate is partially in the water and is used for regulating the flow into the canal. There are a number of gates, six or seven, that lead from the tail race out from the river into the heading of City Creek. One of those gates is raised practically clear of the water. The water slops up against the lower edge, and the other gate is used as a regulating gate to City race, and about one half in the water, and the other gates are down. This divides the shock practically equally between the Provo Bench and City race, and the register on the Provo Bench located farther down the stream records whatever variation that is. The other flow coming to the City race down the Provo river comes through the Provo Reservoir dam, and the only clearance in that dam is about two feet vertical opening of two feet, and it goes over the Timpanogas Can Company dam with just a light spill, probably fifth of a foot, and there are overflows over each of these. Very large quantity going down here is practically all the flow coming through the Olmsted plant. Now, the West Union draws also out of the tail race of the Olmsted plant part of its water, and part over the spillway of the Provo Bench, and it takes a light part of the shock from the wheels of the Olmsted plant, but the Upper East Union is drawing from the submerged gate, and takes very little of the shock; but I examined the registers on the Provo Bench, Provo Reservoir and the Upper East Union, and I also look over the sheets, the log of the wheels of the Olmsted plant each day, and the variation on the Olmsted plant few days ago that I observed it, ran from 3350 kilowatts to 3500 kilowatts an hour.

Q Mr. Wentz, the register in the Provo Bench is an automatic register?

A Yes.

Q Showing constantly, so if there were the variation in the river as indicated by the testimony of the witnesses as to the

variations in City Creek, it would certainly show, would it not, in the flow of the Provo Bench?

A Yes, those two registers are a complete index to the whole system?

Q So that it eliminates, does it not, that condition-- I withdraw that-- that condition eliminates the possibility of the river changing being the cause of the variation in City Creek?

A Yes, there is no river change.

Q Now, of the measurements you gave, Mr. Wentz, I observe that 84 is the least, 84 second feet, substantially the least going to Provo City this year?

A 84.19, I think, on the 23rd.

THE COURT: 84.99.

Q Yes, 84.99. A. Yes.

Q That includes the supply in the city, does it not?

A Yes, that is allowing 8 second feet for the water works system.

Q Take that 8 second feet away and additional three second feet, and give eleven second feet as city supply for municipal purposes, and assuming the farm acreage within the city to be two thousand plus, what duty would that permit Provo City to irrigate upon?

A Little less than thirty acre duty.

CROSS EXAMINATION by Mr. Tucker.

Q Mr. Wentz, deducting 19 second feet more for the Factory race from that constant flow, what duty would that leave?

A Practically forty acre duty.

Q Mr. Wentz, where are these registers placed, where is the register on the Provo Bench canal placed, on the inside, on the canal side of the gates or on the river side of the gates?

A It is placed eight thousand feet from these gates down the canal.

Q That register that you speak of determining the height of water in the canal, in Provo Bench Canal, is eight thousand feet

down the canal?

A Yes sir.

Q From those gates?

A Yes sir.

Q And where is the register of Provo Reservoir Company's canal?

A It is just on top of the bench at the station.

Q How far is that from their gates?

A From their head works it is about a mile or a mile and a quarter.

Q Is there anything to prevent tampering with these registers, are they under lock and key?

A They are in houses, locked.

Q No one has access to them but yourself?

A Yes, Mr. Franklin has access to the Provo Bench register, Mr. McCune to the Provo Reservoir register.

Q Does anyone have access to the gates of Provo Reservoir Company but yourself? A. Yes.

Q They might be changed while you are away?

A Not without my knowing it, no.

Q Why do you say that?

A Because I would detect it on the registers, detect it on the City Creek gauge.

Q On the City Creek gauge?

A Yes sir.

Q What do you mean by the City Creek gauge?

A Gauge on the City Creek ~~is~~ just below the mouth of the canyon. Of course I see that river practically every day. Some days I am away at Heber all day, but the flow there is practically the same, there isn't very much coming by the Provo Reservoir Company's dam.

Q There is no automatic register on the City Creek gauge?

A No.

Q Isn't it customary for you to leave that part of the system in the evening sometime and not return again until the next morning?

A Yes, that is customary.

Q Now, why do you say that no one could change the Provo Reservoir

Company's gates in the night time without your knowing it?

A I would detect it on the register next morning.

Q If someone had tampered with the register then you could not detect it, could you?

A Well, I guess if you get that technical, probably all the Provo river would be turned down to the lake during the night and turned back in the morning, I wouldn't know anything about it, that is possible.

Q From that personal observation do you know whether there is fluctuation in the flow below the Provo Reservoir Company's intake during the night and during the day time?

A No, there isn't any fluctuation. I say I have been at the river gauge at least each twenty-four hours, and it is not changed, and the little change at the plant it is only held up for a short while.

Q And couldn't those Provo Reservoir Company gates be adjusted so as to make the thing read the same when you came around every time?

A No, they don't know when I am coming around, nor anybody does not. I do not have any regular trip or any regular time.

Q Have you ever noticed any fluctuation between the city headgates and the Olmsted plant?

A Yes, caused by the plant.

Q What is that fluctuation?

A Fluctuation caused by the plant. They are rather short duration except last Saturday we put the Olmsted people, put in the emergency dam, that would shut the lower users off for maybe an hour before the water got up again. Same day the Timpanogas, somebody with a chip on his shoulder, got out during that time, found the gauge readings down. If he had waited an hour it was back up normal again.

Q As a matter of fact, hasn't the Olmsted plant caused very great fluctuation up there during the last week or so?

A Well, they have this fluctuation putting the dam in and Sunday

morning they were testing out and I took the register sheet up and called their attention to it, and they explained it to me and said they were getting ready to go out, only be a matter of a day or two, and I let them scrap it out among themselves.

Q They had a flume washout, didn't they?

A Yes, they had an accident last week sometime.

Q Then you would want to qualify your statement there had been no fluctuation there?

A That is accidental fluctuation those two days that I did not recall at the time.

Q You have not answered my question yet whether you know of your own personal observation whether there are fluctuations in that City Creek between night and day?

A I have not been on the creek at night, only to go by the register, and they are absolutely the best evidence there is. On the day time I go on that creek in the morning when I am making the measurements. I see it approximately-- I leave home at seven, and I get on to City Creek about nine or half past nine, and I see it practically until two or three in the afternoon, until I finish up at the brick yard here and Tanner race, and I am looking all the time for fluctuations, never make a meter measurement in my life, but what I am there watching the gauge, looking specially for fluctuation. If I find one I discontinue it until it does settle, but I have not found any.

Q Mr. Thompson and Peay complained of fluctuations in City Creek to you, didn't they?

A Yes, they complained when the river would drop. Had complaint on it from Mr. Thompson, when the river was dropping, when it was going down from high water to low water, there was more water going down in the night than day time. I went and looked at the three registers to see if there was anything in that theory and there was absolutely nothing.

- Q Registers or no registers, how will you explain the testimony of Mr. Curtis and Mr. Brown, these other men, who say there is more water in City Creek in the day time than night time, can you explain that?
- A There are a number of diversions below the mouth of the canyon and Provo Pressed Brick. It is possible some of those diversions have been taken out in the night time and put back in the morning, by the users of the East River Bottoms Water Company, but I think when they say the quantity is one half, that is a big exaggeration. I think probably may be a difference, if some of those were taken out, be a difference of ten or fifteen second feet, about what the notes show.
- Q As a matter of fact, it is your duty as water commissioner, if you knew there were these diversions being made at night, and you were making your measurements of Provo City in the day time, to make some allowance for these diversions, isn't it?
- A No, it would not be proper to make those allowances for these diversions. Be proper to investigate them during the night, put a gauge reading on for the twenty-four hours and determine that. Now if the city requested that any time it would be done.
- Q After the city complains of fluctuations and they are not getting as much water as they are charged with at night, isn't it the duty of the water commissioner to rather take the initiative and find out whether they are getting the water or not?
- A Yes, it is.
- Q You never made any investigation where that water was going in the night up City creek?
- A Oh, yes. I think part of the-- that makes City Creek look smaller at the brick yard during the day run and night run is the gates outside of the gate house that back the water up through the channels of the wheel. They are taken out at night, they hold the water up along the boards for probably

three or four feet deep. They are taken out at night and ^{current} draws that/~~xxx~~ off swiftly, and doesn't look like there is a fourth of the water there it does in the day time. When those condition occur at the gauge readings down at the low period , we could determine that.

Q The fact those flash board were out, whatever they are, wouldn't stop the dynamo, would it, from eight to twelve o'clock at night?

A Yes, sure, it would stop the dynamo.

Q When do they take those flash boards out?

A They were out this morning when I was there, I don't know what time they are taken out.

Q They are taken out in the evening, aren't they, when the plant ceases work for the day?

A I don't know when they are taken out.

Q Mere conjecture on your part whether they are ever taken out, isn't it, Mr. Wentz?

A They were out this morning and out yesterday morning.

THE COURT: Mr. Wentz, how many diversions are there above the brick plant from the City race?

A There are nineteen.

THE COURT: If they were taking water into any of those in excess of the quantity they ought to have, it would reflect upon the quantity of flow?

A Yes sir.

REDIRECT EXAMINATION by Mr. Ray.

Q It would require the assistance of a deputy to attend to the gauge readings and see whether or not there were diversions not authorized in your measurements above the brick plant and below the intake of City creek, would it not?

A Yes, we have those people on schedule at the present time, and have been for about a week. Before that they were not on schedule and practically no restrictions on them, and I do not know why they should butt in there and use water now.

Q But the only way you could determine whether that was done

would be to put a gauge reader, a man to watch those diversions?
 A Yes sir, the flow at the head of City creek is constant all the time and flow during the day time at the lower end is all right. What happens in the night, I don't know.

THE COURT: In that connection, I would suggest, gentlemen, whatever else may be done, that you make observation and varify the condition that exists with reference to that fluctuation, and report it to the commissioner. If there is a fluctuation between the day and night at the lower end-- and I will suggest to Mr. Wentz when that is suggested to him, he take such measures as may be necessary, even though it involves some expense to find out who is causing that fluctuation, and when he finds anyone causing it shut off all water from that user until they put in a device that you can lock, and then fix their intake so that they can take so much water and shut off all their water until they do it. It would seem in some way that the quantity of water Mr. Wentz has been apportioning and diverting to the use of Provo City during part of the time has not been available from this evidence, so that that ought to be corrected in some way.

MR. A. C. HATCH: I wish to ask Mr. Wentz one question.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q You say there are nineteen diversions from City Creek above this measuring device?

A Yes.

Q In distributing water to City creek, do you make allowance for all those users in addition to the city's quantity?

A Oh yes, I measure the quantity that is actually to the city.

Q Measure^{ments} are below all of the nineteen diversions?

A Yes.

MR. TUCKER: I would like to ask one or two questions regarding the position of Provo City as to taking all

these fluctuations.

RE-CROSS EXAMINATION by Mr. Tucker.

Q Now isn't it a fact, Mr. Wentz, that Provo City, using a common term practically takes what is left of the water after these other users get theirs; their gates are set at a certain definite point and Provo City gets the water that is left in the river?

A No.

Q Why isn't that a fact?

A Any fluctuations in the plant, plant picking up more load or taking less load is divided practically equally between the city and Provo Bench. The flow down the river, the change of the flow of the river, the brunt of that is borne by the Provo Reservoir Company, practically the same stream comes through their dam on down the channel. The Provo Reservoir is taking quite a lot of the shock of the natural variation of the river.

Q I understand that there is practically no natural variation in the river?

A Excepting storms and a shower, days without showers, practically no variation at all.

Q Aren't the Provo Reservoir Company's gates set at a certain position all the time?

A And the dam, just a small opening in the dam.

Q How do they get the brunt of the variation then?

A Because about the same amount of water goes through the dam all the time, and the gates are only set lightly in the water. They are not drawing under a high head, only just dipping in the water.

Q Then the water would vary, you think in the canal rather than going over the dam?

A Yes, part of it, larger part of it.

Q And I understand that this register of the Provo Bench Canal

shows practically no variations lately?

A Not between night and day does not show any variation except the shifting testing of the plant last Sunday, and accident to the flume, such things as that.

Q But now otherwise or excepting from Provo Bench Canal Company bearing part of the shock, my statement as to Provo City getting what is left is true, isn't it?

A No, West Union takes part of it, Upper East Union takes a little.

Q Aren't the Upper East Union gates set down in the water?

A Yes, drawing under a head, but any variation in the creek, slight variation on the Upper East Union.

Q Because of variation in head the same is true of the-- how do you determine, Mr. Wentz, that the shock is borne about equally between the Provo Bench Canal and City Creek?

MR. JOHN E. BOOTH: Object to that as having been answered twice.

MR. TUCKER: He has not explained how he determined that. He said it was.

A The Provo Bench has two gates--

THE COURT: Objection is overruled.

A The west one is clear of the water. It is a gate, I think, six feet wide, that is clear of the water, the other is dipping in the water used for regulating gate. The channel from the tail race out to City Creek, six or seven gates on that, one of them is practically clear of the water, and the other is used to regulate the gate.

MR. A. C. HATCH: Mr. Wentz went all over this.

THE COURT: He illustrated that on the board.

MR. TUCKER: But, as I understand it, he allows a certain shock through Provo Bench Canal, by that is, by having one gate open and the other gate shut. Now, City Creek has five or six gates open, how can he determine that the shock between those two are borne equally?

THE COURT: I don't understand the premise just as you state it.

A City Creek has only one gate open, six or seven gates there, they are all clear down except two, and those are only three foot gates. One of them is clear, just dipping in the water, and the other is about half clear, used as a regulating gate. If there is any difference in the shock there the Provo Bench is taking practically three-fifths of it, according to the width of the gates.

MR. TUCKER: I think that is all.

MR. RAY: That is all we have. Your Honor suggestion as to determining this, we want the water to be properly distributed to Provo City. If it is not being there should be an arrangement made whereby it is.

THE COURT: It is evident there is a leak somewhere. Mr. Wentz has been turning down, according to his testimony and delivering to Provo City, or for their use, approximately twenty second feet more than the measurements made by Mr. Thompson and computed by Mr. Swan show.

MR. RAY: Your Honor, may I suggest there Mr. Swan's measurements do not include the eight feet.

THE COURT: With the eight feet taken off be approximately twelve, and that is a quantity of water that would relieve a great deal of the necessity for water and in addition to that there appears to be a constant flow over those waste gates that ought to be investigated by the water commissioner here, or water master, who ever has charge of it, and if this quantity of 84 and 92 and different quantities that have been made available for the city-- would seem under the evidence of both parties probably be sufficient for their use-- if it is not, Mr. Wentz, under the present condition, unless the water gets lower ought to furnish them more. That can be traced where it is lost.

MR. TUCKER: We feel that will help us out a great deal if we get the water we are being charged for, but ever at that rate we feel we are entitled to some more. I would like

to make some observations as to the evidence which is before the court.

(ARGUMENT)

THE COURT: It seems to me from the evidence that the quantity has been distributed here for Provo is probably amply sufficient. Quite a reduction from that amount has been wasted in some way. Now, the uncontradicted evidence is there is running now six or eight second feet over the spillway that has been turned to Provo City and is available for their use. Where the other water goes to is unknown to the court, but under the evidence the court, Mr. Tucker, could not make any order directing the commissioner to make any change, because it seems he is giving you fully and completely all you need. I do not doubt that the situation changes so that you will require a further adjustment the commissioner will make it without any order of the court. He seems to be anxious to supply you.

MR. TUCKER: I feel, your Honor, he is laboring under a mistake regarding that six to eight second feet. There was evidence that was flowing by and there is also evidence, and I think your Honor understands the situation so that we can say that must go down into the Tanner Race, and is charged to Provo City through the Tanner Race.

THE COURT: As I understand it charged to Provo City.

MR. TUCKER: No matter where it was charged just so it was charged to us. Now, the officers thought they had that matter corrected, and I think the evidence is rather inconclusive whether that amount of water is--

THE COURT: Running yesterday is the evidence.

MR. TUCKER: At any rate, we are being charged with the water.

THE COURT: You ought to use it. I understood it was being wasted.

MR. TUCKER: No, it is running down the river and being retaken in the Tanner race and used there, and charged to us in the Tanner race.

MR. A. C. HATCH: Except possibly the whole of it would be wasted by evaporation spreading out all over that.

THE COURT: That is not of importance then.

MR. JOHN E. BOOTH: Mr. Thompson said it would be much more economical to stop it off.

THE COURT: That would not make any difference then. I understood it was running down the river to waste.

MR. A. C. HATCH: Is there any matter before the court at this time?

THE COURT: Not that I know of.

MR. TUCKER: I would like to call attention also to one statement made by Mr. Wentz and one computation. Just now he figured three second feet for these municipal ditches. I understand the city ditches, the evidence indicates shows there is twenty-eight miles of these ditches, and there are twenty-seven ditches. Now, I think it is perfectly clear that three second feet is not adequate and cannot be adequate to supply those twenty-seven ditches continually with a continual flow, and it simply is an illustration of the basis upon which Mr. Wentz is placing Provo City irrigators, and, inasmuch as he is practically taking the Morse decree for the ratio for these other parties we cannot see why he should not include Provo City in ~~xx~~ with those other parties.

MR. A.C.HATCH: As to that it appears to me something like I had a little band of cattle up in the Strawberry Valley one time ~~x~~ and there was quite a stream there. The Indian came along and said that the cattle was drinking all of the Indian's water. Now, if Provo City has not use for the water they ought not to have it. 150 second feet I

think Mr. Tucker asks for.

MR. TUCKER: 100 second feet.

MR. A. C. HATCH: They were entitled, under the Morse decree, and came here this morning wanting the Morse decree enforced. What would they do with 150 second feet-- simply run it to waste into Utah Lake. Now, he virtually concedes 50 second feet would run to waste. Hundred is all he is now asking for, came in this morning asking for 150.

MR. TUCKER: No, we haven't asked for more than 100 second feet at any time.

MR. A. C. HATCH: The order of the court provides they shall be supplied with their necessities even if it takes all the water from the Provo Reservoir Company, excepting their storage water.

(ARGUMENT)

MR. TUCKER: Your Honor, we feel that the commissioner is not fair, that he is prejudiced against Provo City, and we think there should be something added to the order in order that we may get our rights until the final decree is rendered which will bind him, and that is what we are here for.

(ARGUMENT).

THE COURT: I will say this, gentlemen, I think I have heard all I care to hear, I am not going to make any order today because it seems to the court that the quantity of water is being given to you that will probably amply supply your needs. If it does not I will give an order to Mr. Wentz at once to supply sufficient to do it, if there is water available to do it under the terms of this order, which would mean the water should be taken entirely from the plaintiff until they had been reduced to that point where they get

nothing but their stored water and decreed rights. Now, it seems to the court an ample quantity is being given for the use of Provo City. I cannot see it any other way. If it is not that can be determined very quickly after these matters are checked up, put someone on these streams at night to see where the trouble is. Your evidence is it is reduced fifty per cent at night. If the quantity of water that is going to you is constant all the time and is not diminished by fifty per cent during the night time, you will have probably a sufficient quantity, an abundance, and your evidence shows that is so. Now, it is someone, and if you can find out who it is, the court will very quickly stop it, send someone to jail and stop their water.

MR. TUCKER: We do not wish to question the ruling of the court at all, but simply ask in case we do wish to ask for an injunction in the future, what course can we pursue?

THE COURT: Injunction against whom?

MR. TUCKER: You suggested an injunction against the commissioner.

THE COURT: No, I have not mentioned the word injunction at all.

MR. TUCKER: In case we find out where we haven't the water we need in the course of a week or so, what course can we pursue?

THE COURT: Notify the court and I will come down again.

MR. TUCKER: Then can we put in evidence showing the damage that is actually being done to farmers in this community because we have not had enough water?

THE COURT: Yes, I don't understand what you mean by that last statement.

MR. TUCKER: We had witnesses here galore to day to prove they have been damaged by not having water enough

in the past. If that situation is remedied all right. In case at the end of the week it is not remedied ~~they~~ we will want to get these witnesses here again, and we will want to prove--

THE COURT: I am not going to pass now upon what evidence you can introduce when I don't know what motion you are going to make. Upon the evidence here it does not seem you are going to meet that condition. Water has been turned to you in my judgment sufficient, if it had reached you. When I used the word injunction I was enjoining upon him rather as an admonition to be particularly careful to investigate as to the needs of this defendant to see that it is supplied. That was the idea, not that you would apply for an injunction in the technical sense, and I will come down again and will shorten the notice because this means considerable this time of the year of course, but I am inclined to think when you make your investigation of this stream and what becomes of the water, you will be able to get it all right without further hearing. The court will take an adjournment at this time.

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W. M. Hale
E. B. Danks

THE UNITED STATES COURT
FOR THE DISTRICT OF COLUMBIA
CLERK OF COURT