

M E M O R A N D U M

May 21, 1956

RE: J. N. COOK, vs. JOSEPH R. WESTON

WATER RIGHTS

It is the position of Cook that Weston, during the early irrigation season may take from Tuft Creek the first  $2\frac{1}{2}$  second feet of water. All water over and above this amount belongs to J. N. Cook, as well as all of the water in Jeho Creek. After the early irrigation season has passed and the combined flow of Tuft and Jeho Creeks is reduced to a quantity not to exceed  $2\frac{1}{2}$  second feet, then the combined waters from these two streams are used by all of the parties under a time schedule, so that it could be accurately expressed that J. R. Weston is entitled to use not more than  $2\frac{1}{2}$  second feet of water from either or both of these springs at any time during the year.

IN SUPPORT OF THE THEORY THAT WESTON IS LIMITED TO  $2\frac{1}{2}$  SECOND FEET

The Agreement of August 25, 1934, between the Cooks as First Parties and the Westons, Johnsons and Matsons as Second Parties, sets forth in Paragraph 1 and 1(a) that all of the waters of Tuft Creek are appropriated, and which sets forth that at the time allotments begin to apply in distribution of these waters that Cook is entitled to six days out of every 14 day period. This same agreement also sets forth that the waters of Jeho are likewise fully appropriated and that Cook is entitled, after the water goes on time, to 8 days out of each 14 day period (this 8 is stricken out and in ink is written 9 days, and the number of hours changed from 192 to 216). In further support of the limit against Weston to  $2\frac{1}{2}$  second feet, see the proposal of the State Engineer in the general adjudication book as follows:

Page 292 - Claim 281 and 282  
Page 293 - Claim 882  
Page 294 - Claim 852  
Page 295 - Claim 854

Against the above the Defendant has pleaded the Stipulations which are dated March 12, 1952, one of which does not recite Cook nor his attorney, Walter G. Mann, as parties, but the other does, so that Mann stipulated as attorney for J. N. Cook and also as attorney for Del Cook and O. K. Cook, wherein he agreed that the quantity of water to which the Westons would be entitled would be according to a measurement by the State Engineer to be made during some period of the following month of May, and that the amount so measured and agreed upon should determine the carrying capacity of the ditch and of the quantity of water Weston should be entitled to use. While Mr. Cook claims that Mann went ahead and entered into this stipulation without authority so to do, this was all done in the Court House on March 12th, while J. N. Cook, Del Cook and O. K. Cook were present. The water was actually measured as this stip-

ulation provides was to be done, and Mr. Cook was present at the time the measurement was made, both at the Tuft Creek and Meadowville Creek and Walter Mann was present. Mr. Cook has no recollection as to any objection made at that time to the measurement as the Engineer completed it, but he did object to the quantity of water which the Westons were trying to force into the ditch. They were actually forcing so much water that the engineer requested Westons to turn part of the water out of the ditch and to desist from further cleaning it while the measurement was being made. Mr. Cook has no recollection of either orally or in writing serving notice on the officers of the State Engineer's office, nor on the parties hereto that he did not intend to be bound by the stipulation entered into by Walter G. Mann dated March 12, 1952. It appears therefore that the Defendants may insist upon a ratification of this stipulation.

In answer to this position, this action was filed by Plaintiff in the same Court in which the general water adjudication has been heard for these many years for determination, and was before the Court prior to the date upon which the Court in the spring of 1958 entered its decree adopting the proposal of the State Engineer.

#### DAMAGES

##### FIRST CAUSE OF ACTION

DAMAGES under the First Cause of Action are to be limited entirely to the year 1954. Mr. Weston took this water during the years 1952 and 1953, but since there was no water shortage during 1954, no damage resulted to Mr. Cook. The witnesses will be in a position to indicate that although 1954 was a dry year, and that even if the water had been used by the parties concerned in accordance with the interpretation of the water rights as viewed by the Cooks, their crops would have been below normal, but, nevertheless, they will be in a position to state that the taking of this water by Weston added to that damage to the extent of a certain percentage of the total crop which amounted to an estimate as to a definite number of tons of hay and bushels of grain, and that this hay and grain, during the year 1954, was worth a certain sum of money.

#### DAMAGES

##### SECOND CAUSE OF ACTION

The damages here relate to the Meadowville Ditch, the head waters of which is the Jud Kimball Spring. All the damage flows out of the fact that after about July 1st of each year Weston fails to shut off the water in the Meadowville Ditch or to keep it down to the amount the ditch will carry, but insists on letting it overflow onto a 40 acre meadow belonging to Cook. In this way the cattle trample this muddy meadow from sometime in July to September. Weston insists on bringing this water

through this ditch in order to provide livestock water for his cattle. Damage is done by the cattle trampling the forage and causing a shorter crop than would otherwise be produced, as well as some damage to the soil itself and causing inconvenience to Plaintiff in not being able to cross this tract of land in getting to and from other areas and segments of his ranch. Mr. Cook, ~~Duff~~ and Kay will be in a position to testify how many tons less crops are produced on this 40 acre tract per year by reason of this overflowing damage to the soil and the damage they suffer by being inconvenienced in this manner.