

November 26, 1917.

THE COURT: Now, there probably are some questions that might be determined today, and that would be with reference to who should take the burden of preparing the findings and decree, some matters of detail of that kind probably may be disposed of and determine about the date when the court should come back and sign the findings and decree or hear any suggestions made with reference to the findings as they are prepared. I will hear any suggestions of any of the parties with reference to any of the matters.

MR. RAY: I understand, your Honor, upon the decision as formulated by the court, both findings and decree will be prepared by someone designated by the court agreeable to the parties, and then there will be time given for such exceptions and modifications as desired.

THE COURT: This is merely an outline of what the court has found, indicating just the award made to each party, every party who was a party to this suit and made an appearance in any way has been disposed of. That is the rights as the court finds them have been indicated in this decision, and of course, it is possible, and more than likely the court has made some error and possibly some parties have been overlooked, some transfers of interest may not have been kept in mind so that there may be some changes necessitated along those lines.

MR. RAY: Would the findings be drafted and decree drawn prior to the parties making an examination of your Honor's decision and suggestions upon omissions, if there are any?

THE COURT: Probably ought not to be. The attorneys ought to have time to examine and see any suggestions they want to make with reference to errors.

MR. RAY: That would obviate the necessity of re-drawing it.

MR. A. C. HATCH: It would obviate the necessity of

redrawing probably many pages of the matter, and I would suggest that the court fix a time, say ten days or twenty days, so as not to conflict with the Supreme Court session some day to meet again in Provo and hear from the several parties with regard to it; such time as the court may fix.

THE COURT: I think the suggestion is very good, because there are many things, as we read this over, that suggest to the mind probably matters that ought to be discussed, for instance the method the court has indicated as distributing costs of the administration of this decree and the appointment of a commissioner, together with his powers, many of those.

MR. A. C. HATCH: And fees and compensation.

THE COURT: And length of time, and many matters of detail.

MR. A. C. HATCH: If the court would fix a date ten or twenty days hence, or shorter time.

MR. RAY: I suggest three weeks from last Saturday, which would be the 15th.

THE COURT: If it is agreeable to the parties, unless there is some objection, the court will fix Saturday the 15th to hear any suggestions with relations to omissions or changes in this finding at ten o'clock.

MR. RAY: May the appointment of those who will draw the decree be deferred until that day then?

THE COURT: Yes, I will be pleased to hear suggestions from all the parties with reference to that. Now, are there any other matters that the court can dispose of today?

MR. A. L. BOOTH: I do not know whether there is any necessity for shortening the time of getting the decree and finding, but it seems to me if the ~~fx~~ committee, say of three of the attorneys representing some of the interests were appointed now to draft the formal parts of the findings which could not be changed that they could perhaps be ready by the 15th and then let the rights be fixed after that. I don't

know whether that would shorten it any or be more convenient.

MR. A. C. HATCH: I do not think there is any hurry about it.

THE COURT: If there is any particular reason for it.

MR. A. L. BOOTH: That was the only idea I had in mind they could be completed sooner if that part was in shape.

MR. RAY: There is one matter I call this to the court's and counsels' attention, they may think it over prior to the next session of the court. Mr. Wentz has taken up with the Geological Survey the matter of putting in measuring devices in the Provo River in order to accurately and at all times determine what the flow is. That involves a gauge in the South Fork and in the Provo River, does it not?

MR. WENTZ: Yes, a register.

MR. RAY: And the Geological Survey will furnish up to date a sufficient device to be installed by the parties. It will cost them about two hundred dollars is the estimate of the government. Mr. Wentz thinks it would cost less than that, and the maintenance of them would be the same as the present devices, and we shall ask at the next session of the court that the commissioner, whoever is appointed, be authorized to have those devices installed and charged as part of the costs.

THE COURT: If there is nothing further, gentlemen, the court will take an adjournment at this time until the 15th.

IN THE DISTRICT COURT OF UTAH COUNTY, UTAH.

Provo Reservoir Company,

Plaintiff,

-vs-

Provo City, et al.,

Defendants.

December 15, 1917.

THE COURT: The court is ready to proceed with anything you gentlemen wish to present.

MR. TUCKER: Your honor please, Provo City asks that Mr. Franklin S. Richards and Charles C. Richards be entered as counsel for Provo City, upon the removal of Mr. Thomas from the state and the election of E. E. Corfman to the Supreme Bench.

THE COURT: Their names may be entered as attorneys for Provo City.

MR. McDONALD: Your honor please, I call the court's attention to some clerical errors which are made relative to certain users of water on the Provo River bottoms, and I have prepared for the court a statement showing the areas of land. It occurs relative to areas and names, and I will say for the information of your honor by comparison of some of the copies I find the copies are different, some copies of the decision furnished are not the same as others, in some some errors appear. In other words, there is a different statement, and I have pointed out from the copy which I received the difference between the areas of land as fixed by the stipulation and the amounts awarded. In some instances no amounts were

awarded, that is the names happened to be left out of some of the copies. In other of the copies some of the names are in that are left out in others.

THE COURT: Have you compared it with the copy on file?

MR. MCDONALD: I have not compared it with the copy on file, I compared it with the copy I received.

THE COURT: That would be the one that would want to be corrected.

MR. MCDONALD: In any event, I have gone over and checked it with A. L. Booth, counsel for the plaintiff, as to the areas fixed by the stipulation and I have given the correct areas together with the areas fixed by the decision and where the award is left out entirely it appears as fixed by the stipulation, so that it is merely a matter of correcting the names as it appears in the official, if it should be erroneous there. There are also some names that are misspelled and I have called attention to that. Now, I call the court's attention --

MR. A. L. BOOTH: Brother McDonald, do you remember how much difference in area there is between the two?

MR. MCDONALD: No, I didn't figure it, I should judge about twenty acres.

MR. A. L. BOOTH: As I understand it that land is all south of the Provo River bridge.

THE COURT: There is nothing in this statement you have furnished me to indicate where the land is.

MR. MCDONALD: No, it is known as the river bottom land in the proceedings. There is some, I think, south and some north.

MR. A. L. BOOTH: On the county road that runs north of Provo bench.

MR. MCDONALD: Yes. I next call your honor's attention to some omissions relative to Charleston Irrigation Company in Wasatch County. You remember that at the close of the trial there was some question arose, and finally settled by a stipulation that was drawn on a separate sheet of paper -- a copy of it was furnished to the Reporter and filed with the Clerk-- that seems to have been overlooked in drawing the decision; so I have prepared some slips incorporating the proviso in this stipulation and pasting it onto my copy and I have prepared five or six copies.

THE COURT: What page in the decision?

MR. MCDONALD: It is paragraph 40. The proviso reads as follows: "Provided further that said company shall have said duties at all times when available as against the plaintiff; and the said company shall at all times have a quantity of water not less per acre than that distributed to any user in Summit or Wasatch County under the decree, exclusive of any stored or reservoir waters."

And the same proviso is added to paragraph 41, and paragraph 42 there was an error. The Charleston Irrigation was given some water in the 11th class to which it was not entitled and it was entitled to water for one hundred acres extra as it is called in the stipulation; so Mr. Wentz has prepared a substitute for paragraph 42 which I think will be acceptable to your honor and it reads as follows-- if you will follow me and take paragraph 42 then you will see the difference-- "That pursuant to the terms of a stipulation entered into and the evidence introduced, the Charleston Irrigation Company through its upper canal is entitled to 12 second feet as a

first class water right, for the irrigation of seven hundred and twenty acres of land and 1.67 second feet as a sixteenth class water right for the irrigation of one hundred acres of land (that is according to the stipulation) for the irrigation of one hundred acres of land, and 6.83 second feet as a seventeenth class water right, except during the period from July 5th to September 15th of each year said parties are entitled to 12 second feet measured at the lands as provided in Section 34, as amended, of the stipulation".

Now I have prepared some slips, your honor -- I will say, your honor, that the same proviso which I have heretofore read should be added to paragraph 42 as amended.

Paragraph 23, I am not able to understand the meaning of this paragraph and I have submitted it to several others and there is no two to whom I have submitted it that agree as to what it means, and the misunderstanding, I think, comes about by reason of the following language about the middle of the paragraph: "so long, and so long only, as the requirements of the users of water from P^lovo River diverting the same at points below the point of discharge of such drainage water in the same river are not supplied from seepage water." Now, if I understand that correctly if there is water coming down from the main source of the river to users below this point of discharge, then Mrs. Tanner will be entitled to all the water coming from those springs, or whatever quantity does come. Now, Mr. Wentz tells me that there is a stream of water comes

down during the whole of the irrigation season and if that be true then of course that would give the Tanner people this spring water during the whole of the season.

THE COURT: What spring water do you refer to?

MR. MCDONALD: It is referred to here as the drainage water.

THE COURT: Water rising on her land?

MR. MCDONALD: Yes. Now so far as my clients are concerned, who have used this water for thirty or forty years, it won't make any difference because they will be supplied now from the river, if I understand this correctly, instead of this spring water, if they are allowed to discharge this water at the point where it is intended to discharge it. It has never been discharged up to this time into the river, but has been discharged into the Lake Bottom Canal and the old users have always used it. Now, if it is to be diverted and discharged into the Provo River at the point where it is intended to be discharged it will be below the point of diversion of a number of these old users, and as a matter of necessity, then of course they will have to be supplied direct from the Provo River, which has not been the case heretofore; and if that be the intention of your honor, of course they ought to know it.

THE COURT: If they are to be supplied from the river there would be some indication of it in the award.

MR. MCDONALD: They have been getting it. The decrees heretofore provided they must get their water from these springs. It is now called seepage and if these springs for any cause should fail then they

should be entitled to some water from the river, but the springs have not failed, in fact if anything they have increased in quantity; but you see the predicament it places the old users in. This water, of course, will either be used by somebody down below or it will run to waste into Utah Lake. I am not sufficiently acquainted, but if your honor wants to take further testimony in the matter or look at it, you will see at a glance that the water has never been discharged into the Provo River. The system is there, as I understand it, and discharges the water a little east now from where it has always been discharged, in the surface ditch in to the Lake Bottom Canal; and the reason we could not understand this is because --

THE COURT: This language is very plain, there is nothing ambiguous in this language, is there?

MR. MCDONALD: No.

THE COURT: I thought it was very plain. The difficulty is not in the construction of this language, but in the --

MR. MCDONALD: In the application.

THE COURT: This language has nothing whatever to do with the supply of water to those people you are referring to, does not intend to apply to them, and as I understand you -- I may not understand you -- is whether they have been supplied in some other part of the decree. Have they?

MR. MCDONALD: Yes, they have been supplied, taking the decree as a whole. They have been supplied by water from the Provo River sufficient to irrigate their land at the basis fixed and will receive water from

that source but it will not be from the source they have always irrigated.

THE COURT: Are their lands and names mentioned in some other part of the decree?

MR. MCDONALD: That is the part, your honor, I have just furnished a statement of.

THE COURT: Are they objecting to that, to getting the water, these you have corrected here?

MR. MCDONALD: No, they are not objecting to it, but the thing is they must look to the river hereafter and not to the springs.

THE COURT: They must if they have been awarded water from the river. Of course, I don't know who you refer to, but if they have been awarded water from the river that is where they will get it. I don't understand the ambiguity you refer to.

MR. JACOB EVANS: The springs constitute part of the river.

MR. MCDONALD: Of course in applying it upon the ground is the difficulty we have encountered.

THE COURT: Of course I know nothing about that. Examination of the ground or some other evidence might enable the court to change the wording of this decree so as to relieve you from the embarrassment you are under.

MR. MCDONALD: Then there is this part of the decree. I don't know from the language used whether Mrs. Tanner is to have all the water coming from what is denominated here the drainage.

THE COURT: From her land.

MR. MCDONALD: From her land. That is suppose there is no water coming down from up above, down the river, then, as I understand, she would not be entitled

to this drainage water according to this language.

THE COURT: She would not be entitled to take any other water at any other point on the river on account of having emptied the drainagewater into the river.

MR. MCDONALD: If there is water comes down. This said if there is water brought down to the users below this point of discharge then she is entitled to take it, otherwise, I take it not.

THE COURT: Entitled to what?

MR. MCDONALD: To water from this drainage.

THE COURT: No, I don't think there is any language that indicates that at all.

MR. MCDONALD: I will read it.

THE COURT: The language seems to the court to be so plain there is no two constructions can be placed on it. I don,t know what construction you place on it.

MR. MCDONALD: I place the construction on it if there is water brought down the natural river that Esthma Tanner will then be entitled to water from this seepage source, but if there is no water brought down then she will not be entitled to it.

THE COURT: No, there is nothing in the language the court could put that construction on.

MR. MCDONALD: I call the court's attention to it.

THE COURT: The provision, let me read it to you, the first part of it provides she is the owner and entitled to the use of the seepage and spring water accumulating and arising upon her land, and collected by her in the drainage system laid upon said land situated about five miles from the mouth of Provo Canyon. Now there is a period, that is the end of that statement. And to take from the river an equal amount at the intake of the Provo

Bench Canal, so long, and so long only, -- that "only" has reference to the taking from the river. She may take from the river so long as it necessary for water to run down past that point and when it is not necessary she cannot take any water from the river.

MR. MCDONALD: That is the point that I didn't understand.

THE COURT: When there is no water running down there there isn't any water she supplies to anyone below. When she turns this seepage water that she is entitled to into the river, so that it may be used below she can take out an equal quantity at the point above but when it cannot be used below she cannot take any water above because the water is wasted then and is not supplied to anyone in exchange for the water taken out. It seems to the court plain.

MR. MCDONALD: It was uncertain to me, and I submitted it to a number of attorneys, and there wasn't any that seemed to understand.

THE COURT: I think probably the want of punctuation as appears in my copy may have been responsible for some of it, because if you put a period after what I have indicated, all the rest refers to the water taken out.

MR. WILLIS: May it please the court, I find in the copy I have here -- I have not compared it with the original, but on page 27 I think that it is a clerical error and I would like to have a correction made. On page 27 the word John B. Bowers is used and should be John B. Fowers. On page 29 the word George H. Carlile appears. It should be George R. Carlile. George R. Carlile in the second allotment

but George H. in the first allotment.

THE COURT: It should be George R. in both places.

MR. WILLIS: Yes. Now, I find further, your honor -- at least I don't find any reference at all here to the fact that my clients from the Midway Upper dam down to the Wright place have any high water duty. If your honor will remember the question came up here on a stipulation with reference to the Upper Midway or the upper users of the water above the Midway Upper dam. I raised the question at the time with reference to that as to whether or not it included users below that and Judge Hatch told me that the stipulation might be so considered, and as I understood it -- perhaps it is my fault in submitting my brief to your honor, but I thought that it was taken care of and I don't think the plaintiff will dispute that it was understood that during high water periods when there was water sufficient to take care of everybody, that they should have a forty acre duty; and we would like that when it comes to the writing of the decree to be referred to in some manner because that was the understanding I got and Judge Hatch conceded that it might apply when I called the court's attention to it. With the exception of that we are satisfied.

THE COURT: That is the users between the Upper Midway dam and the Wright ranch.

MR. WILLIS: Satisfactory to those who are my clients. It is stipulated so far as part of the clients, those that were users under the Island Ditch, they have a forty acre duty with a sliding scale, but the

but the rest of my clients, nothing was said with regard to the sliding scale and we don't claim it, but it was agreed we should have during the high water or perhaps under the 17th class a forty acre duty. Then later we come down to the conditions as they are stipulated here or set forth here.

MR. CHASE HATCH: If the court please, I have filed motions to modify the decision. The first is as to paragraph 55, names of Joseph Hatch, Abram C. Hatch, Minnesota A. Dodds, Jane H. Turner and Lucy H. Farnsworth be substituted in paragraph 55 for Ruth Hatch and Abram C. Hatch executors; the formal motion to have them substituted as defendants having been entered, and our motion is they be substituted and the rest of the paragraph read as in the original decision.

Then in the matter of John M. Huber as administrator of the estate of John Huber deceased, as far as I am able to determine that interest was omitted, and we ask that the court add to the decision a paragraph to be known as 43-A, to read as follows: "That defendant John M. Huber, as administrator of the estate of John Huber, deceased, is the owner of .733 second feet of primary or low water for the irrigation of 44 acres of land, said water to be diverted from the waters of Snake Creek, a tributary of Provo River, separate and apart from the waters of the Midway Irrigation Company a defendant herein, and that the said John M. Huber is entitled to high or flood waters to irrigate said 44 acres of land situated in Section 21, Township 3 South, Range 4

East, Salt Lake Meridian under the same ratio and duty as herein set forth in paragraph 43 ."

And further that he be entitled to sufficient of the high or flood waters of Pine or White Pine Creek a tributary of Snake creek and Provo River to irrigate fifteen acres of land in Section 22, Township 3 South Range 4 East, Salt Lake Meridian, said lands belonging to the estate of John Huber, deceased. Said high or flood waters to be used each and every year until such time as the water commissioner shall give notice to discontinue the use of such waters. That is according to the prayer of his counter claim set forth and there is no contest as my notes show of his claim or interest.

Then in the matter of Nephi Huber and Joseph E. Huber defendants, we ask that their names be stricken from paragraph 43 of the decision and a paragraph to be known as 43-B be added decreeing the same right that accrued to them but separate and apart from the Midway Irrigation Company. Your honor will remember there was some contest on that. Mr. Wahlquist represented the Midway Irrigation Company and attempted to introduce evidence to show that instead of 26 acres of primary low water they were only entitled to 23, but your honor sustained the objections to the introduction of the kind of testimony they attempted to offer, and we ask also that their water right be decreed separate and apart from the Midway Irrigation Company for the reason that they are at the head of the ditch. The undisputed testimony shows that a great portion of their water is taken out from private ditches

before the intake of the Midway Irrigation Company's upper canal, and such portion as flows through their canal is mostly diverted to them by way of stock-

holders of the company; and we ask that a modification be made in accordance with the prayer of their counterclaim, and there was no evidence introduced, competent evidence, which would tend to sustain any claim other than the prayer.

And the further motion on behalf of George Schear successor to Alice Schear we ask a paragraph 43-C be added, as set forth in the motion, which does not claim any more water rights than Mr. Schear asked for in his counterclaim, but ask they be decreed deparately. In his case there was no opposition, not testimony questioning his claim, that he had a ten acre low water right and 28 acre high water right and he always had used the same independently of the irrigation company.

The original motions are on file in the case and if your honor cares to have the copies I will submit them.

MR. JOHN E. BOOTH: If the court please, if nobody else cares to take up the time now, I will present mine. I desire to call your attention first to some motions, three of them. Matter of Thomas J. Foote, I suppose it is inadvertently left out, I don't find it in my copy or in the original decree on file, and we desire to have his rights determined with the others. It was presented here on practically a stipulation and there was no contest about it, for eleven acres in the river bottom. It was a separate claim he had and not joined with anyone else. I am not at all

surprised that some should be left out in all these hundreds, but I think by calling your honor's attention to it it can be remedied.

Now similarly with regard to the Wildwood resort. It was agreed by the plaintiff in this case, and no objection, they should have .27 feet for the Wildwood Resort, and that appears to have been entirely left out. I call your honor's attention to it that it may be corrected, unless your honor remembers you left it out on purpose.

THE COURT: There was some left out on purpose, but I don't remember who they were. They were left out because there were no pleadings. I don't remember now, I haven't in mind, I will check up on these matters;

MR. JOHN E. BOOTH: Of course that would not apply to these.

THE COURT: There were some there were stipulations they should have such amount of water but no pleadings. I don't remember who they were.

MR. JOHN E. BOOTH: In both of those cases pleadings were in.

MR. A. L. BOOTH: I don't know that there were any pleadings in the way of answers, just a stipulation.

THE COURT: The stipulation is not a pleading.

MR. A. L. BOOTH: I think that is the situation with reference to these and it was understood that the testimony that was given in relation to these by the introduction of the Chidister and Morse decrees would be taken in connection with the stipulation as a pleading. If it is not that way they would have to ask to file their answers.

MR. JOHN E. BOOTH: I was not attorney in that case.

One more of that type. John D. Dixon, in regard to the application that is plead and also his application to the State Engineer for 10 second feet of the very high waters. I will ask your honor if you will kindly include that where it belongs.

Now the moreserious part, I want to ask for a modification in the case of the East River Bottoms Water Company. They are classed in Class A at the beginning on page 2. These people have been using this water, they and their predecessors, and two of them are here as originals, for very, very many years, long before probably most of Provo was settled; and I have a statement from Mr. Wentz as to what has been used during the years and I find that the lowest they have been awarded under the commission I think is about 10 second feet, about October 6th of 1917, least that has ever been awarded to them in the two years '16 and '17, and even in the year '16, which your honor knows, was a very dry year, they were allowed 12 second feet, and they are now cut down to 6.62 in the very highest, and those people are feeling like they just cannot get along. Now, while it is a low duty on its face, 62 acres is a low duty, but the way they are situated up there, kind of ground and all these things -- and I think those things can readily be considered, that the seepage there is immense, and while say you allow a duty of 52 acres within a mile of the lower end of that, have half of that water comes to the surface again, and that would make it so that there we have 78 acres

acres irrigated by that water, and within a mile and a half below another half arises, and practically that water they get irrigates 90 acres of ground. Now the stipulation, for one reason, we did not take much time, your honor remembers in presenting the matter to the court. It was rather a formal matter, it is not contested by the plaintiff and was agreed to under the stipulation, and we think we ought to be entitled to what that stipulation calls for, and that was practically the decision rendered originally by your honor in the Morse decree; and by having that they believe they can get along, but it is really a serious condition they appear to be in if they are cut down to the amount of water that is allowed to them, and having that stipulation we relied upon that and did not present the expert testimony and take the time because of the stipulation and decree which had already been rendered. We felt we were justified in relying upon that and we think we ought to have that corrected and the error as I believe it is perhaps inadvertently. While looking at it one way 52 acre duty does look low and relatively we are above nearly all the others, I concede that, but our position is such we feel like we ought not to be compelled to accept this, especially under the statement I have received from the commissioner of the water that has been awarded. I would be glad to let your honor have this for reference.

Now somewhat similarly with the Faucett Field. Two of the parties of the Faucett Field -- you will find it on the next page -- their duty is practically the same

as the East River Bottoms. Two of these have had this place now for nearly seventy years. They have enjoyed their water rights, first ones that took out water from the river there and they are now reduced considerably from what the stipulation was so that the remarks I made in regard to the stipulation will be ~~xxx~~ applied to them as to the East River bottoms, and it looks a little hard. One of these men, been there seventy years, going over this matter, "Well" he says "I can't have it very much longer anyway and as they have taken away my water they may just as well take the home too because I have no particular use for a home without the water, and I won't need either one of them very long." I am not claiming he is right in his theory about that, but everybody looks out, you remember, rather than in, and I call your honor's attention to this for the reason we are really short under the award that is given us in this decision, and these people never having been disturbed in their water right, we believed under the stipulation entered into and the matters presented we really ought to be entitled -- the stipulation and the water awarded to us under the Morse decree, and we submit, your honor please, we should have that because of the stipulation and nobody objecting to it.

Now the Timpanogus Irrigation Company, they filed an answer in opposition but I think that was so explained it won't be necessary to go into that any further, realizing how much we are to do here. I merely call your attention to these things, and unless your honor cares to hear further I will not impose upon the court. We feel we are in earnest about this.

These are poor people. They cannot appeal this. If everybody else is satisfied they could not appeal and yet I do not mean to say by that that they are entitled to any particular consideration because it is not a matter of sentiment. I realize that, and as I explained to them, that the policy of the general government, and of the state and courts, and all of it, is to get the very best use out of the water that we have, and I think that has been the theory on which your honor has tried these cases heretofore, while they don't always understand it. I recall, I think the case your honor heard down at Richfield, waters of the Sevier River, one of those old men up the river did not understand when they talked about second feet. He said "What is a second foot, can I water with it, that is what I want to know? If I can't water with it I don't want any second feet." There is a lot of these people don't comprehend all these technical terms.

I do think I will call your honor's attention to one other thing in the Fancett Field. They are a party of small holders, they cannot double up with other people like they can in a large stream and they need a large stream of water although small holders. As an illustration close to there I have a ten acre orchard. If I were awarded a duty of 40 acres to a second foot and I was given a fourth of a foot to myself to use on that ten acres it would be absolutely worthless because I could not do anything with it, and so you see we have to have larger amounts in order to reach us; and then what I said with regard to seepage in the East River bottoms also

applies to these, and the water is again measured just below, and I think under the theory of this state all the water, both that goes down the canal and all the seepage water is to be measured. Am I correct in my theory of that?

THE COURT: That is the result of it.

MR. JOHN E. BOOTH: That is the way I got it, so practically it tends to increase.

THE COURT: Judge Booth, do I understand you to say the situation is such under this Faucett Field Ditch every user must take his water separately from the other and they cannot take it by time at all.

MR. JOHN E. BOOTH: They can take it by time, yes, they do take it by time.

THE COURT: Of course the court understands an award of a sufficient amount of water to irrigate a few acres of land, if it must be taken separately and continuously by the party will be of no use whatever, but do I understand the Faucett Field is so situated they cannot take it by time.

MR. JOHN E. BOOTH: They can take it by time, but two of them cannot take it one place. They take their water through the Upper East Union from the River down to the Faucett Field and there they take it out at several places and that makes it so that it is not as convenient as if they could take it all out at one place.

THE COURT: I don't think there was any evidence introduced with relation to that particular feature.

MR. JOHN E. BOOTH: No, because I say we relied entirely on the stipulation of getting the water that was awarded to us under the original Morse decree.

I was not attorney for the Wildwood original but I will ask permission that they be permitted to file an answer and in the case of Mr. Dixon if he did not I will ask the same privilege.

THE COURT: I will suggest to counsel, any of you who have suggested names that have been left out, to examine the pleadings and see whether you are in a situation to ask for anything, because I did this, I took a list of every person who had filed a pleading in the case, and in checking over, unless I made some error, every person who had filed a pleading was given some thing in this decree; so those of you who have suggested there are parties whose names are not mentioned, I would suggest to examine the pleadings, because it may be you will find them in that situation. However, it may be I inadvertently overlooked some of them.

MR. JOHN E. BOOTH: I think your honor the first answer of Mr. Dixon this part was not in but afterwards an amended answer was filed.

THE COURT: It may have been overlooked in that way.

MR. CLUFF: I have a slight suggestion to offer. On page 6 paragraph 8 your award there given to Charles Giles ~~to~~ Charles Thomas, South Fork of Provo Canyon, of course gives them the same spring that was given to them in the Chidester decree. The only correction is this. The examination of their lines up there shows that spring arises upon a side hill above their land and happens to be on Charles Conrad's land and we would like to make it more specific, that the language be changed, the spring arising on Charles Conrad's land about twenty rods

south of the south line of the lands of the said parties. That will make it definite and specific and be no doubt about it.

Now, on page 4 the group under the Alfred Young ditch, Lafe Baum, Elmer Baum and S. S. Cluff, Jr.-- the Alfred Young Ditch, as I remember it, the testimony shows it was I believe the first ditch that was ever taken out of Provo River, and these parties, the land they own where there is similar to the land all up the river bottoms of the parties around them there, and I notice the court has made an award of a fifty acre duty to all these other parties and given that particular group 57 acres. Now, the testimony of course of the parties owning the land was that the duty would be much different from that, but we think at least the court ought to make a fifty acre duty the same as all the other river bottom people along there, and we ask that that correction be made as to that group.

Also with relation to the Provo Pressed Brick Company, fifty-seven acre duty that is allowed them. The land is a similar proposition all through there.

MR. F. S. RICHARDS; If the court please, in behalf of Provo City I desire to say, your honor please, we were only called into this case yesterday. We have therefore had no opportunity of informing ourselves as to the state of the record with reference to the rights of Provo City, and are under the necessity of asking that we may be afforded time in which to do this before any action is taken by the court affecting the rights of the city. From what I have already heard there will be some time required in the

adjustment of these matters, and may possibly be others, and I desire to ask, if your honor please, when the matter is closed as far as this session is concerned and adjournment may be had to afford reasonable opportunity of examining the record and ascertaining what suggestion we may desire to offer to the court with reference to a modification of the decision so far as it affects Provo City; as we are advised in some particulars the city feels it has not received all that they are entitled to.

MR. STORY: Your honor, on behalf of Utah Power & Light Company, I am filing a paper entitled objections and motions for modification. I think perhaps it might be termed an excorescence as far as the court procedure is concerned, because I don't know any such motion is contemplated. On the other hand, I have understood your honor desired to have objections made prior to the actual drawing of the findings, so that matters, whatever matters are to be thrashed out could be determined before all that work was done, and also that it should be -- such objections as were made should be made in writing in order that adverse parties might be fully apprised on the contentions which would be made. So I have filed, as I say, this written objection and motion to certain parts of the decree on behalf of the Utah Power & Light Company. I think it unnecessary to read the motion at length, and I will state briefly what it covers.

The principal objection is to the limitation of 229 second feet which your honor has made on the right of the company to divert waters from the Provo River, on the ground that it is against the

weight of the evidence introduced in the cause. Second objection is that it does not permit the company to divert indiscriminately from the river or its tributaries the total amount to which we are entitled. In other words, the volume of water in the tributaries is subject to fluctuations, and we have been accustomed in the past when the water, the full amount that had been appropriated from any particular tributary is not available from that tributary, to divert that much more water from the river. We will ask a modification of the decree in that respect.

The next point which we raise is that the decision so far as it relates to the Utah Power & Light Company appropriation does not specifically say they are entitled to divert the water during the entire winter period. I don't know whether it makes any particular difference whether that is specifically stated in the award to the company or not, provided there is a limitation upon the right of storage granted to those who have reservoirs in Wasatch County. There is a limitation upon their right to store any such water as ^{it} ^{not} will ^{not} prejudice the rights of the company in any way to divert this water throughout the entire period. In other words, by Section 64. I think it was, you give them the specific right without any limitation to store water during the period commencing September 15th and ending the following April. I think that is entirely proper provided of course it does not interfere with our right to use the water for power purposes.

THE COURT: I will say with reference to that, it was the

intention of the court to award it the entire year. Of course, I did not suppose there would be any objection to stating the fact it was for the entire year.

MR. STORY: I assumed it was merely a question of the wording of the decree.

The next question that will be raised is as to whether or not this court has jurisdiction to decree in advance what a party's rights will be under applications filed in the office of the State Engineer, provided the statute is complied with with reference to proof, etc. before the State Engineer; my position being that the court has jurisdiction to entertain such matters only on appeal from the State Engineer's office and you cannot decree in advance what the right will be. Of course it could only be subject to whatever rights might be determined in the State Engineer's office itself. That, however, is more or less formal. I think it can be handled by the wording of the decree. The principal point that will be raised is upon the weight of the evidence upon the Light Company's appropriation, and it will be utterly impossible, I take it, to argue that question today. As a matter of fact, it will probably require nearly a day because I shall want to quote copiously.

MR. A. C. HATCH: I thought that was wholly argued at the trial.

MR. STORY: perhaps it was, but I desire to argue it again.

MR. JACOB EVANS: Why not do that when you make a motion for a new trial?

MR. STORY: I thought we could pass on the motion before the decree was prepared and thus save the trouble of changing the findings.

MR. JACOB EVANS: Of course our view is you are allowed now more than you are entitled to.

(Argument)

MR. A. C. HATCH: If the court please, my understanding was that it was only clerical matters that would be called to the attention of the court at this time, that the decision and objections to it would not be gone into, but such as was raised by the parties wrongly named in the Hatch case. During the trial the other parties were substituted by an order of the court and those were the matters that I thought were invited by the court. I never have understood at any time that the court was inviting a reargument of the case or any part of it. We went through this as well as we could and I presume Mr. Story presented everything at the argument of the case that he will or can present if it is reargued. The court heard it, heard our side of it. Our contention is that 158 second feet is the most they have ever been entitled to, and we think they have gotten an excess of water and that the court erred in giving them the quantity that he did. Now, we might argue it, as he says, take a day. We might take a week. I don't think anything could be said to the court in addition to what has already been said in support of his contention. I don't think anything could be said on our part further than has

been said to the court in support of what we claim should be given them, 183 second feet. I have forgotten what time we put in in arguing it, but he has not suggested even that there is anything new, whereby the court may have any further information in regard to it, and I think there should be an end to this sometime, and of course we don't care to reargue it. I don't think the court ought to be imposed upon by having to stay here a day and listen to Brother Evans and Brother Story and myself. The motion was just served upon us and he goes farther. He attacks the award of the court to us and it is a reopening of the case and I wonder that he does not ask to take further testimony.

MR. STORY: Never can tell perhaps we will.

MR. A. C. HATCH: Perhaps he will. We object to any further argument of this matter except Brother Story can suggest something that is new, something that will give the court and give to us light upon the subject.

MR. STORY: I should be very glad, Judge Hatch, when the time comes and the opportunity is available, to tell you all I have to say, to tell you at the same time I tell the Judge, but there was a good many matters I think perhaps the court did not consider in connection with his reconsideration of the testimony. Now of course perhaps it is out of the ordinary in raising these questions on the decision rather than on the written findings but certainly I cannot be mistaken that it was quite fully discussed at our last session as to what the extent objections might go, might be, and that we were going to decide, have

all these matters thrashed out if possible in advance of preparing the written findings. If you don't hear it at the present time I will simply have to make the same objection to the written findings after they are drawn up and argue it at length same as I would on a motion which would be interposed at that time for a modification, on the ground of the weight of the evidence, which you always have a right to raise and interpose and which of necessity covers the entire field of the evidence.

MR. A. C. HATCH: Simply rearguing to the court the case.

MR. STORY: Is a motion for a new trial ever anything else but that?

MR. JACOB EVANS: You probably would want to do that also.

MR. STORY: No, we will thrash this out the next time, we want to at least argue it once.

MR. JACOB EVANS: That will make it three times.

MR. STORY: I will amend my statement, we are going to at least argue it twice then.

MR. WILLIS: If the court please, Judge Hatch said he understands this matter to cover only clerical errors. One of the contentions I raise is not a technical matter, and I want to know if he challenges our stand on that. If so, all right, and I want to know if he does not. If he conceded what he stated in the court up at Wasatch County, then I take it my clients will be taken care of in that 40 acre duty, but it is not a clerical error, it is an omission that should be conceded to us.

Furthermore, I don't think on technicalities the Utah Power & Light and the plaintiff should be permitted to take up the time of this court at the expense of

the rest of the clients in this matter. We are all being charged up with the expense, and they have certain rights under the law, no one can deny them, but otherwise I think every man here should object to the chief litigants in this case taxing up the other fellow with costs in this proceeding.

MR. A. C. HATCH: In reply to Judge Willis, the 40 acre duty that is stipulated, as I understand, is after all the other rights are supplied and there is a surplus.

MR. WILLIS: Yes, that is all we are asking for, judge.

MR. A. C. HATCH: And we have no objection to them taking a two acre duty when all the rest of the rights are supplied and there is a surplus of water.

MR. McDONALD: I find there is an answer by Levi M. North and there is no award, in checking up the decision.

MR. A. C. HATCH: No proof offered, was there?

MR. McDONALD: His rights were fixed by the Fulton decree.

MR. A. C. HATCH: I do not think there is any evidence showing he succeeded anybody.

MR. McDONALD: I will take that matter up, maybe it was awarded under some other name.

MR. ROBINSON: In paragraph 21 the rights of J. W. Hoover as to his primary water right the court will likely remember that the stipulation that was entered into between Mr. Hoover and the plaintiff also included an 80 acre highwater right, which water right was acquired under an application to appropriate water by John H. McEwan which was filed August 7, 1909, and is designated here as a Class "F" water right. We in support of our stipulation also put Mr. Hoover on the witness stand and he testified as to his

primary water right and also that he was watering 30 acres of his land during the high water season and that he and Mr. McEwan were together on this application when it was applied for on behalf of him and McEwan. There is nothing in the record to show Mr. Hoover has any high water right.

MR. JACOB EVANS: Isn't that covered in paragraph 37 of the findings, the high water right?

MR. ROBINSON: That is as we understand it, but Mr. Hoover is not mentioned. That is only as to Samuel Reiske and Mr. Hoover as the evidence shows, they were jointly interested in this water.

MR. JACOB EVANS: The award is made to Samuel Reiske?

THE COURT: You own part of that.

MR. ROBINSON: We want part of it and the evidence shows we owned a part of it and it was stipulated we did. I think there is no question as to that.

MR. A. C. HATCH: You don't ask for water additional to this award.

MR. ROBINSON: No, the award is just as stipulated except the high water right which we acquired under this filing.

MR. JACOB EVANS: Do you know what proportion Mr. Hoover should have and what proportion Mr. Reiske should have?

MR. ROBINSON: I think it was understood and the testimony showed they just filed it and agreed to take half interest in it.

MR. JACOB EVANS: Isn't that a matter that can be adjusted between them?

MR. ROBINSON: I prefer to have it adjusted under the decree. They may be able to adjust it, I don't know.

THE COURT: Who represents Mr. Reiske?

MR. ROBINSON: I don't know who represented Mr. Rieske.

WE represented Mr. Hoover and put him on the stand and he testified to the facts as I have given them.

THE COURT: Is there anyone here representing Mr. Rieske?

If the attorney representing Mr. Rieske is present he may consent to this matter and I will make the amendment.

MR. JACOB EVANS: I am inclined to the view the whole evidence showed Mr. Rieske was the owner of this water.

MR. JOHN E. BOOTH: I represented Mr. Rieske.

THE COURT: What do you say as to Mr. Hoover owning a half interest of the water right decreed to Mr. Rieske?

MR. JOHN E. BOOTH: I suppose that is satisfactory.

THE COURT: Does he own half of it?

MR. JOHN E. BOOTH: I think so.

THE COURT: Is there any objection to the change being made and awarding it to him and Mr. Rieske instead of Mr. Rieske alone?

MR. JOHN E. BOOTH: I am not aware of that at all. I submitted the matter to Mr. Rieske and it was satisfactory to him so I paid no more attention to it.

MR. ROBINSON: If the judge will remember when Mr. Hoover was put on the witness stand we referred to this application that had been made and Mr. Hoover testified at that time that he was watering 80 acres of land with a high water right and had been for a number of years, ten or fifteen years, but that later he and Mr. McEwan had agreed to go in together and make an application for high water to the State Engineer, he paying some of the costs and Mr. McEwan paying some,

and that the water that would be acquired under this application would be for his benefit and Mr. McEwan's benefit. That was the testimony, as I remember it.

MR. JOHN E. BOOTH: That might have been, we had no notice of that. We filed our application and I am not aware of anything of that kind.

THE COURT: I will examine the pleadings and evidence in relation to it, and if it is supported by the pleadings and evidence the court will change this.

MR. ROBINSON: If there is any question in regard to that we would like to ask leave of court to introduce evidence.

THE COURT: If the situation is as I imagine it was from the suggestion made by Judge Booth, there is no contention made in your pleading, is there, Mr. Reiske holds this as trustee, the title to this water.

MR. JOHN E. BOOTH: I think not.

MR. ROBINSON: There was no suggestion of that.

THE COURT: That is what you now claim.

MR. ROBINSON: Those were the facts as they existed, but our evidence only went to this, that Mr. Hoover acquired a highwater right for eighty acres of land and it was so stipulated.

THE COURT: Did Mr. Reiske make the stipulation? You are asking now that the court shall change the award made to Mr. Reiske and give you half of it.

MR. ROBINSON: Either that or else we be decreed. It would reach the same point, we be decreed some high water.

THE COURT: I don't understand you introduced evidence of appropriation of high water except the appropriation here. You didn't introduce evidence of appropriation any high water, did you?

MR. ROBINSON: Yes, under this application of Mr. Reiske.

THE COURT: That is what I mean.

MR. ROBINSON: I think the evidence will show that.

MR. JOHN E. BOOTH: That may be the fact but we have no notice of it.

THE COURT: If you consent to it I will make the change without examining. If you do not, I will examine the record.

MR. SOULE: If the court please, with reference to clients in Summit County represented by Mr. Thomas any myself we find three of them have been entirely omitted from the decision. E. B. Leffler has $5/60$ of a cubic foot of water as a first class right in the Fulton decree. A. S. Carlile has a $2/3$ cubic foot of water under the Fulton decree as successor to John Phillips and Thomas H. White. E. L. Murphy has $1/12$ of a cubic foot of water as successor to George O. Ellis under the Fulton decree. These three claims have been omitted and they would be entitled, of course, to their pro rata of the 17th class along with the others.

With reference to the storage water of the Washington Irrigation Company, your honor finds that the company is entitled to storage right of 500 acre feet upon complying with the requirements and making proof in the State Engineer's office. As I remember the testimony, your honor, the record shows that Mr. Wents had examined the reservoir and it was well built and contained a capacity of 871 acre feet. That the reservoir had been built to its capacity and it had been used continuously I think either from 1911, or '12 for the irrigation of the lands

under the Washington Irrigation Company in low water season. As I understand the law it would be this these parties have a storage right, even though their application to the State Engineer asked for only 500 acre feet-- it shows a field appropriation and beneficial use of the water and they would have a right, as I understand the law, to an additional 371 acre feet from the date of actual use, and the 500 acre feet from the date of filing their application in the State Engineer's office; and since they are using the water, have used it a number of years and their system is operating, I don't see why they should have to go back to the State Engineer's office and ask for a license. I think they are entitled to a decree in this court now.

THE COURT: Are there any other suggestions?

MR. McDONALD: Your honor please, in looking over the pleadings, I find the name of A.N. Taylor is left out of the group which I furnished you for 13.32. It is not on the list.

THE COURT: You may correct the list.

MR. JAVOB EVANS: If the court please, we ask a modification of the decree with respect to paragraph 30 on page 15. This is with respect to the Provo Pressed Brick Company. Before the case was closed your honor will remember that we received permission to and did introduce the application upon which the certificate was issued for the 100 second feet of water; our contention being that as shown by the application all the water that was intended to be appropriated under the application was the water used through the Mill Race, the City Race and Tanner

Race, and that the application extended on and beyond that quantity. That is the certificate extended on beyond that quantity of water and the court awarded them the full amount as shown by the certificate. We expressly call your honor's attention to the application as it was made which limits them to the use of the water from these various sources, and we contend that under the statute of this state that that would be all that they would be entitled to receive from the State Engineer, would be the water they made application for, and from these various sources, and that the State Engineer could not grant them a further or different right from that applied for. The defendant in its application specifically shows the intent. That is, immediately south of the pen stock they say will be placed gates and rating flume for the diversion and control of the water, the Factory Race water being taken at this point, the water going to the City and Tanner Races will be carried in a tail race in a southwest ~~six~~ direction to the confluence of the City race, where gates and rating flume will be placed for the diversion of the City and Tanner race water. This point is north 60 degrees 30 minutes east 808.5 from center of Section 36. From this point the water ~~flows~~ ^{belonging} to the Tanner Race, will be carried a distance of 240 feet to the above described point of return. Then they go on to state, putting all the water now running in the three channels, viz., the Factory race, City Race and Tanner race into one to increase the power by the use of water now running in the City and Tanner race immediately south of pen stock; Factory race

water being taken at this point. The water going to City and Tanner races will be carried to confluence with City race. The water belonging to Tanner race will be carried, etc. Section 1288x16 under which the application was made among other things provides as follows: (Reading)

THE COURT: I will suggest this. The evidence you introduced after the case was closed, it raised a question that I think a representative of the Brick Company ought to have an opportunity to meet. Mr. Soule has raised a similar question in his suggestion now for the first time that the Washington Reservoir Company or Irrigation Company, whichever it is, ought to be entitled to water in addition to that for which they have made an application. I feel disposed to permit the parties to present those questions at some time when they might prepare and present them. I suggest that your suggestion it was introduced before the case was closed is not according to the theory of the court when the case was closed. I think the case was practically reopened for that purpose because the evidence was closed and arguments had before that. And I might say, gentlemen, now, so that counsel may understand how the court feels about it, I am very anxious to be right in every detail of this decision and I want all the benefit I can get from the presentation counsel may make regardless of the fact it seems it is a reopening of the case again. I want the benefit of the suggestions the counsel for the various parties may be able to make, and if the court has come to a wrong conclusion with reference to any of them it should be made right. Con-

sequently on such matters as this especially I am going to give you an opportunity to have it presented again. I think Mr. Cluff will want to present his views on that. My impressions are that a certificate that is issued by the State Engineer has reference to the application, may be controlled by it, and I want to hear Mr. Soule's views in relation to it. He has suggested an application may be made for 500 acre feet which would support a certificate from the state engineer of 800.

MR. SOULE: Support a decree for using the water.

THE COURT: Would be entitled to the water if he used more than he applied for, and I want to hear him on that proposition as far as he wants to be heard. I make that suggestion so that probably you would not care to take more time at this time. Those are purely questions of law.

MR. JACOB EVANS: We will be glad to go into it and aid the court all we can.

MR. SOULE: Our position is we have a right for 500 feet under the application to the State Engineer and have actually acquired a right to 371 additional feet.

THE COURT: Yes, your contention being you can appropriate water in another way than by applying to the State Engineer.

MR. SOULE: Yes. And another matter, your honor, on page 22 there is a mistake in the name near the bottom of that page; Fred A. Peterson and as successor to Eldora Rose and F. E. Bowers, it should be P. F. Bowers.

MR. JACOB EVANS: I would like to ask about how much time

Provo City desires to investigate this matter before you will be ready to present it.

MR. F. S. RICHARDS: Your honor please, we desire all the time the court feels it can reasonably give us. It is absolutely impossible for us to tell how rapidly we may be able to obtain the record and get this information. I assure your honor, however, that all possible diligence will be exercised in the effort to obtain the information necessary to enable us to intelligently present such suggestions to the court as may seem necessary.

THE COURT: May I ask, does your investigation at this time so far as you understand the situation contemplate getting transcript of part of the record?

MR. RICHARDS: Yes sir, and that order will be placed immediately.

THE COURT: I was going to ask the Reporter how he was situated with reference to time.

MR. RICHARDS: I will suggest we ought to have to the last of January anyway.

MR. JACOB EVANS: I will suggest this, that the decree should be prepared because it is going to take some time to get a decree and it should be ready for next year.

THE COURT: I will suggest this, when the court has finally determined the matters of these objections, what changed shall be made and what shall be included in the decree then the feature that you suggest can be controlled by an order. It will not be necessary to wait until the final decree is a matter of record. The court can by an order direct whatever conclusion is finally reached in this decision shall be the

method upon which the division and diversion of the waters shall be regulated, so that it will all be available even if we had to crowd this matter into the irrigation season for the final entry of the decree. Of course, I don't think it will require that.

MR. JACOB EVANS: We don't want to unnecessarily push this matter forward to a conclusion, at the same time we would like to have the decree signed at as early a date as possible and that would close up the case; and of course there are things may come up which mean a retrial and we wish that to be avoided.

THE COURT: Would Monday, the 28th of January, be satisfactory to you, Mr. Richards, and Mr. Story?

MR. F. S. RICHARDS: It will with the reservation, of course, I don't know what position we will be in at that time. Be as diligent as possible.

THE COURT: If I am correct, the 28th of January comes on Monday.

MR. CLUFF: I take it then we will adjourn until that date and perhaps take a day or two.

THE COURT: I will attempt to have my engagements so arranged that I can give you whatever time is necessary. I don't wish more time taken than necessary.

MR. STORY: Will it be more convenient to have the argument here or Salt Lake?

THE COURT: I think we had better come here, the records are all here, I think matters have been suggested that will require reference to the records. The court will make an order that the proceedings today may be transcribed for the benefit of the court and taxed as costs.

MR. A. C. HATCH: We want to give notice we will ask a modification of the findings in regard to Utah Power & Light, reducing the quantity awarded to them to the amount shown as we claim by the great weight of the testimony down to not exceeding 180 second feet.

MR. RAY: May it please your honor, at the last hearing I suggested to the court there had been taken up with the commissioner the matter of the installation of measuring devices in the river to insure the accurate distribution of the water. I stated at that time the estimated cost at approximately two hundred dollars, the government furnishing the instruments but the parties to this litigation being charged with the expense. I understand it will not cost quite two hundred dollars and that would be the outside, and I now ask an order of the court authorizing the commissioner to co-operate with the Geological Survey in the installation of those measuring devices, and the cost of the labor of installation be charged as a cost of the administration of the waters in this law suit.

THE COURT: Are there any objections to such an order being made by any of you? If there are no objections the court will direct such an order be entered. If there are no more suggestions the court will at this time take a recess to Monday morning, January 28th, at 10 o'clock A. M.

IN THE DISTRICT COURT OF UTAH COUNTY, UTAH.

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PROVO RESERVOIR COMPANY,

Plaintiff,

v.

PROVO CITY, ET AL.,

Defendants.)

January 28, 1918.

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THE COURT: Gentlemen, the court will resume its session at this time.

MR. MCDONALD: If your Honor please, under the terms of Section 42 of the stipulation entered into by the parties the amount of land under the Charleston Irrigation system was increased one hundred acres in excess of that set forth in the answer of that company, and I would like at this time to amend the answer so as to conform to the stipulation and decision of the court.

THE COURT: Any objection to that being done?

MR. MCDONALD: I went to the clerk's office for the purpose of getting the stipulation, and they said your Honor had them. I have called your Honor's attention also at the last sitting that the name of Ed Dillon had been omitted from the decision. Mr. Dillon is decreed one half of a second foot under the Fulton decree, and the stipulation entered into makes that decree the basis of the settlement of the action in Wasatch county, and I would like to have his name added. That is it is not in the decision as it stands. Now, it has been omitted by a clerical error, I think.

THE COURT: His answer was filed?

MR. MCDONALD: Yes-- no, he didn't file an answer, for the reason the stipulation provided.

THE COURT: I cannot award him anything unless there is some pleading. The stipulation will not take

the place of a pleading, the court cannot award on stipulation.

MR. MCDONALD: It may be an answer was filed. I think it was by Levi M. North, who bought the premises, but no water was decreed to either so that it would go to Levi M. North, I presume.

THE COURT: If you will call my attention to the pleadings, the files are here, and if there is not one you may file one.

MR. MCDONALD: All right, I will do that. I presume there will be no objection to the answer of the Charleston Irrigation Company being amended increasing it one hundred acres.

THE COURT: That may be done.

MR. MCDONALD: I call your Honor's attention to some clerical errors at the last sitting. May I inquire whether those have been corrected?

THE COURT: They have not been corrected on the original decision because I haven't it, it is on file with the clerk, but I understand those corrections are to be made. I did not hear any objections at the time and I understood they were merely clerical errors.

MR. MCDONALD: They are just clerical errors is all.

MR. JOHN E. BOOTH: If the court please, at the last sitting I called your attention to an omission of ^{Thomas}~~James~~ J. Foote, his answer was filed and took a note of it.

THE COURT: I was unable to find his answer among the pleadings, however, it may be with some other parties.

MR. JOHN E. BOOTH: It was a separate answer. I have a copy if it was lost.

THE COURT: You might examine, I may have overlooked it in my examination.

MR. JOHN E. BOOTH: Did your Honor receive the answer of the Wildwood?

THE COURT: Yes, that was a copy of the original

filed with the clerk; I received it. There were some other matters went over to this time.

MR. RICHARDS: Your Honor please, as far as we are concerned, we are very much ~~the~~ ~~in~~ in the same position we were in December. The transcript was ordered promptly, but the reporter has been unable to furnish us with it, but we are promised an installment soon. We shall ask to be given further time in which to obtain the transcript and ascertain what the real condition of the record is. I think, however, if your Honor please, being entirely candid with the court, that I ought to say, that from the information which we have from the outside, it looks as though we would be under the necessity, in order to protect the rights of Provo City to ask the court to reopen this case, and permit testimony to be taken to determine the necessities or quantity of water that is necessary to meet the requirements of Provo City. It seems to be rather clear ~~that~~ we think that the award that has been made is not sufficient, and it is impossible to determine what would be required without a little demonstration, and we therefore think that this decree-- that is, this water should be distributed under this decision during the coming irrigation season, and an opportunity be given to Provo City, and of course as to other parties I have nothing to say in regard to them, but as far as Provo City is concerned, we should have an opportunity of making an actual demonstration of what water we require. That has not been done in the past, as I am informed. It will involve perhaps some soil surveys and measurements of the water. What I have in mind, your Honor please, contemplates the actual measurement of the water as it goes into the ditch, and then the water as it reaches the land, and the quantity that is required upon the land, so that we may determine with as great certainty as it is possible to do what the actual requirements are. Now, in my conversation with the parties I find they

all say they want Provo City to have what it is entitled to, what it requires for its use. The only question is the question what that quantity is, and I know of no other way of determining it except in the way I have suggested, and, in any event, your Honor please, we will ask for further time, because we haven't the transcript and are not prepared to make any definite suggestions until we get it.

THE COURT: Was it your idea to submit the question of reopening and continuing the matter for this demonstration at this time?

MR. RICHARDS: No sir, that was not my thought, because I am not prepared perhaps now to advance all the reasons I would be able to after ascertaining the facts.

THE COURT: I was going to suggest the court would want some reason presented before the court did that, why you did not make the demonstration and present it to the court when the case was tried; that is, why it was not done.

MR. RICHARDS: As I indicated, your Honor please, it is because of our desire to be absolutely frank with the court that I make this suggestion at the present time, but I am not prepared to make a motion or ask for a definite action until I can get the record and find out what was done.

MR. JOHN E. BOOTH: If the court please, in connection with what our friend Mr. Richards has said, in behalf of the East River Bottoms Water Company, Faucett Field, Park and Nuttall, McBride and Young, and those people I represent, I want to also suggest the same idea. I have not taken an active part in this case as other counsel, because I did not think it necessary to secure the rights of my clients, having stipulated ~~by~~ both by pleadings and testimony, and no controversy and the use of the rights should be final, but it appears that we are not getting them according to the stipulation. I have talked to my people and there isn't one of them I have talked to but what is in favor of making the waters of Provo

river do the very best duty they can. I believe your Honor has that idea. However, in trying to do right, of course, they do not want to do a great wrong. Nobody wants that, but what a man honestly believes to be true it is true to him as long as he has that opinion, whether the fact is the same or not. A lot of my people really believe that they are practically ruined under this proposed decree; they cannot see the justice or right in endeavoring to ruin a farm that is worth four hundred dollars an acre with the improvements on it and their homes, have had it for fifty years, for the purpose of opening up other farms that are not worth over a hundred an acre when they are opened up, and for this reason they say this, that they are willing and anxious to try for a year under as strict regulation as we can at

all manage, and if they can get along and save their crops that they are willing to accept the present proposed decree, or such other as may be necessary, but if this decree is made final now, they are a lot of poor people, and of course expenses are heavy, necessarily would be on these people, and they do not want to appeal; we really don't want to have to appeal, and under the record if they did, I do not know of any particular assurance we would get this matter reversed, because I haven't any idea that the Supreme Court will know any more about it than your Honor. I haven't any idea the Supreme Court will desire to do right any more than your Honor, so that it might be just that much for nothing, and we join Mr. Richards in asking we be allowed to try this for one year.

THE COURT: One season?

MR. JOHN E. BOOTH: One irrigation season, and we assure the court that in good faith we are willing to concede all that we can and still preserve ourselves, but if they are mistaken about their apprehension, their apprehension may not be granted, and of course I say what one naturally believes

to be the truth he acts upon whether it is the truth or not, and they are very much alarmed, there is no doubt about that-- "Oh, dear, oh, dear, we have to break up our homes"-- and to show this, two men have actually sold out recently because of this fear. We would rather some other fellow would be ruined than us, we will sell out.

MR. JACOB EVANS: Fellow that bought them must have thought they had some ^{water} right or would not have bought them out.

MR. JOHN E. BOOTH: Oh yes, he thought they had. If there is anybody on the river has a water right it is those fellows up there on the river that took it out first. As to the West Union Canal, we are satisfied, as I said before.

MR. RAY: May it please your Honor, on behalf of my clients I desire to make this observation. This suit was filed about four years ago, and Mr. Wentz was appointed commissioner. Prior to the closing of the testimony in this case Mr. Wentz had gone upon the stand and placed a schedule on the board as to what he considered to be a fair allotment of water to the respective users of the water and that in most instances had been the quantity of water allotted to the respective users under his administration as commissioner. I do not mean to say that was absolutely true as to Provo City, but as to most of the users the quantity of water which Mr. Wentz placed upon the board as being a sufficient quantity was the water which they had used during the last two irrigation seasons, and since the close of those seasons the court has been opened for the taking of testimony. Provo City had its city engineer and its special expert Mr. Deming and other witnesses who testified in this case they had taken the measurements of every ditch of Provo City. They had most accurate figures as to the capacity of the ditches, the quantities of water turned in at the head, and

they are sufficient for the satisfying of the needs of Provo City. We adjourned this case from time to time, which was filed four years ago, the court being extremely liberal and not foreclosing anybody of the right to introduce testimony as to their necessities and as to their lack of sufficient water under the management of Mr. Wentz as the court commissioner. Finally then the case was submitted, nobody complaining they had any fact which had not been sufficiently called to the attention of the court. The court then announces a tentative decision, and as I understood it, states that if the court has by inadvertence, or for any other reason mistaken any of the testimony or figures or such, he would be glad if the parties have those corrections made before the decision is embodied in findings and the final decree. When that is announced it seems that everybody would like to retry this water suit. That is a very usual feeling about lawsuits, but a very unusual proceeding with a lawsuit. The thing which most of them are anxious to protect here are things which are actually covered by motions for a new trial, and in substituted findings, motions for amendment to final findings, and in appeals to the Appellate Court. There can be no continuation of this case to such period that many of the litigants will not feel convinced that future demonstration and lapse of time will demonstrate the error of the court. That is certain. For the court to arrive at a decree with this many litigants that would be satisfactory to all; it would be a most remarkable thing. Now my clients want this matter settled. We are not without disappointment, we have two thousand acres there which we think should precede the rights of any secondary appropriator, gone without water upon them. We have contended the Blue Cliff right is not a right ever perfected under the statutes of the State of Utah, but the evidence is in upon that. We introduced our evidence upon it and

thought we introduced it in a satisfactory way. If we could re-introduce we would make it stronger if we could. We would make a stronger showing as to our two thousand acres if we could, but those are matters upon which we were foreclosed. When the court announced to us there being no further testimony, this case would be closed for the court's decision, it seems to me under those circumstances this case ought-- that a decree ought to be prepared in this case, supported by the necessary findings and conclusions and take the proceeding in the ordinary way, Now the suggestion has been made here there be left at large a certain quantity of water. That appeals to me as a very reasonable thing, because the court must of necessity in making this decision have taken into consideration the methods of application of this water have been inefficient and it is slow to change any inefficiency into efficiency, and during the interim there might as well be put into the hands of the commissioner a quantity of water, but your Honor will understand the contention of this case would not be made or asked for by a litigant for the purpose of showing the sufficiency of the water allotted, but for the purpose of showing the insufficiency of the water allotted, and the administration being made by the user himself could not produce a result which would leave this case in any different situation than it was at the time of its final submission. There will be a commissioner here, of course, but there are forty-seven thousand acres of land under this system and the application of water by each one would be for the purpose of showing he needed more water, and we have all introduced our evidence. Mr. Wentz has observed the situation for years, given his testimony, they have had months to controvert it if they could, and put enumerable witnesses on the stand to prove it. We have been given an opportunity to show wherein the decision

has clerical errors, or errors which are by inadvertence, and it seems to me when that is done we ought to have the findings and decree prepared and then our remedy ought to be those that are provided for by the statute in the ordinary course.

MR. WILLIS: May it please the court since this matter was called to my attention, I have talked with a number of my clients and the general feeling is that this matter ought not to be continued. Each person has had his day in court, many of us have stipulated the duty of water and the acreage, and Provo City particularly contested this matter and had its day in court by introducing testimony, and while I do not want to seem discourteous to counsel coming in here on behalf of anyone, yet, at the same time, my clients have rights in the matter and I feel it my duty to protect those rights as much as I can. The continuation means heavy expense. Judge Booth speaks about two of his clients having sold their land because they did not have water enough. There are many of my clients, I fear, that will have to sell theirs before they can keep up the expense that is being occasioned by reason of this litigation, and there are other serious reasons why this ought not to be. We do not want to be placed in the position where we may have to try all of this whole matter over again and go to all this expense, and I think that it would be unjust and unfair to those persons who are willing to let the matter stand as it is. My clients are not satisfied, and I don't believe anyone under God's heaven could be satisfied, I don't care what you give them, unless you give them what they think they ought to have, and yet we stipulated believing that the duty of water that was agreed upon could be economically used would be sufficient to meet their needs. Now, I do not believe that a change or a retrial of this matter would produce different

results for the reason we find in going over the evidence from other states and also from this state in water cases that there is a certain duty of water fixed and in most of the cases in the trial of this cause that duty, or a similar duty, has been awarded here, and has been stipulated, and in many instances in Utah County the duty has been lowered, the acreage has been lowered, and we do not believe this matter should be opened up and be allowed to introduce their testimony. If the matter can be mer by a reservation of a surplus quantity of water to try this matter out then I do not know that I would so seriously object, but we do believe that the findings of fact, conclusions and decree in this matter should be entered and then if the court feels that some provision ought to be made to protect the rights of everyone and in a way, at least, I sense the feeling the court must have in relation to this matter, it does not want to deprive anyone of their rights, especially of their old rights and old users, but at the same time, the court must look at the matter squarely and that is that every person has had their day in court and unless they can show something more than the fact that they think they have been hurt, this matter ought not to be delayed. I am told-- I have not gone over your Honor's decision with regard to Provo City-- but I am told that that decision gave to Provo City a far greater per capita of water than was ever given and being used by other cities, nearly, if not quite double the quantity. Surely if Salt Lake City can get along with a certain quantity per capita Provo City ought to get along with double or nearly double that quantity. Now, I am not saying that the decision shows that, but I am led to believe by some who have read that decision, and while it may seem premature to argue this matter at this time, not coming formally before the court, yet I feel that my protest in behalf of my clients ought to be entered at this

time against the opening up of this case again or the continuing of time for the entering of its decree. I thank you.

MR. CHASE HATCH: If the court please, without taking time to make any argument on the matter I wish to announce my clients, and all of them, are anxious to have the matter closed.

THE COURT: Let me ask, are the remarks Mr. Ray and Judge Willis have made, do they apply to the suggestion of Mr. Richards that he has not his transcript yet, and for that reason is unable to present what he wants to, or to the proposition of letting the matter go over for a demonstration?

MR. CHASE HATCH: That was my objection, your Honor. I had no objection to a reasonable time being given to Richards and Richards in order that they may go over this matter if it is a reasonable time, and I presume they are hurrying the stenographer as much as he can be after that transcript.

MR. RAY: My suggestion went to this, and I did not intend to go nearly as far as Judge Willis has gone in the argument of the fruits of the decree. My suggestion is this that the decision of the court be now embodied in findings, conclusions and decree, and that the necessary time on motion for a new trial, or whatever it be, be given to Mr. Richards for the preparation of the transcript, of course, and that the decision embodied now in a decree.

THE COURT: Your suggestions were in opposition to Mr. Richards suggestions he needed further time on account of the transcript?

MR. JOHN E. BOOTH: A little more explanation. In our stipulation as set forth in the answer and testified to we understood that that would be acceptable, and therefore we did not put on any testimony as to the duty that was

required up in the river bottoms here, because we relied upon that stipulation, and set forth in the pleadings and testified to, and no objection thereto. Now, as I understand it, this decision does not correspond with that stipulation.

THE COURT: The stipulation, I take it, had with the plaintiff.

MR. JOHN E. BOOTH: Yes; and nobody objected to it except in one instance I think the Timpanogas objected, but offered no testimony in regard to the matter, and we still believe if we get according to that stipulation we will be satisfied, and yet again notwithstanding we are not getting what is stipulated to us, if it is shown we can show or somebody else can show that we have enough, we do not insist even on the stipulation. I realize the importance of water here in this state, as we all do, and we don't want any water that can be used to other people, and still preserve our rights.

THE COURT: Judge Booth, you might obviate all the difficulty if that stipulation that you entered into is a fair one. Of course, it seems to the court that the award given to these people was an abundance of water. Now, if the court was mistaken as to that and it is apparent that the court was, as you seem to suggest, possibly all the other parties would join in the stipulation that you have with the plaintiff. If they did the court would enter a decree upon that, of course. A stipulation with only one party where there are so many parties, does not mean anything except as between the parties stipulating, and the court was compelled, of course, under the evidence that was given to determine what the duty was, and if it is a matter that is so plain that the court's award of fifty or fifty-seven acre duty which is the lowest the court has ever noted in any case the court has ever tried, the court has tried a

great many of these cases, and had to deal with land that required as high a duty as yours does, and I have made the award more liberal to your client than to any other litigant that the court has ever had to deal with. Now, if it is true that this is such an extraordinary situation could you not remedy this situation by getting a stipulation from the other parties. They are all protesting they do not want to deprive anyone of any right they might have, and if the situation is so serious men are compelled to sell their homes because the award of one second foot for fifty-seven acres of land is such that they cannot raise crops upon it, probably this could be obviated by a stipulation with the other parties.

MR. JOHN E. BOOTH: Possibly.

THE COURT: If that is true the court does not want to enter a decree upon it. The court does not want to enter a decree awarding one second foot for that quantity of land if it is apparent that it is so small a quantity of water they cannot raise anything with it.

MR. JOHN E. BOOTH: I recognize the force of your Honor's suggestion, and will be very glad to act upon it.

THE COURT: Unless there is some demonstration to the court there is some land upon which something can be raised and yet cannot be raised without more water, then a duty of one foot to fifty-seven acres, the court would need some demonstration on it, because it would seem to the court from my experience the award was about as abundant with reference to the water as could be made.

MR. JOHN E. BOOTH: I recognize that. In fact, in a good many suits I had before me when I was on the bench, I don't remember one of them where I allowed a duty as low as fifty-seven acres.

THE COURT: I am satisfied there has never been a duty in any case I have had.

MR. STORY: If the court please, as far as water being used for irrigation is concerned, my clients occupy simply a neutral position so far as the several claimants for irrigation was is concerned, and hence more or less neutral position with reference to the question whether additional time should be taken for the purpose of trying out this case. As I have listened to the discussion this morning it seemed to cover two points, one whether or not additional time should be given to those who have objected to the present decision of the court ~~and~~ to argue that matter, and the other is to open the case perhaps for new evidence. It seems to me they are entirely separate and based upon different considerations. I had understood from the beginning that the procedure which we have had in contemplation was in the interest of saving time of the preparation of the findings until after the questions had been threshed out. In other words, if your Honor should prepare findings of fact and conclusions of law at the present time, an opportunity would be given for objections and then the question of the sufficiency of evidence would necessarily have to be argued. I have understood these questions were going to be argued in advance, which would perhaps be out of the regular order, but certainly be in the interest of saving time and work. To that end I understood that Provo City would be given an opportunity to get its transcript. I understand they have attempted to do so. I have further understood it is the desire of all the parties as well as the court, when these matters were discussed to discuss them at one time, rather than piece meal. That certainly is my desire. I had understood, or I had endeavored to prepare the argument for my client, but because of being occupied in California much longer than I anticipated on some very important ~~xxxxxxx~~ cases there, it has been impossible for me to prepare the argument for this

morning, and with the understanding Mr. Davis would be unable to complete the transcript for Provo City, I have understood or presumed perhaps that the argument of the legal questions involved, ^{findings on the} sufficiency of the/evidence would be continued some reasonable time until the transcript could be prepared. For that reason I am not prepared to furnish and present the power company's claim, and I am very anxious, of course, to have an opportunity before your Honor actually makes its final findings, to present the question of the sufficiency of evidence on that particular finding, and if we/^{do}not present it before they were prepared we would have to present it another way, and with all deference to my good brother Ray's suggestion these matters are covered by a motion for a new trial, they are not, in my opinion, covered by that procedure, because a motion for a new trial contemplates going into the evidence again and retrial of the case; does not contemplate an amendment of the decree to conform to the evidence as actually produced, as it is an objection to the findings of fact, so that it seems to me, your Honor, in the interest of all concerned, even though your Honor should decide you do not care to reopen the case for the purpose of letting the present decision be tried out for a season, it would be to the interest of all to have the case continued such time-- that is the argument on the present evidence continued such length of time as would permit the various parties in interest to get a transcript and have the arguments all at one time instead of piece meal, and I suggest that be followed.

MR. TUCKER: Your Honor please, I speak for Little Dry Creek, First Ward Pasture Company, Provo Ice & Cold Storage Company and Excelsior Roller Mills Company, E. J. Ward & Sons Company and Smoot Lumber Company; I would say those clients have no objection to the findings and conclusions being put off until at least Provo City has had an opportunity

to secure a transcript and examination, and we go farther and join with Provo City in asking that a final decree be not rendered in this case until after the next irrigation season. Now, in doing that we consider that this case is not--

THE COURT: Let me suggest this, I do not understand that question is before the court at this time. If it is I will suggest some points with reference to which I want some information on, but I do not understand anyone has made an application for this matter to be held for demonstration yet. I asked Mr. Richards and he said he did not make that application now, he merely suggested he would later. There are some questions in the mind of the court I want to hear from counsel on when that matter is presented. The very first one is as to the power of the court. In other words, I might suggest it now as well as any other time. Suppose the plaintiff, by its attorney, or the Provo Bench by its attorney appealed to the Supreme Court for a writ of mandate to require this court to enter a decision, and enter findings and decree in this case after a decision has been announced, tentative decision it is true, but I want your views upon the question whether you would have any defense to that writ if it should be applied for when the time comes to argue it, but I do not understand it is before the court for argument now, and I will hear you though as to your suggestion with reference to waiting until the transcript can be procured?

MR. TUCKER: I took it that Mr. Ray in his ~~speech~~ ~~speech~~ speech had practically asked the court that findings and decree be prepared immediately.

THE COURT: Yes.

MR. TUCKER: And if I am right then in that assumption my statement of the position of this client opposing that I supposed was in point now.

THE COURT: Certainly.

MR. TUCKER: We consider this case to be out of the ordinary, we take it your Honor would so consider it, and that the Supreme Court would consider the taking of evidence in a case of this sort is largely a theoretical matter, and the case is out of the ordinary. Now, we take it that inasmuch as each of the clients that I have named is receiving considerably less water under this decision or tentative decision, than they have ever received before, as is shown by the record, that there is one convenient way of getting evidence on that matter and that is to put this water which is given under this decision actually on the land and in the wheels. That is the most convenient and best evidence that could be secured. There is one way of determining and getting that evidence and that is to give the thing a trial for a season, and it is our position that even though a writ of mandate were asked of the Supreme Court that they would consider that question.

THE COURT: I will hear that when the time comes. I will hear the argument on both sides upon that, but I don't consider today, unless it is presented in some different way than it has the question of continuing this matter for demonstration. I do not understand that is before the court for determination at this time. The only question I am to determine now, as I understand it, is whether Provo City shall be permitted time to procure the transcript which has been ordered, and was ordered sometime ago, before they are required to make their argument upon their suggestion this tentative decision, or the decision as announced should be changed before the findings are prepared, and whether Mr. Story should be required to proceed with his argument before such time, before the entire argument is made, and Mr. Soule, I think, has an argument.

MR. RAY: May I make a suggestion. My contention is not at all, of course, if this is postponed in behalf of

Provo City that all arguments should xx not be postponed.

MR. TUCKER: Replying then to the question before the court, I will say for the clients I have named there is no objection on their part to the case going over until Provo City has had time to examine the transcript.

MR. JACOB EVANS: You represent Provo City as well as these other men you have stated?

MR. TUCKER: We represent them with associate counsel, yes.

MR. SOULE: I am very much in the position of Mr. Story with reference to the argument I desire to raise. It has been practically impossible for me to brief the matter since the last hearing account of being in court almost entirely since then. My contention though is purely a question of law as the evidence as it now stands, question whether we are entitled to 841 acre feet of water in our reservoir instead of 500 as concluded in this decision, and I will submit your Honor authorities right away on that. It is a pure question of law. Now, my clients write me they have discovered another error in the decision of the court, some of their rights under the Fulton decree. They advised me that the right of Christine Fraughton as administrator of the estate of Henry Fraughton, deceased, and successor to Marshall Leffler should be first class two acres.

THE COURT: Have you the page in the decision?

MR. SOULE: No, I haven't got the page. I just have this letter. First class two acres, 33 thousandths of a cubic foot, second class thirteen acres, 217 thousandths cubic foot, seventeenth class 125 thousandths cubic foot. The acreage is not given, but it would be for the whole acreage. Samuel Gines, Sr. should read first class eighty acres, 1.333 cubic feet, 17th class 666 thousandths, and the claim of Samuel Gines, Jr. should read successor of G. O. Ellis instead of successor of G. O. Ellis and Samuel Gines, Sr.

I will submit a statement of it, your Honor, in writing, and call your attention to the page.

THE COURT: Yes, and call my attention also to the pages upon your pleading that justify this, where you have plead it, I take it you have this copy.

MR. CLUFF: If the court please, as far as my clients are concerned, especially the Provo Pressed Brick Company, I am in the same position as Judge Story this morning. The case with reference to that company was opened by the court, and I did expect and will likely offer some little evidence, but learning that Provo City would be unable to present their case here this morning, I did not prepare, and, of course, would like to have an opportunity to get ready to present whatever they are going to at the argument, and for that reason we are perfectly willing they should have more time, because we are not at this time just ready to present our argument, because we want them to be ready before we do.

MR. ROBINSON: If the court please, as far as my client the Upper East Union Canal Company is concerned, we are willing that Provo City shall have such time as is reasonable to obtain the transcript, and these other people and clients who desire to argue their motions may also have such time as they may desire.

MR. JACOB EVANS: This question rather reminds me of a party starting out at the foot of the Wasatch Range and trying to climb over the range and thinking when he gets to the first ridge he has got to the top, then he sees another ridge and has to climb that, and he has to continue on and on. Provo City claims now to require additional time because some of their attorneys have been elected to the Supreme Court bench, some of them have moved out of the state and they have new counsel in this case. If the case drags out as slowly as has been going on in the past in all probability

the Provo Reservoir's attorneys will be dead, some of them, and they will have to have the case delayed. Some other client's attorneys will be dead, and they will have to have time to investigate. Now, this case has been tried, as Mr. Ray stated, all the evidence was introduced that anybody cared to introduce. The court was extremely considerate of everybody's rights in this case, they were heard from time to time with great patience and at great expense, the case was thoroughly argued some four or five days were taken up in the arguments of this case by Judge Corfman, by Mr. Mat Thomas, by Mr. Tucker here, by all of the attorneys who desired to represent Provo City, men who had been through this case and knew it from A to Z, men that were competent to try lawsuits, or reputable standing at the bar and in the community: They have had their day in court. Judge Hatch today is a sick man; we do not know whether he will be with us in the course of three or four or five or six months. We may be deprived of able counsel that has represented us all through this case, and we insist, and we think we have the right to insist that this decree shall be made up. We do not think it is a question of votes in this community, and we do not think because people seek ~~through~~ new counsel-- they may get tired of this counsel as far as we know, or they may die, and some other counsel have to read the record. Now, we insist this decree should be made up and we ask now that the court appoint somebody to prepare its decree in accordance with the findings that the court has made, and ^{if} then/after this decree is made up it is formed as it should be let each party have an opportunity to have a copy of that and let them make their specific amendments, if they have any, to the proposed decree in its form before it is signed, and let it then be made. We are getting no where in this way, we are merely coming down here and spending the time of ourselves and the money of our clients and getting

no where, and the whole thing seems to be a question of delay, delay, putting it off from time to time and we want, our clients want, and we think we have a right after a case has been heard and all the evidence has been introduced and thorough arguments had without any limitation upon anyone, and by able counsel, we think that we now have a right to have this decree prepared in proper form and submitted to the court; if the court shall think it is fit and proper which it may, after the decree is prepared to have a copy of that decree served upon the attorneys for the various parties, and then require them to make their specific objections to the specific things in the decree, and the time fixed for hearing, all well and good, but we do not think that we ought to continue to meet here from time to time and postpone this matter from time to time. When we met before we did not do anything. We are meeting again, expecting we were going to have this matter closed up, and now we meet exactly the same thing, and I say there ought to be an end to this thing somehow, and we ask the court now to name such attorneys as he may think proper, or to name certain clients as he may think proper to prepare this decree, that it may be prepared, and then that a copy of it may be, if the court sees fit, served upon the various parties in this case, and that they be given a certain time ~~xxx~~ in which to make specific objections to the things set forth in the decree if they are dissatisfied with them. If we argue this now, then the decree is made up I assume they will want to argue it before the decree is signed on the specifications they desire to ~~xx~~ set forth in changes of the decree. After that is done they will want to reargue it again on a motion for a new trial, and I say we ought to get somewhere, we ought to do something, we ought not to let this matter lay upon the table and let counsel come in here and suggest by oral statements a change ought to be made here, a

change ought to be made there. Let us get this thing to going as courts usually go. Let us do it in the usual and ordinary and regular way, and then we will be getting somewhere, and everybody will understand where we are. That is our position. We say it is unjust to us to have this matter go over any longer, we say it is unjust for everybody, and the whole sentiment here seems to be that they want to retry this case over again, they want to gather new evidence. The evidence has been examined, it has been heard, the very things that ^{are} ~~I~~ suggested here this morning by Judge Richards that experiments ought to be made, were made, were testified to, the testimony is in the record, and it simply means a re-opening of the case. Now, we think everybody has had their day in court and we think this decree ought to be prepared and we do not think there ought to be an adjournment now until the court appoints somebody to prepare this decree and get it in condition, get it in shape. That will give ample time then for this record to be written up by the reporter, but I think something ought to be done to get us a little further advanced in this matter instead of standing still and doing nothing.

THE COURT: I will just make this suggestion. When the suggestion was first made by Mr. Richards that he desired an opportunity to have a transcript and examine it before he presented some arguments with reference to this decision the court postponed the matter and by doing that encouraged Provo City to order a transcript. They have ordered a transcript, gone to a large expense to have that transcript, and the court would not feel at this time that a fair treatment was being accorded Provo City if they were not permitted the opportunity to get the benefit of the large expense that they have gone to by reason of the acquiescence in their request at the time they made it. Gentlemen, I would not feel the court was treating them fair

at all if the court did not give them an opportunity to get this transcript. As to the other matter I will not express any views at this time because it is not before the court for determination, but the matter will be postponed until that transcript can be procured, because the court encouraged them to make that expenditure, and now I would not want to cut them off from it.

MR. JACOB EVANS: This is the point which I seek to make concerning that. It is apparent upon its face what they are seeking is further delay that further experiments might be made, and we think that the court ought to appoint somebody to put these findings in to the shape of a decree that will give them the necessary time that they are now seeking to have the transcript prepared. It will take some time to prepare that decree. When the decree is prepared, then ^{them} let ~~xx~~ point out specifically wherein they want that decree changed and give the reason for it. If we adjourn now--

THE COURT: The court has no objection to the attorneys among themselves preparing the findings and decree in accordance with this announcement of decision and having them ready if they care to at that time. There is no reason why they should be prohibited from doing that, but I do not think the court ought to appoint anyone until it is finally determined whether this shall be in all respects the basis of the findings and decree.

MR. RAY: And that decision would await the argument on the question of Mr. Story and Mr. Richards.

THE COURT: Yes, under our statute and the ruling under such statutes the decision consists of a finding and decree. This is not a decision in the sense referred to by the statute. Of course it is an announcement of the court of the conclusions the court has arrived at from the evidence introduced and considered. The case was submitted and with reference to the reopening of the case I take it the case

is reopened for a particular purpose, and stands open now so far as Mr. Cluff's client is concerned, the case was reopened for you, and any rebuttal of that particular evidence Mr. Cluff would have an opportunity to present. It has not been opened, as I understand it, for anything beyond that. You introduced the original application made to the State Engineer which did not conform to the certificate issued by the State Engineer. Now, there may be some rebuttal of that evidence. Mr. Cluff wants to introduce, and which, of course, he has the right to do.

MR. JACOB EVANS: Certainly, but he is not prepared to do it. The trouble is we come here, and he says he is not ready, Provo City says they are not ready, Mr. Story comes here and says he is not ready, now we want to do something that will make these people get ready to go ahead with this case.

THE COURT: I think, Mr. Evans, there is some excuse for them in the possible outside understanding that has existed that the matter would all be presented at once, and having inquired as to the success with which Provo City was getting its transcript, the ~~xx~~ rapidity with which it was being made, they have all concluded and probably properly too, that the court would prefer those arguments and presentations all made at the same time, same session of court at least, and I think all parties would prefer that should be done.

MR. JACOB EVANS: Oh, I think that is the proper thing to do. When we come to the point of arguing this matter we should argue the matter in Salt Lake City, as it was done before, but I think we ought to know specifically what they are going to talk about. I think they ought to file some paper what particular part of this decision they object to.

THE COURT: Mr. Hatch prepared very definitely in

writing and Mr. Story just exactly what they expected to be heard upon, and I think Mr. McDonald presented in writing the corrections that he desired. I think aside from that there is no other.

MR. JACOB EVANS: We ask the court to fix the shortest time possible for this transcript to be prepared, and we want to make it emphatic we insist upon this decree being signed in some form at the earliest possible day, some form or other so that we can proceed and go ahead. Our clients are put to very great expense concerning this matter, and other clients.

THE COURT: I am inclined to think with reference to the expense there are many of the litigants here that ought not to be required to join in paying any part of the expense occasioned by these hearings. There are many of them that are not interested at all. I think Mr. Willis' clients, probably none of them are interested in the matters that are causing this delay, and many of the others are not, so that I do not think these expense incident to these hearings ought to go as the general expense. I think the parties vitally interested in this question should bear the expense.

MR. MCDONALD: I would like to say, your Honor in connection with that, the people in Wasatch county are not taking any active part in this because it is understood by them they will not be charged up with this extra proceeding. I suppose that is true with Summit county?

THE COURT: I do not suppose any of them are interested at all in this proceeding.

MR. MCDONALD: While on my feet I would like to suggest to your Honor I have gone through the index to these files and I am unable to find an answer of Mr. North, I called your Honor's attention to this morning. However, I have a copy of the office files which shows it was filed.

It may be in the stipulation but not indexed. I have not gone through the files.

THE COURT: I have before me an alphabetical list of every person who had appeared in the case in any way, and when we checked over the awards that I had made every person who had appeared according to the record and according to that list I had, had been awarded something.

MR. MCDONALD: Except the clerical errors.

THE COURT: Except the clerical errors, of course, which we have corrected. That is the reason, gentlemen, in each instance I have asked you to find in the record the pleading. If there was no pleading filed you ought to have an opportunity to file one.

MR. MCDONADD: We claim nothing only as decreed in the Fulton decree. It may be I omitted to file it with the clerk.

THE COURT: That may be attended to when you check up. I will leave the files here.

MR. MCDONALD: If I discover it is not on file I will file an answer.

MR. A. L. BOOTH: If the court please, in this matter of postponing, we should like to know whether Provo City is going to ask the court to open up the case for further testimony or not. Mr. Richards has not told us.

MR. RAY: Mr. Booth, how can he determine that until he reads this record?

MR. RICHARDS: That is what I answered.

THE COURT: I understand Mr. Richards at the opening of the court when he first appeared stated to the court he was unable to announce to the court what he desired to do because he was not familiar with the evidence, and if he could have an opportunity of examining the evidence he could then announce to the court what steps he desired to take, and I understand he has not that transcript yet.

MR. A. L. BOOTH: I understood the court to state a mement ago that except for Mr. Cluff and his client the Provo Pressed Brick Company, there would be no opportunity given for further testimony.

THE COURT: I did not intend to say so; I merely stated the case had not been reopened at this time for any other purpose that that occasioned by the introduction of the certificate of appropriation of the Provo Pressed Brick Company, and the case was opened for that purpose, and Mr. Cluff at the same time would be permitted to introduce such evidence as he had, but I did not intend what the court would or would not do in any other respect.

MR. RAY: I was merely going to try to end this thing by asking the court to fix the first Monday in May as the date for the presentation of argument in this matter. Reason I suggest May is somewhat a matter of my own convenience. I have the April Grand Jury in the Federal Court, and I have inconvenienced myself a great deal to meet some of these dates, and would like to not have a hearing during April.

MR. STORY: Would it be convenient for you last Monday in April rather than first Monday in May?

MR. RAY: Doesn't give a full three months, and I am sure Mr. Davis will ~~be taken~~ need three months.

MR. CHASE HATCH: There are several counsel that will be engaged in the trial of a case set at Heber first week in May.

THE COURT: Counsel who will be interested in this matter?

MR. CHASE HATCH: Yes, and I wish to say further in my objections made here I did not wish to be understood as discussing the question of Provo City and their rights, but having filed motions, several motions, for modification of the decree my clients are interested in the delay, putting

it off and having to appear so many times.

MR. JACOB EVANS: It is the same old story. Every lawyer that has any business at all has got cases, and I may have cases, every one of us have cases now we cannot set this matter for the convenience of one attorney because it inconveniences other attorneys. Then when we do set a date to come here-- Brother Story has had a long time to prepare, he has not prepared, no reason why he should not be prepared to go on, and the same way with Mr. Cluff. It seems to us a vacillating proposition to delay this matter and we insist on getting to this decree as early as we can.

THE COURT: The court wants to. The court wants to get it off its hands entirely as soon as he can. Did you answer Mr. Story's question?

MR. RAY: Second Monday in May would be more satisfactory for me, because I think we will have one of these unnecessary meetings which are irritating to Mr. Evans and the most of us, if we set it too early.

THE COURT: I think I will postpone the matter until the last Monday in April. I think from what Mr. Davis says that will give time to get a transcript out, and time for Mr. Richards to examine it. Mr. Davis hopes he will be able to get it out in two months, and that gives us three months. If, however, Mr. Davis should find that he is not able to get it out I will arrange with him so that he will notify me in time, and I will have all parties notified not to come, and we will postpone the matter. Unless some different arrangement is made we will come back on the last Monday in April. What day will that be? The 29th of April, at which time we expect Mr. Soule, Mr. Story, Mr. McDonald and Mr. Cluff to be prepared with the matters they are to present.

MR. JACOB EVANS: May I suggest if the court is going to meet last Monday in April for the purpose of hearing

additional argument whether it will be satisfactory to hear that argument in Salt Lake City instead of coming here.

MR. RICHARDS: It will be entirely agreeable to us.

MR. STORY: Suit my convenience.

THE COURT: It goes without saying it would suit the court's convenience, of course. If there is nothing further in relation to this matter the question of Commissioner should be settled today.

MR. RAY: Your Honor please, I ask without having prepared a formal motion that the court enter an order appointment Mr. Wentz at such salary as the court may think equitable for the administration of the waters of this system for the year 1918, with this provision that the water shall be distributed in accordance with the tentative decision handed down by the court, except in this respect, that for a period of readjustment the commissioner may have the privilege of taking from secondary water and converting to primary water a sufficient quantity of water to take care of clients whose systems are not now in accord with the quantity of water awarded to them. I should say ~~thexnux~~ a quantity not in excess of 20 second feet, and such quantity as the commissioner may think necessary for the purpose of helping the water users during the period of readjustment. This is not to be construed at all as for a period of experimentation, or anything else, but for the period of caring for this during the readjustment of their system, because I do not want to be estopped on that at all.

THE COURT: I think I understand.

MR. WILLIS: May it please the court, I would like to second the suggestion of counsel as to Mr. Wentz, for the reason Mr. Wentz is more familiar with the matter than any new party could be. I therefore think that my client would be satisfied and we indorse, and would like to see

your Honor appoint Mr. Wentz for the incoming year.

MR. RICHARDS: Your Honor please, in behalf of Provo City, we object to the appointment of Mr. Wentz at the present time, and ask the court to indicate a time in the future that will be satisfactory when this matter can be considered. We are not prepared at this time to argue the question, nor are we prepared to suggest the name of another person, but my clients, I find, are not in favor of the appointment of Mr. Wentz, and I am advised there are other parties to this suit who are also opposed. Now, what the merits of the opposition may be I am not prepared to say at the present time because we have not gone into it. I had no idea this question would be up to day, and we will be prepared, if the court will give us a reasonable time in which to consider the matter to present our objections.

THE COURT: Could you present them this afternoon?

MR. RICHARDS: No sir, I could not do it today.

THE COURT: I understand from Mr. Wentz that if he is to be considered, that his plans are such he ought to know immediately whether he is to be the commissioner or whether he is not.

MR. RAY: In that respect I might make this suggestion in Mr. Wentz's behalf. I have not talked to him about it, but I do know that the government is very anxious to procure the services of Mr. Wentz if he will consent to serve them, and if he is to do that they must know very soon.

THE COURT: I understand that is the situation.

MR. RAY: It is a position of importance. The objection of Provo City to Mr. Wentz has been seasonal. It has recurred with the season, though I do not know formal objection has been made. Since your Honor was here there has been almost constant dissatisfaction by Provo City as to the appointment of Mr. Wentz, but it would seem to me that the court has observed as carefully as counsel could observe,

or as the officials of Provo City could observe, the character of Mr. Wentz's services, and he is the personal arm of the court in this matter, and while I am certain of course your Honor would not appoint anyone who was doing injustice to anybody, this matter ought to be settled now if possible.

THE COURT: Let me ask Mr. Richards a question. Why, Mr. Richards, couldn't you present your matter this afternoon, could you indicate why you can't do it.

MR. RICHARDS: If your Honor please, I suppose if we come asking for a change of commissioners it would be expected we would make some suggestion of some competent man, who could take the position, and we are not prepared to do that.

THE COURT: But you could give your reasons why you think Mr. Wentz is not proper.

MR. RICHARDS: Possibly, I am not advised as to that, but that was the thought I had in mind.

MR. RAY: Mr. Richards, may I make a suggestion here which I wish you would consider with your clients in that matter. It has been my duty to get engineers for the government and irrigation engineers especially. The war and the added governmental work has created such a dirth of men of any experience in the irrigation matters that it is extremely difficult to find anybody with experience who is open to employment at all, and your clients might take that into consideration, determining whether anyone is available.

MR. RICHARDS: I say right now unless some capable person is available we would not feel justified in urging the objection, and we think-- at least I am adviced since coming here, if we have reasonable time in which to pursue the matter a competent man can be found.

MR. JOHN E. BOOTH: On behalf of the West Union Canal

Company, Lake Bottom Canal Company, East River Bottoms Canal Company, Faucett Field, Barton & Young, Park and McBride, all of those, we are opposed to the appointment of Mr. Wentz as commissioner. If the city gets ready to present theirs I will ^{not} under take to present reasons now but wait.

MR. TUCKER: In behalf of the clients I mentioned the Provo Pressed Brick Company, Little Dry Creek Company, and four power users, I will say those clients are opposed to the appointment of Mr. Wentz this time, and we can be ready.

THE COURT: With reference to the four power users you speak of were they awarded anything, have they any interest in this case at all?

MR. TUCKER: They were made separate defendants.

THE COURT: And disclaimed any interest in the water.

MR. TUCKER: They disclaimed to be the owner of the water, but they were awarded user of the water, I don't know exactly what it is myself.

THE COURT: Not in this decision.

MR. TUCKER: Provo City was given a certain quantity of water for their power rights.

THE COURT: If I remember correctly, that is the reason I ask, so that you may know the view the court takes, my view is those power users are not in this case at all, they have no interest in the water. They have disclaimed any interest. They say they do not own it and merely use it under an arrangement with Provo City, and the court awarded that water to Provo City, and they can do what they please with it as far as this ~~my~~ decision is concerned. They can use it for culinary purposes or any other purposes.

MR. TUCKER: They were awarded that water for power purposes.

THE COURT: They can change the ~~xxxx~~ use. It is described merely as the water theretofore used by these power

companies, but the power companies are not given any right in the water, and I thought I would call your attention to it at this time, because probably you had overlooked that in the decision.

MR. TUCKER: We understand there is some question as to the exact status of these power owners; they maintain they have some rights.

THE COURT: They did not maintain it in the case. I am disposed to take this matter up this afternoon and determine it, because I think in fairness to Mr. Wentz if he is to be considered by the court he should know it. I know the application you speak of has been made to Mr. Wentz, and know how anxious they are to get his services, and he ought to be free to deal with such parties, if he is not to be required to pursue this work. Now, are there any other features we take up before the afternoon session, when I will take up nothing probably except the appointment of a commissioner. If there is not the court will take a recess at this time to one o'clock.

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

MR. C. C. RICHARDS: May it please the court, we have no specific objections to file or make as to Mr. Wentz, but we renew the objections that I am informed were made to his appointment a year ago. Our clients, Provo City, feel as though the commissioner has not been quite fair to them in the discharge of his official duties. There is a want of confidence there that we feel that should exist, or they felt should have existed heretofore, but has not. We feel that in the appointment at this time of a commissioner to carry out the order of the court and findings and decree after it shall be entered that it would be proper to select

another man of equal qualification and equal standing in the community that can have the confidence of all parties to the litigation. The officials of the city feel as they say they have felt, that the commissioner is rather closely, associated, too closely associated with the plaintiff and plaintiff's interests to occupy this position with absolute fairness to all parties. That he is also a land owner, and a user of the water under one of the canals. Now, there is nothing personal in this, if your Honor please. We do not desire to make it personal, but we feel that in this litigation that is of such importance to all of the parties, that there ought not to be any question or feeling of doubt as to the confidence in the party who is to execute this order of the court. That is the way we feel about it, if your Honor please.

THE COURT: There were some other parties.

MR. CLUFF: If the court please, I am instructed by my client, the Provo Pressed Brick Company to say that they would prefer having another engineer that is here.

THE COURT: I am anxious to give all the parties an opportunity to be heard. Judge Booth suggested -- do you care to present anything with reference to the appointment of the commissioner further than you have?

MR. JOHN E. BOOTH: Nothing further. We have not had any consultation, we did not expect an appointment at this time. Of course, under the present conditions there cannot be any distribution of water for a month, or anything of that kind, and we were not prepared. All those clients I mentioned oppose the appointment, but I will say that if Provo City has a man to present I think we would concur with them.

MR. RICHARDS: We are ready to suggest a name if your Honor desires one.

THE COURT: Gentlemen, no reason has been given

yet why Mr. Wentz should not be continued. The mere fact, as Mr. Cluff said, his clients would prefer someone else be appointed, and suggested that Mr. Wentz is too close to the plaintiff, without any suggestion at all as to any connection with the plaintiff, I don't know just what was meant by your suggestion. If Mr. Wentz is in the employ of the plaintiff, or in any way connected with it, ~~it~~ it might be an objection to his reappointment, but I did not understand you to make that suggestion, did you?

MR. RICHARDS: No, it is not our purpose to file any specific charges or put Mr. Wentz on trial. It is simply a matter we have not confidence in Mr. Wentz, and we think we should have, on the general statement, one that we have a confidence in.

THE COURT: Do you care to make a suggestion?

MR. RICHARDS: Yes sir, Scott Stewart is a resident of Provo, twenty or twenty-five years experience, a civil engineer, and I am informed eminently qualified in every way to discharge this office.

MR. JOHN E. BOOTH: We will concur in that suggestion.

MR. ROBINSON: As far as the Upper East Union Canal is concerned, we are satisfied with Mr. Wentz. However, there are some of the members of the canal company -- and I think that is somewhat to an extent universal among the farmers-- feel he ought not to be employed for the full year, that there will be work extending over a period of possibly five or six months, and that it is too expensive to have a man at all the time when the work that is really required of a commissioner extends only for a period of about five months, and this company feels if a commissioner were appointed he should not be appointed with the understanding his salary was to run for the period of a year, but should be appointed for a period from about May 1st until October 1st, or maybe a month longer than that, and that is

the objection that--

THE COURT: That same objection would apply to anyone.

MR. ROBINSON: That would apply to anyone. So far as Mr. Wentz is concerned, the Upper East Union Canal Company has no objection to file.

MR. JOHN E. BOOTH: I suppose the question of salary would come up after the appointment was made, and I would like to be heard on that question.

THE COURT: You might discuss it all at the same time. It is possible Mr. Wentz or Mr. Stewart, or whoever might be requested to act might not want to accept it if the salary was made too low. Possibly be well to give your suggestion as to that, Judge Booth.

MR. JOHN E. BOOTH: The people whom I represent feel that it is a very great hardship on them the way things have been going. I think in one company their expenses since this suit commenced have run up a thousand per cent over what they were before. Up to the time of the filing of this suit Hyrum Thomas was commissioner for some years, A. L. Booth commissioner a while, and Demoisey, T. F. Wentz one or two years, and the expenses were practically nominal, and now it has got so that it is really a burden and we certainly curcur in the idea that it should not pay an annual salary at such rate as it has been going here. There isn't any chance of stealing water now for anybody, consequently there is no particular need of a commissioner today, and won't be until probably May, or along middle of May or first of June. Now, the water is there running to waste, nobody wants it, probably be water running into Utah Lake until the first of June all the time, everybody can have all they desire, all they need, all they want, because it is there and nobody to interfere with it. Now, why they should pay a commissioner two hundred dollars a month for nothing, actually

nothing, why, they don't like it, and when it gets so the water has to be divided and regulated, why, of course then there ought to be a commissioner and he ought to be qualified and ought to be honest and true, and will do what is right under the orders of the court. I notice this that the clients who received more water under this proposed decree than they ever have received before are quite well satisfied with Mr. Wentz. Those people who have had their water cut down, and many of them have, I think there is hardly anyone but what are dissatisfied with Mr. Wentz. I suppose the inference is they think he has not treated them quite fairly.

THE COURT: You mean in the findings?

MR. JOHN E. BOOTH: In the findings and in the distribution, and they are quite earnest about this and yet respectful, but they certainly want a change.

MR. ROBINSON: If the court please, just a little objection to one statement of Judge Booth. I think the Upper East Union Canal Company is not wholly satisfied with the decree, but we are still satisfied with Mr. Wentz. We have been cut down somewhat.

THE COURT: I didn't understand anyone was referring now to their satisfaction or want of satisfaction with the decision of the court, but merely as to the administration of Mr. Wentz in dividing this water under the tentative orders that the court has made from time to time in this case.

MR. ROBINSON: I so understand it, ~~but~~ and that is referred to, but we thought we should make that known, we are not objecting for that reason.

THE COURT: Any other suggestion with reference to the personality of the commissioner or the salary?

MR. RAY: Your Honor, I had suggested the appointment of Mr. Wentz, and as to one or two suggestions made I might

now give the court my views upon them. As to the question of salary, it might be perfectly possible that there would be but two months out of the year during which there would be an actual division of water as between the primary users. I can conceive of such a situation. I suppose that would have been true last year, that was never a time but there was sufficient water for the primary users, and it might be contended there was no time last year but what that was so, but we cannot get competent men to hold themselves in readiness twelve months to draw one month's salary. In addition to that the commissioner under the decree of the court, will be the supervisor of the system to see that the necessary gates are in and ditches in good condition. Now, we attempted on the Uinta year before last to put in a commissioner late and thereby save expense. As a result we found when the water needed division there were no appliances for its division and there resulted from that great confusion and great loss to the farmers. Under this system there are about forty-seven thousand acres of land, and to raise the commissioner's salary, if he works twelve months, would require about five cents per acre or five dollars for a hundred acre farm. That is not a very great burden upon anybody to have the assurance the water is being properly distributed. There are some expenses incident to this, and I am not at all anxious to raise the expense of any of my clients beyond the point necessary to get competent service, and have some objection on the part of one client at least to the apportionment of the expense, but that has nothing to do with the commissioner, the apportionment of the expense is not for the commissioner, it is only for the court if anybody has any objections to the apportionment of the expense. Judge Richards has suggested we ought to have a man who could have the confidence of all. The only man who could have the confidence of all is the man who has

never serviced, and the minute he has served a month then you have to get a new man. It is utterly impossible, a commissioner serving ten thousand water users should always have the confidence of all.

MR. JACOB EVANS: Fifteen thousand users.

MR. RAY: Takes a man who has the intelligence, courage and experience to administer this decree, and there is no objection but Mr. Wentz has done all those things. Mr. Stewart is a personal friend of mine, engineer of high standing, and is a resident and water user of Provo, two objections that are urged against Mr. Wentz. If it can be shown that MR. Wentz has any connection with anybody here which renders him less efficient, I for my client, shall not suggest his appointment, but no such thing has been made, and I assume therefore it could not be made. In addition to that there is the question of experience with the use of the waters under this system. It takes a considerable time for a man to be able to do the work quickly and efficiently, and know the system itself. Mr. Stewart has a fair familiarity with that, although he has never devoted the time to it Mr. Wentz has. It seems to me there is no objection applying specifically to Mr. Wentz that could be taken into consideration. The question of salary is not what we would like to pay, but what is necessary to pay in order to get a good man. Engineers are in demand. Engineers of experience are in demand and men cannot be required to hold themselves in readiness for one, two or three months work per year, and I assume neither Mr. Stewart or Mr. Wentz would consider a salary of five hundred dollars for two months if that was all the work there was to be done on this system.

MR. WILLIS: May it please the court, I, in behalf of my client, want to do anything I can in reason to cut down some of this expense, because it has become a great

burden on them, and the question is this, however can we get an experienced and capable man under other conditions. If we can, or if we can get Mr. Wentz to work for less, then I would like to see it done. I do not know Mr. Stewart, but I know this, I do not care how competent and how capable an engineer may be, it costs something to learn what Mr. Wentz has learned in the years that he has served in that capacity, men being equal in other respects. That is in favor of Mr. Wentz. I have no particular favor, so far as any man is concerned, but it looks to me like Mr. Wentz is the most competent man by reason of his experience, and unless there are specific charges that he is not doing his duty I do not think that he ought to be displaced by a new inexperienced man. Those are my feelings exactly. I don't know of Mr. Wentz having favored anyone. I was prejudiced against him in the beginning, but I found my prejudices were without ground, and since that time I have learned to place confidence in him, and my prejudices were renewed by reason of what appeared to me to be the fair handling of the water system for all persons concerned.

MR. JONES: I asked Mr. Ray to make an objection to Mr. Wentz on these grounds that the expense for twelve months in the year we object to, but as a man for dividing the water, and so on, we did not object to him, but we do object to paying him for twelve months in the year instead of six, and his expenses we do not think have been divided equally among the ~~xxxxxxxxxx~~ litigants in this case. We feel as though he has put a little extra onto us, but it may be that it is all right. We have not had the privilege of having one of your decisions, so we hardly know what is contained in that. Mr. Ray had one for the Provo Bench, but we did not get one for the Timpanogas Canal. In fact, we really don't know^{only} what we have borrowed from our neighbors what is in there.

THE COURT: Do you feel the method of apportioning the costs and expenses as designated in this decision is wrong?

MR. JONES: We do not think he has divided it in proportion to the acreage that is under the system. Now, for instance--

THE COURT: You mean heretofore.

MR. JONES: Yes sir. Now, the power plant he informed me was paying about eighty-five dollars a year, paid more some years and some years run sixty-five. Heretofore we paid five dollars and sixty cents is the most we ever paid until this litigation started. Since then we have paid more than that every month.

THE COURT: I am free to say so far as the objections to Mr. Wentz is concerned, there is nothing been called to the attention of the court that would justify the court in giving any serious consideration to them. No one has suggested except the last gentleman, possibly, there had been some discrimination in the adjustment of expenses and aside from that-- there is nothing definite as to that-- no one has even intimated that Mr. Wentz has not been always eminently fair in his administration of the orders of the court, and unless some suggestion of that kind is made, or unless it was shown that he had some connection in some way, bore some relation to the litigation, I would not think that his position would in any way militate against his reappointment. There are so many reasons to the mind of the court why a change would be disastrous at this time that I am disposed to appoint Mr. Wentz, unless it is shown, unless the court was satisfied that the salary that he would acquire was out of proportion to what ought to be paid. I know nothing as to what Mr. Wentz might say about the subject, and possibly it would be well for the court to take a recess for a moment or two so that some consultation could be had with Mr. Wentz

just how he feels about accepting the appointment and what pay he would have to have. I have just been examining the order that was made continuing Mr. Wentz in the position to which he had been appointed before I had anything to do with the case, and I find there that the order was he be paid two hundred dollars a month. I do not think I ought to make the appointment until Mr. Wentz has been consulted about it, and if some of the parties will consult with him and find out just what the situation is.

MR. JACOB EVANS: We suggest the court talk to Mr. Wentz himself.

THE COURT: I would a little prefer counsel would do it, so that you may have a free expression from him. The court will take a recess for five or ten minutes.

(RECESS)

MR. RAY: May it please your Honor, I have talked for the first time with Mr. Wentz, and he announces he cannot afford to take this position and does not care for it at less than the compensation of twenty-four hundred dollars a year, for which compensation he will devote his time to the administration to the waters of the river.

THE COURT: Are there any further suggestions in relation to the matter now in view of the knowledge you have what Mr. Wentz would desire?

MR. TUCKER: Your Honor please, I take it Mr. Stewart would not be in a position to under-bid Mr. Wentz if it came to a thing of that sort, but we explained to him we understood Mr. Wentz was putting in six months at two hundred dollars a month, and Mr. Stewart at that time indicated that if there was no opposition to him he would accept the position under the arrangement which Mr. Wentz had been working. Of course, I am not in a position to say he will

take the position at six months for two hundred dollars a month. I think likely if it was not considered he was under-bidding Mr. Wentz he would take the position. He does consulting engineering work here, and his other work would merely fit in with his employment for six months on the river.

MR. JACOB EVANS: I might make one suggestion with respect to this salary. As I remember it at the time Mr. Wentz was appointed Mr. Tucker, also a civil engineer, was drawing a salary, I think of one hundred and fifty dollars a month-- two hundred a month. Mr. Taylor was also employed. There were three engineers at that time. The services of two of those engineers have been dispensed with by Mr. Wentz. Now, the river system is such, it seems to me, particularly during the time this litigation is going on, as to ~~ik~~ require the services of a man practically all the time. Mr. Wentz is perfectly familiar with it, and we think he ought to be retained in the position he now holds at the salary he would expect. We think it would be very unwise to make a change at this time.

THE COURT: Then I understand that the salary has been two hundred dollars a month for quite a number of years?

MR. JOHN E. BOOTH: Not for a whole year, your Honor please, never has been for a whole year. Speaking for the people who have to pay, there is a godd deal of difference between the fellow who has to pay and the fellow who gets it, and I am speaking for the people who have to pay, and they are very much opposed to paying for six months in the year, from October 1st to April 1st, when there is not a thing to do, that is any use to us. Of course, I do not mean but he could find plenty of work. He could draw plans and make ditches, but it is no use to us when he got through. All of my clients are very much opposed to this extravagant expense we are being put to, and if this

goes at two hundred dollars a month for the year it is going to increase it about a third more. We do not like it.

MR. MCDONALD: Your Honor please, personally I would prefer Mr. Wentz to anybody I know of as an engineer, but my clients in Wasatch county who own the major portion of land and water in that county do not need an engineer for more than three months out of the year. They have absolutely no use for anybody, as I understand them, longer than that period, and I feel they would be very much opposed and feel they were imposed upon by paying for twelve months out of the year when they could along very nicely with two or three months.

THE COURT: Do you think your people in that county could get along if a commissioner was appointed for only two or three months in the year?

MR. MCDONALD: Yes, your Honor, they have got along until this suit was commenced on an average of about sixty-five dollars a year for two months service, as I remember it, probably a little over, and since this suit started their expenses have been five or six hundred dollars a year.

THE COURT: I don't think you really mean, Mr. McDonald, that your people think their rights could be taken care of with a commissioner on this system for only two or three months in a year. During the rest of the time everyone taking water just as they cared to.

MR. MCDONALD: Yes, your Honor, I understand up in that valley.

THE COURT: Their rights should not be interfered with?

MR. MCDONALD: Their rights should not be interfered with. As a rule there is plenty of water and will be under the system during the high water period up to practically July 1st, during which time they do not need any commissioner. Then there is July and August, period they

do need a commissioner to distribute water, and I think if I remember I called the court's attention to that and also offered some evidence during the trial of the case by Mr. Clegg that the irrigation season in that county was two or three months for which they would need a commissioner.

MR. SOULE: I think what Mr. McDonald says also applies to our clients in Summit county, their rights are being adjudicated very largely; no dispute as to the amount of water they get and time they get it. I think before this water suit was commenced they had very little expense, if any, on the distribution of water, and there is half a year in which they do not need any water.

THE COURT: I do not think those suggestions would have anything to do with the salary that was paid or the time the commissioner-- it might have considerable to do with the apportionment of the costs. If it could be conceived there are users who are not interested in the distribution of the water except during two months, or the storage of it, or interfered with it any other time, why, of course probably they ought to be taxed with the costs in proportion to the time they have an interest in it, but I do not understand your people are just in that situation.

MR. RAY: It seems to me that is utterly at variance with the evidence in this case. The reservoir is turning water whenever it becomes low, and every water user is interested to see that they only take out what is turned in.

THE COURT: I understand these gentlemen say there is only two months when they care how much they turn in or how much they take out. I hardly can see how that can be, how much they store, or how much anyone else might interfere with the stream. Is that true, don't you use water for any purpose more than two months in a year.

MR. MCDONALD: If your Honor will remember the

testimony of Mr. Clegg, he is one of the leading irrigators in Wasatch county for forty or fifty years, and my remembrance of his testimony was they would ~~not~~ have no need for the water commissioner outside of three months in the year. That is my remembrance of Mr. Clegg's testimony. I have talked it over time and again with him, and he said three months would be the limit for which they would need a commissioner or engineer.

THE COURT: My recollection of the decision is you have some awards that extend over the three months, and the awards to others interfere. The fact that before litigation parties were without expense is hardly an argument, what the expense was with reference to the expense afterwards, because that is always the case up until the time some trouble commences, parties have no expenses whatever. Taking water out of a stream after litigation is instituted, there are certain expenses, of course, that must be borne.

MR. C. C. RICHARDS: May it please the court, it seems to me what has been said is very strong and persuasive argument in favor of the appointment of Mr. Stewart. From the first of November until the first of May I cannot imagine there could be a distribution of water needed by a water commissioner. Certainly the irrigation is over by the first of November, and certainly the water is so high during April there could be no need of distribution before then. That then leaves six months, May, June, July, August, September and October, might take in another month, leave it at six months. Now, if these men are of equal qualifications and I understand Mr. Stewart's qualifications-- Brother Ray has testified of it-- only I have no personal acquaintance with him, if you have the matter simply with the service, the acquaintance, the opportunity, with the expense in half, it seems to me that ought to be not only persuasive, but conclusive.

MR. A. L. BOOTH: If the court please, Judge

Richards was not here when the testimony was given. As I recall it the evidence shows that in 1916 there was a shortage of water in April and May, and all of the months except June, and they were getting along with about half of the usual amount in the month before high water came. The Provo Reservoir Company will begin taking water out, I think in April, and will be using it from then until the end of the irrigation season, so that it will be necessary for the services of a commissioner for longer than the three months that are covered by the irrigation season in Wasatch county. Not only that, but I think one reason why their expenses have been so small before the suit began was because they had no contrivances whereby the water could be measured. Mr. Wentz has taken measurements and observations at the head of all the canals and irrigation ditches on this whole system, as I understand, and is prepared now to suggest the kind of devices that should be put in so as to enable the use of the water to be made in an economical way. Now, Mr. Stewart has not had the experience in going over this system. It is true we do not question his competency, but Mr. Wentz having all that information and being ready now to suggest to the users of the system the kinds of gates and kinds of measuring devices that ought to be put in, it seems to me at least for this year there ought to be no change in the commissioner because of the necessity for getting these things in shape, and after that possibly the expenses can be reduced a considerable amount so that a man who is not an engineer would not have to be on the whole system all the time. They might have it so that an ordinary individual can make the observations and tell how much water is going down, but we do not think it would be wise for a change at the present time.

THE COURT: Is Mr. Stewart in the court room. I want to know if Mr. Stewart is willing to take charge of this

matter and do it for twelve hundred dollars a year. Have you read Mr. Wentz's report for the last two or three years, gentlemen?

MR. C. C. RICHARDS: I have not seen it at all.

THE COURT: They are on record.

MR. C. C. RICHARDS: I was going to suggest I presume the observations made by Mr. Wentz are part of the case and they can be read by another man who understands just that kind of business so that it will not be lost to Mr. Stewart if he should be appointed he can take up the record of these measurements and observations and pass upon them same as Mr. Wentz.

THE COURT: I am not disposed, gentlemen-- I don't know the court ought to, although I feel very positive that I am doing an injustice to the litigants, but it is at the suggestion of most of them in making any change, but if Mr. Stewart comes into court and I will examine him somewhat, what experience he has had in water distribution, that is, taking care of water systems, and if he has had the experience I don't know that I ought to require you to keep Mr. Wentz at this additional cost, although I think, gentlemen, my opinion is it will be worth very much more to you than the extra cost from what I have observed of his work as shown by his reports and evidence in this case, and yet where the parties are so insistent they want the ~~extra~~ expenses cut down I think possibly we ought to do it. If Mr. Stewart will say that he will take charge of this work and do all that is necessary to be done from the first of the year to the last of the year for twelve hundred dollars, I possibly ought to employ him.

MR. RAY: That, may it please the court, would involve, I assume my clients Provo Bench, I would insist upon a full report of the distribution during the summer that takes a great deal of office work at the close of the irrigation season. Prior to Mr. Wentz taking charge of this

there was an engineer on each of the three divisions during the summer, and I have not made a comparison, but I assume that the expense to those three men exceeded the expense which Mr. Wentz would now incur taking charge of it alone. There can be nothing of more importance to the litigants here for future litigation and for the purposes of this suit than a complete record of the transaction of the commissioner himself, his gauge heights and everything else, and that must be done during the non irrigation season.

THE COURT: Whoever takes charge of it must take care of the situation during every month of the year, so far as it needs any care.

MR. RAY: I wish to say further I remember one year Mr. Demming was the commissioner and did not make a report. We had to bring the matter up and had two or three hearings, and had quite a time to get him to make a report. He said, that will take a lot of time and time of the office. Finally we got the report made. Now, Mr. Richards suggests these reports are made and can be read by Mr. Stewart. That takes time to read them. I think in one year there is something like fourteen or fifteen parts of the report here. It will take Mr. Stewart the balance of the non irrigation season to get into his head what Mr. Wentz already knows about it. It seems to me the height of nonsense to change this for twelve hundred dollars a year. I call your honor's attention to another thing. As far as the expenses are concerned, I think the Provo Bench and Provo Reservoir irrigate about fourteen thousand acres or nearly one third of the acreage in this valley. It is not a question of numbers requesting this thing, and we think Mr. Wentz ought to be continued. We think we are getting a man cheap when we get a man at twenty-four hundred dollars ~~th~~ as capable as Frank Wentz is, and think it would be a mistake to make a change.

MR. ROBINSON: I believe I started the argument

about economy, and in behalf of my company I wish to state we would much prefer to have Mr. Wentz continue this year under all the circumstances that this case is in. Now, we feel it would be economy to have Mr. Wentz continue at twenty four hundred rather than to have anew man come in and assume the responsibility at twelve hundred. However, for economy we do not feel that would be economical, that is the Upper East Union Canal.

MR. C. C. RICHARDS: Replying to Brother Evans I have simply this to say. I appreciate that it takes time to read figures. I read figures for the last forty years, and typewritten figures as well as those written by pen. It takes an expert also to familiarize himself with it, and I am prepared to say that after having been in quite a number of irrigation suits before this, it doesn't take all the time from the first of April to first of November to distribute water by water masters in any part of the country. I have been in, and I have been in a number of the counties from here north two or three hundred miles. That there may have been a shortage in April I do not pretend to say. I do pretend to say it is an unusual thing for there to be a shortage in April when it becomes necessary for watermasters to go on the stream and distribute water. It is a rare thing when water has to be divided among the users before the first of May, and add two months more to it and take sixty days for reading figures and getting acquainted with it, then you have but eight months, and if there be work from the first of December, during December and January and February and March for the water commissioner, tell me what it is. As has been suggested, he may make plans, but plans for what? These people who are going to put in headgates have got their plans to make, and have to pay someone else for the making of them. The preparation of the plans and execution of them it is not part of the order of this court, I take it for

this commissioner to go out and prepare plans and specifications for the headgates. That is a private matter.

MR. RAY: They must be put in.

MR. C. C. RICHARDS: To conform to the directions. When he comes there he has got his six months time to see that will be done. They will not be putting in headgates in February, January, March or December, and if they do, they will have to be approved at the opening of the irrigation season, so that it seems to me six months is ample time, or seven months or eight months.

MR. A. L. BOOTH: Mr. Stewart is at the door.

THE COURT: What experience have you had in the distribution of water and handling of water systems?

MR. STEWART: Well, my experience has been generally along those lines. I have been employed by various companies, various periods by the Provo Reservoir Company, and perhaps for the longest continuous period, and that work involved not so much the distribution of water as it did construction and other problems, and did involve the distribution of water at times, and my general experience has been something the same as that, except that I have had no long experience handling the distribution of water alone. I have had a general engineering experience for about twenty years.

THE COURT: Have you examined the reports made by Mr. Wentz and Mr. Deming during the time they were water commissioners here?

MR. STEWART: No, not fully.

THE COURT: I mean generally?

MR. STEWART: Only partly.

THE COURT: Do you know what they cover, do you know the work covered?

MR. STEWART: Yes sir, in a general way, because I compiled the acreage under the Provo Reservoir Company's

system, and have been over the entire system and know pretty much where all the laterals are, and the distribution in a general way, but not in a practical way.

THE COURT: And the records of measurements and all that matter that has been done?

MR. STEWART: In a general way, yes.

THE COURT: It has been stated you would be willing to undertake that work and do it for twelve hundred dollars a year, is that true, can you do it for that amount of money?

MR. STEWART: I did not intend to make that statement in that form. I was asked whether I would accept a position under a salary of two hundred dollars a month during the irrigation season, and I said that I would do that, two hundred dollars a month and expenses during that period, and be compensated for any other work at the same rate that might be necessary during the balance of the year. That, as I understood the irrigation season was considered as six months, and my reply would only be that way, that I would expect compensation for the other six months in whatever amount of work was done, I would expect compensation at the same rate. I would not care to consider the matter on the basis of twelve hundred dollars for the year.

THE COURT: Well, you say you are somewhat familiar with what Mr. Wentz has done, those reports, and Mr. Deming did; would you say you could do that work in six months of a year?

MR. STEWART: No, I wouldn't say that. I would think perhaps the work may not involve as much detail work as they have done, because they have been preparing for this suit, and it might be possible that could be handled during that period, but I realize that certain consultation work will be necessary during the balance of the year, and I would not care to accept the position with the understanding what

work would be done gratis, or that it would not be paid for at the same rate that the other work was when I was in the actual service. I would be perfectly willing to do all the making of the compilations and do everything that could be done during the other period of continuous service, but whatever is done as extra work in the rest of the year, I would certainly expect compensation at the same rate.

THE COURT: That is all I care to ask unless someone else wants to ask some questions.

MR. A. J. EVANS: I want to observe, if the court please, been some things said here about some people and others objecting. I want to say I am one of those that are objecting. I am not only a member of the Provo Irrigation Company, and bear this burden, but I am also quite a large owner of water, having purchased it from the system. Now, the least money paid involves the most profit. We are paying our own engineers two hundred dollars a month, and paying them by the year, and talking about the time of watering it is getting now quite the common thing in this county that water is used on lands into December unless it freezes up. The alfalfa is regarded by a good many practical farmers, that alfalfa watered late in the fall is the best irrigation and is the most productive to the crop of any time it can be used. Now, the conditions may be different up in Ogden about the fore part of the year, I don't know. In our country April and May is usually short and needs looking after. I can easily see how some of our good brethren that are up at the head of the stream perhaps don't need anybody because they help themselves. We have had some experience in that other places. Now, the Provo Reservoir Company waters about eight / thousand acres of land, the Provo Bench about four thousand, and I think that is very nearly half that is watered in this county, and the Upper East Union added to that-- I don't know just what their amount is-- so that I think when it

comes to the acreage-- everything else has advanced, I belong to a company that only last week we met and advanced our foreman a hundred dollars a month, making three hundred dollars we pay him. We ourselves are paying fifty cents more for all the work for team work and earth work than we have ever paid before because conditions having been different and it seems to me Mr. Wentz is real modest, and it would be suicidal policy at this time to make any change. Perhaps in a year from now it may be different but we will meet that when we come to it. I might observe further that Bishop Gardner, man of large experience, is the superintendent of the sugar factories of this state, and he says he would rather have fall water late in the fall to irrigate his crops. It absolutely assures a crop of grain next year without another drop of water. That has become quite prevalent. Down in Millard county, same in Beaver. Down there they do most of their watering late in the fall. They tell me when they can do that and have proper irrigation it insures their crops so when you talk about confining it to three months or possibly six months it will be a folly to do such a thing because our experience does not bear out that condition.

MR. JOHN E. BOOTH: Do you think it is necessary to have a commissioner to distribute the water in December?

MR. A. J. EVANS: I would say I would think it more important then if what I said be true, that is the most important irrigation, it should be divided then, because the water is not enough then to go around to give everybody what they want and consequently it should be distributed in proportion to their ownership.

THE COURT: The rate, the proportion of costs that we apportion to the Wasatch division was on the basis of only one hundred and thirty days use of water, and on the 17th Class only ninety days, so that they get the benefit of

this situation where their shorter season is up there. The length of season, or length of time that they use the water was taken into consideration in fixing ~~xx~~ the basis of apportionment of costs, so that the users up in Wasatch and Summit counties that you refer to do not pay the same proportion you do in this valley. You have the entire period.

The order of the court is that Mr. Wentz be appointed, and his salary be fixed at two hundred dollars, and I do that, gentlemen, because I am satisfied from all that has occurred here that it would be such a mistake as I ought not to impose upon these persons who object so strenuously to the change. No reason has been given satisfactory to the court at all for a change, and when I examined Mr. Stewart, he does not understand he was to do this and be limited to six months at two hundred dollars a month. The court knows enough to know what the commissioner has to do, and knows he will be here the greater portion of the year. Possibly ten months will be sufficient, but the saving would be so small in making a change by limiting to the actual time-- and that is what Mr. Stewart's proposition, two hundred dollars a month for the time he puts in-- the saving would be so small it would not be appreciable to the small holders at least. The large interests have practically all expressed their preference to have no change, and to have Mr. Wentz even at the salary for the entire year, and the matter as presented by Mr. Ray, figured at about five cents an acre without taking into consideration at all the power users that are charged with a portion of it as I take it-- that was g figured just at the acreage-- a considerable portion of the payment is made by those who do not use water for irrigation, so that it does not seem to the court that the court would be doing its duty to change commissioners until this case is ended. After it is ended, after the decree is entered, it might appear different to the court, but that

order may be made now until the further order of the court.

Now, are there any other matters? Now, I am inclined to think, gentlemen, that the costs which are not much of course, but costs of such hearings as we have today, and which is made necessary practically-- that is practically do not accomplish anything for the general litigation-- made necessary because the city and the power company, Utah Power and Light Company and the Washington Reservoir Company were not ready to proceed, I think the costs here today ought to be apportioned to those people alone. It is true this last matter was of an interest to all, but the expense of having this session today was not occasioned by reason of this general matter, and I am inclined to think that cost ought to be apportioned to those parties. What have you to say, gentlemen, who are interested in that.

MR. RICHARDS: No objection.

THE COURT: It don't amount to very much, but I don't think that the litigants, such as the clients represented by Mr. Willis and these other parties ought to be taxed with the cost of these hearings which are in a sense abortive by reason of the fact you could not be ready.

MR. RICHARDS: We are quite willing to pay any cost we are responsible for.

THE COURT: I think Mr. Soule's client, Mr. Story and the city ought to pay the expenses of today's session.

MR. RICHARDS: The clerk will apportion that I suppose

THE COURT: What do you say as to the proportion? I had supposed pay about one-third each, I do not suppose it will amount to much, Mr. Davis' per diem and the court's per diem is all I know of. I do not know of anything else. I will have the clerk notify each of the parties of the amount assessed to them. Now, if there are no other matters to come before the court, the court will take an adjournment until the last Monday in April at Salt Lake City,

unless there is some objection to it. If there is objection on anyone's part, the court will come here. Very well then, it will be in Salt Lake City.

IN THE DISTRICT COURT OF UTAH COUNTY, UTAH.

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PROVO RESERVOIR COMPANY,

Plaintiff,

v.

PROVO CITY, ET AL,

Defendants.)

May 22, 1918.

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THE COURT: Gentlemen, if you are ready to proceed with this matter, we will take it up.

MR. CLUFF: If the court please, there is just a little testimony I wish to offer in explanation of the last testimony, of the exhibit that was offered, application of the Pressed Brick Company. I will have Mr. Wentz take the stand.

MR. A. C. HATCH: Just a moment, if the court please. I would like to know just what will be the extent of this hearing. My understanding was that the entire rights of the plaintiff and the defendant Provo Pressed Brick Company would be finally determined at this hearing. Am I right?

THE COURT: I had supposed there was nothing left undetermined except the effect of the evidence you introduced when the case was reopened for that purpose, which, as I remember it, was the application made to the State Engineer upon which was based the final certificate of appropriation.

MR. A. C. HATCH: We have a certified copy of their proof of appropriation that we think ought to go with that application, and we would offer it if the court will permit at this time, as being corroborative of what their intent was, not only at the time they made the application, but at the time they made their proof.

THE COURT: Very well, it may be received.

MR. A. C. HATCH: That will be all.

THE COURT: And I understand the proof will apply

to that.

MR. CLUFF: That will be all.

T. F. WENTZ, called by the Provo Pressed Brick Company, testifies as follows:

DIRECT EXAMINATION by Mr. Cluff:

Q Mr. Wentz, I hand you here Exhibit 260, ask you to state what that is?

A Exhibit 260 is a tabulation of the flow of Tanner race, City race, Factory race and the East Union from 1902 to 1915 inclusive, tabulated from the original notes of the commissioners by myself.

MR. CLUFF: I don't know, if your Honor please, but there are other exhibits that cover a great portion of this, but I desire to offer this at this time as being condensation of all these streams.

MR. A. C. HATCH: Is this already in evidence in the case, the substance of what is here tabulated?

A The discharge of the Factory race, City race is in evidence.

MR. WEDGWOOD: This is the first time they are grouped.

A Yes, all four.

MR. A. C. HATCH: The Tanner race and East Union are also in evidence.

A I think not.

MR. A. C. HATCH: I understand this is additional evidence of your right, what you are now offering.

MR. CLUFF: I am just offering this for the purpose of showing the amount of water in those three races.

MR. A. C. HATCH: There are four.

MR. CLUFF: Well, the East Union of course is-- the

three races are the ones that are mentioned in the application of the Pressed Brick Company.

MR. JACOB EVANS: But the East Union is included with the other three.

MR. CLUFF: Yes, but it is tabulated separately, however.

MR. A. C. HATCH: Now what purpose is there in the East Union in this?

MR. CLUFF: There isn't any purpose of the East Union whatever.

MR. WEDGWOOD: There may be some purpose in connection with the East Union, it might be material.

MR. CLUFF: So far as we are concerned, we are perfectly willing that the tabulation under the head of the East Union may be not considered in, and may be stricken out.

MR. A. C. HATCH: The purpose, I understand, is to show the quantity of water you would be entitled to under the findings of the court.

MR. CLUFF: It is to show the quantity of water in those three races.

MR. WEDGWOOD: During the years specified.

MR. CLUFF: Yes.

MR. JACOB EVANS: And do you claim to have used it during those years?

MR. CLUFF: Yes.

MR. JACOB EVANS: With the exception of the East Union that you don't claim has any bearing?

MR. CLUFF: Has no bearing whatever, because the East Union goes above our penstock. However the water comes together.

MR. JACOB EVANS: But you don't claim you can use any portion of the water belonging to the East Union?

MR. CLUFF: No portion of it.

MR. A. C. HATCH: We have no objection.

THE COURT: It may be received.

CROSS EXAMINATION by Mr. A. C. Hatch:

- Q Now, Mr. Wentz, did you make any of these measurements yourself?
- A In the year 1913, measurements on the 4th page I made, that is the last page.
- Q That would be 1913?
- A '14 and '15.
- Q Do you know whether or not during any of the years covered by this tabulation the Provo Pressed Brick Company used any water other than that which came through the Tanner race, City race and Factory race?
- A No, they would not use all of that flow. You see there is a small stream that comes in below the penstock of the Pressed Brick Company of about four to five second feet, and during the low water season why the Tanner race is supplied by seepage down the river.
- Q So that they would then during the low water season have only such water as flowed in the City race and Factory race?
- A Less the four to five second feet that comes in below the penstock.
- Q And the measurements here given for the Tanner race where are they measured?
- A They are made about a mile and a half below the Pressed Brick plant.
- Q So that the tabulation here would not show in any way water flowing through the Tanner race to the Pressed Brick Company's plant?
- A No, the Tanner race is taken out about a mile and a half below the plant, possibly not that far from the diversion, from the river, and water is collected and supplied from seepage water rising in the river. Very little water going to

MR. A. C. HATCH: We have no objection.

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Q So that they would then during the low water season have only such water as flowed in the City race and Factory race?

A Less the four to five second feet that comes in below the penstock.

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A No, the Tanner race is taken out about a mile and a half below the plant, possibly not that far from the diversion, from the river, and water is collected and supplied from seepage water rising in the river. Very little water going to

the Tanner race comes through the Pressed Brick plant during the low season.

Q And none of the water in the East Union reaches the Pressed Brick plant?

A No, none of it.

CROSS EXAMINATION by Mr. Wedgwood:

Q Mr. Wentz, do you know whether, as a matter of fact, this Provo Pressed Brick Company used the waters of the Tanner and City race as it flows over their own land utilizing the fall of the water for power before they made any application?

MR. JACOB EVANS: Did you say Tanner and City race?

MR. WEDGWOOD: No, Factory and City race.

Q Is so, what years?

A They used the Factory race up to about 1910, and after 1910, I think the enlargement or the combining of the flow of the City race and the Factory race was made, latter part of the year 1910.

Q Well, what was the first year they used water for power if you know?

A I don't know of my own knowledge.

MR. A. C. HATCH: That is in evidence.

Q They used it in 1902 and '93, did they?

A I couldn't say.

Q What was the average flow, if you know, of the Factory and City race during 1902 and '03-- that is the first two years, isn't it, there?

MR. CLUFF: Doesn't extend to the entire year, Captain.

MR. WEDGWOOD: No, during the summer season, the irrigation season.

A The average flow of the Factory race for the year 1902 was 24.56 second feet.

Q And City?

A You want the average flow of the City race during 1902?

Q The two of them combined, that was the two that were available on their land, was it not?

MR. A. C. HATCH: The two that were used at their plant for power and irrigation also.

Q Might as well give it to me up to 1910, that is the time I want.

A You say the Factory race up to 1910 and then the combined flow after 1910?

Q Take it up to 1910, including the year 1910, give me the average of the City race and Factory race?

A The average up to and including the year 1910 is 34.35 second feet. That is the average of the Factory race flow measurements.

Q This suit was commenced in 1913?

A '14.

Q Now, can you give me the average of the Factory and City races up to 1914, that is, including the year 1913?

A Average is 39.02 second feet.

Q Now, I notice on the plats a stream of water below the penstock of the company, and you said something about four second feet.

A It is between four and five second feet.

Q That don't come in this?

A Yes, that is not available, it in these quantities, but it is not available to the plant.

Q Now then, deduct that amount from the ~~of~~ average up to 1910?

A Deducting four and a half second feet from the average up to 1910 leaves 29.85 second feet.

Q Now, deduct the same amount from the years 1911, '12 and '13 that you have given me?

A That is 34.52 second feet.

Q Now I ask this to see if my understanding is correct. Is this

the quantity of water that you have testified to, that is the mean flow that the record shows flowed through the City and the Factory races, as you have testified to during those years?

A Yes, this is the average measurements that are on the record; all the measurements that are in the record.

Q And was there any other source that the Provo Pressed Brick Company could get water over their wheel except through these races during those times?

A Well--

Q Did it have to flow through there, all the water they used?

A No, part of it could come from the supply through the Tanner race.

Q I know, but it got there.

A During the low water season there isn't any flow from the Tanner race.

Q I am not asking you about that, this is all the water that the record shows flowed through there?

A Yes sir.

Q Could they get water on their wheels from any other source except these sources you have spoken of?

A These measurements are made below the penstock of the plant in the City and Factory races, and there is a by-pass running over each of these to the Tanner--

Q Is there any other ditch that leads to their wheels through which they could get water except these you have ~~xxxx~~ specified here-- I see you don't quite catch me, I am talking about the irrigation season, during the irrigation season is there any other source? A. No.

Q Not during the irrigation season? A. No.

MR. WEIGWOOD: There is one question, if the court will just give us three minutes some objections, Mr. Hatch and I have not been able to get together.

THE COURT: Very well.

(RECESS)

CROSS EXAMINATION by Mr. Wedgwood continued:

Q Mr. Wentz, in order that the situation may be clear concerning this Provo Pressed Brick Company, the whole situation with reference to the flow of water through the brick plant wheel, what influence may or may not the quantity of water that is in the Upper East Union have?

A Well, it is an addition, purely an addition. Now, for instance, take on the 20th of this month, the total flow through the four races was 102 second feet; the Upper East Union was flowing 29.22 second feet.

MR. JACOB EVANS: Mean the Upper East Union?

A The East Union was flowing 29.22 second feet. Now, of course the city may elect to take all their water through the East Union, then we would have to supply-- and suppose the Factory race were entitled to a hundred second feet, it would make the Factory say 140 second feet at this point.

Q You say the city may take all of its water now through the East Union, what do you mean, the water of the Factory race and of the City race?

MR. CLUFF: I object to that as being wholly incompetent, immaterial, I cannot see what difference it would make what the city may elect to ~~ix~~ do with reference to the East Union, how it could in any way affect this hearing, or the rights of the Pressed Brick.

MR. A. C. HATCH: Our theory, if the court please, is based upon our construction of their application and their proof of appropriation, and that is, that all the water that they made application for and all of the water that they claim by their proof to have appropriated is such water as was run through these races for the use of irrigators, and for the use of the city below their plant. We think the court will also construe that their right is subject to the city's use, and if the city shall choose to divert all of its water which

it is in evidence here they have the right to do and have been doing for a number of years, switch it back and forth, as the city water master was advised for the best interests of the different irrigators, the city may at any time practically deprive the Pressed Brick Company of any water with which to turn its wheels, and that will be true absolutely if it diverted its entire supply through the East Union Canal. Now, whether or not the city has heretofore--

THE COURT: Now, this question objected to is merely a question asking Mr. Wentz to explain what he meant by a former answer. He stated that the city might take all of their water through the East Union Canal, and General Wedgwood's question now was whether he meant in that answer to include water that flows in the Factory and City races, and I do not think the suggestions that are incorporated in the objection and your answer to the objection apply to this question. This is merely a question asking him to explain what he meant by that former answer, whether he included in that former answer the water flowing in the Factory and City race.

MR. CLUFF: Note an exception.

- A No, I mean the water that has been awarded to the city by the decision except the portion that goes to the Tanner race.
- Q You say the city may elect-- if it elected to take its water through the East Union would it then-- would the water then be flowing in the Factory and City races?
- A No.
- Q What is what I meant, Now, if we assume that the city did elect to take all or a portion of its water through the East Union would there be any water flowing in the City and Factory races except seepage water?
- A That is all.
- Q What?

A That is all except the seepage and inflow water.

MR. A. C. HATCH: Four or five feet that comes in below.

A Yes, the four to five second feet that comes in below the penstock.

Q Now, the effect of that would be no water would run in this mill, Provo Pressed Brick Company?

A Yes.

Q Now, if the Provo Pressed Brick Company took one hundred second feet of water according to Mr. Cluff's contention at such time, where would that water have to come from?

A Come from the natural ~~fx~~ flow of the river.

Q Now, that water, what would become of it as to any useful purpose, or being put to any use after it went through the wheels of the Provo Pressed Brick Company?

MR. CLUFF: I object to it as immaterial and irrelevant, not within the issues of this case.

THE COURT: Objection is overruled.

MR. CLUFF: Note an exception.

A All water that passes through the Pressed Brick Company that does not supply the city below is wasted, goes to the lake.

Q The city would have all the water it was entitled to under the conditions I have stated?

A Yes.

Q Then what would you say whether or not all of this hundred cubic feet of water would be absolutely waste water after it goes through the wheels?

A Yes, all that goes through these wheels is wasted, we have no use for any more water there than rises in the river bed.

Q Now, make it clear, the city has its water under the situation I speak of through the East Union at all times, and all useful purposes this hundred second feet would serve would flow over the wheels back into the river and then to waste?

A Yes.

Q Now, do you know whether or not that water is being applied to a useful purpose?

A Yes.

Q What is it?

A At the present time?

Q Yes.

A Being applied, part of it, by the Provo Reservoir Company for the purpose of irrigation.

Q How many acres of land?

MR. CLUFF: I object to it as not cross examination.

THE COURT: I am inclined to think it is not.

MR. WEDGWOOD: That may be true.

REDIRECT EXAMINATION by Mr. Cluff:

Q Mr. Wentz, it is not possible for Provo City to put this water all into the East Union and from that source supply other rights under Provo City, is it?

A You mean rights that would be -- say that are at present under the Factory race?

Q Yes, at present under the Factory race, Tanner race and City race?

A By a new channel it could be put in the East Union and diverted back to the Factory race.

Q It would require a new channel to take the water around the Pressed Brick Company and then run it right back about where it goes now, wouldn't it?

A It would not require a new channel. They could run it through the present channel and over the spill. You mean without putting it through the wheels of the Pressed Brick?

Q Yes.

A It could go through the present channel and out of the wheels immediately above the penstock.

Q I call your attention to the map on the board, do you recognize that as the conditions there?

A Yes.

Q Will you explain to the court just the conditions there you are trying to illustrate?

A At the point marked bridge 2 B at the center of the map the channel of the East Union and head of the race, of the Factory race follows along the railroad track to the point marked water wheel, and which is heavily shaded. At this point the East Union and the head race of the brick plant divide, East Union following out to the eastern part of the city and the head race going west to the wheel. The water passing either through the wheels or over the spill and below, immediately below, is divided, one part going south along the Factory race through the city, the other part going in a southwesterly direction over to the heading of the City race, where it goes south at one point. This is where it joins the old City race. To the left of the East Union channel and marked Factory race is where the four to five second feet of water comes in below the penstock of the Pressed Brick Company. The Tanner race is diverted farther down the river near the steel bridge on the state road, and follows in a southerly direction down through the city. The overflow from the waters that are in the city race, that does overflow is immediately at the point marked City race-- immediately south-- this is the junction of the old City race, the original City race and the by-pass from the power plant.

Q What becomes of those overflow waters that you speak of if there are any?

A That goes back and joins the river and then down to the Tanner race.

Q Back into the natural channel of the river?

A Back into the natural channel of the river.

MR. WEDGWOOD: But above the Tanner Race?

A Yes.

Q Captain Wedgwood, as I remember, asked you if there was any other source of water for the Pressed Brick Company except those three races. I will ask you to state what is the source of water for the Pressed Brick Company, entire source of water?

A Provo River.

Q Does the map indicate the point on Provo river where the water is diverted to the Pressed Brick Company?

A Well, part of it is diverted there, part of it, major part of it is brought ~~down~~ down through the City Creek from the mouth of the canyon. There is a little at the present time that comes from this point marked point of diversion, but during the high water of this season during the latter part of April, why, a dam was put in at this point marked point of diversion, and they diverted their water at that point, but later we brought the water down through the City Creek as we have done in the past in order to avoid keeping those two channels wet.

Q The water that you speak of that comes down through the City race, that is water from Provo River, is it?

A City Creek, you mean?

Q Yes, City Creek is taken out of Provo river near the mouth of the canyon?

A Yes.

Q If the water did not come down City Creek it would be down the natural channel of Provo river?

A Yes sir.

Q And City Creek intersects the channel of the Provo Pressed Brick Company appropriation there?

A Yes.

MR. A. C. HATCH: When was that so-called appropriation channel first used by the Pressed Brick Company, if you know?

A I cannot say when it was first used.

MR. JACOB EVANS: Have you the date, Mr. Cluff?

MR. CLUFF: I can give you that.

MR. WEDGWOOD: About 1907 the papers show.

MR. A. C. HATCH: This is the first time I now remember of having heard of the two points of diversion from the Provo river for the use of the Pressed Brick Company.

Q Since the trial of this cause commenced has the water until this year been diverted from the river through that diversion channel to the Pressed Brick Company?

A During the low water season after the high water is conducted, practically all of it down the City Creek intersect this channel and then to the Pressed Brick yards.

Q Now, are there any other parties who divert water from the Provo river through this diversion channel marked on this map?

A Well, the city may use it sometimes, the same water, there are no other parties except the Pressed Brick and the city.

Q Is that an actual channel, that diversion channel, as shown on the map, or is it one that has been constructed by the Brick Company or others?

A I think the heading near the river has been constructed, but there are so many old channels in there I could not say how far down it has been constructed. Of course the part after they pass under the railroad track, that has been an enlargement of the East Union.

MR. CLUFF: Now, in order that the record may be complete on these offers that counsel have made of the application of the proof of work completed, I now offer the proof of publication of the notice to water users in this particular application, and also the--

MR. WEDGWOOD: Let us settle one at a time. We object to the publication because the application is in and so is the proof of application of water to beneficial use. The only object of a publication of a notice of application is to afford protestant an opportunity to come in and it is not part of the title question in any way, shape, manner or

form.

THE COURT: Objection may be overruled It may be received with the other.

MR. CLUFF: And in connection with that I offer a certified copy of a map that was submitted with the proof of appropriation. The statute provides that the proof of the appropriation must be made to the State Engineer and accompanying it a map showing the profile of the works and so forth. I offer this copy of the map certified by the State Engineer as being a copy of the original filed with this application counsel has offered, or with this proof of appropriation.

THE COURT: Is there any objection to this offer?

MR. A. C. HATCH: No.

THE COURT: It may be received.

S. H. BELMONT, recalled by the Provo Pressed Brick Company, testifies as follows:

DIRECT EXAMINATION by Mr. Cluff:

Q Your name is S. H. Belmont?

A Yes sir.

Q Are you the party that signed the original application to appropriate water for the Provo Pressed Brick Company?

A Yes sir.

Q Signed it as manager?

A Yes sir.

Q February 20, 1907? A. Yes sir.

Q Mr. Belmont, in that application you refer under the head of ~~xxxxxxxxxx~~ explanatory to the three races, the Factory race, Tanner's race and the City race, will you state your reasons for referring to those in that application?

MR. WEDGWOOD: Object to it as incompetent. This

is the fundamental foundation--

THE COURT: I will hear from Mr. Cluff what the object of it is.

MR. CLUFF: The object of it is this, if the court please. The application of course, as is shown, refers to these three races. However, the first part of the application is that one hundred second feet of water of Provo river-- apply to appropriate one hundred second feet of the water of Provo river, and then it gives the point of diversion from the natural channel of the river on the east bank of the river, and tells the course it will be taken to the diverting channel and so forth, and the use of it. Under the head of explanatory in this application the application speaks of these three races. Now, the object is as shown on this plat. Those three races, head of those three races being so near the diverting channel of the Pressed Brick Company they were condensed all into one, the waters in those three, and to show why-- our contention is that the reason that is mentioned in this application is only that is presented as an explanation to show what would be done with the waters of those prior rights.

THE COURT: You may read the language there you are asking about, I don't remember it.

MR. CLUFF: Under the head of explanatory "The object of this application is to provide a source of supply which will conserve some of the waters by shortening the channel, and by putting all the waters now running in the channels, namely Factory race, City race, Tanner Race into one, Also to supply during some of the winter months when mush ice and flooding prevents its use now, and also to increase the power by the use of waters now running in the City race and Tanner race, the water used to be diverted at the above described point and carried to the present penstock of the Provo Pressed Brick Company, where it will be used

for the development of power at a point which is-- then give the points-- now this explanation is as to what will be done with the waters that are now or were at that time being used, or previous to that being used in those three races, inasmuch as this channel is right near their head.

THE COURT: Now read the question.

(Question read)

THE COURT: Objection is sustained, I see no materiality as to the reason for putting that in.

Q Mr. Belmont, at the time this application was made you may state whether or not the waters that were being diverted by the three races mentioned, City race, Tanner race and Factory race, were waters that were at that time the primary rights or appropriated waters prior to your application?

MR. A. C. HATCH: We object to that as having been entirely gone into heretofore, all being in evidence.

THE COURT: I am inclined to think so, Mr. Cluff, I am inclined to think all those appropriations have been shown of all this water.

MR. CLUFF: That perhaps is true.

THE COURT: What is the object of it?

MR. CLUFF: I think, if the court please, to give the court a full understanding of the intention of this application that it would be proper for the witness to explain his reasons for giving this explanatory explanation of those three races. As a matter of fact, our contention is, if the court please, that we appropriated at that ~~at~~ time one hundred second feet of water from Provo river, that is, if the waters were there. We recognize it is true that in the low water season of each year there was not a hundred second feet of water that had not already been appropriated. We recognized this further fact that during the low water season the waters ~~at~~ of Provo river that were remaining in Provo river at that point were all diverted into those three

channels for irrigation purposes. That the fact is for years the water, the river had been dried off near the City race there, taken all into those three races, and of course we recognized that fact and that we were subject to all of those rights, but if there was a hundred second feet of water in Provo river whether these races took it all or not, we made application for that and appropriated that ~~water~~ water for power purposes.

THE COURT: That must be determined, Mr. Cluff, by what you did in the State Engineer's office, and not by what was in the mind of Mr. Belmont or anyone else. I do not think it is material at all as to what was in his mind, or what reason he had for making application to the State Engineer, or by his statement either explanatory or otherwise. His motives are not involved. Their rights must be determined by what is shown by the record.

MR. CLUFF: I understand that. Our contention is that this explanatory part in the application is simply incidental to the application.

THE COURT: That is a matter of argument, I take it, and not a matter for expert testimony. I do not understand you are expecting Mr. Belmont to testify as an expert what the effect of putting that explanatory note in there is.

MR. CLUFF: No, that is true.

THE COURT: Secondly or what his view of the matter might be from his point. The court must determine what you did, what you put in ~~x~~ your application, the effect of it, and not what Mr. Belmont thought the effect would be.

MR. WEDGWOOD: Mr. Cluff, so you may understand our position, I will state to you now we claim the explanatory matter absolutely controls, made so by the application itself.

THE COURT: Made what?

MR. WEDGWOOD: The explanatory matter is absolutely controlling, and made so by the application itself. Prescribed

rules of the State Engineer, appears in writing on there, control it.

THE COURT: That is a matter of argument.

MR. WEDGWOOD: Yes.

MR. A. C. HATCH: This question opens up for cross examination all the matters we have gone into as to the use of the water. Mr. Belmont, if he answers yes, we will put in two or three days here, who was using this water and whether or not they used it economically, and all that, open up this whole case.

THE COURT: The discussion by Mr. Cluff and the suggestions made by the court have gotten somewhat away from the question objected to. The question, as I remember it was whether this water that was taken through these races had been appropriated and were supplying primary rights, substance of it.

MR. A. C. HATCH: Yes.

THE COURT: I think that was all shown fully by the evidence we took at such great length last year.

Q Mr. Belmont, calling your attention to the plat on the black board, do you recognize what that is?

A Yes sir.

Q Can you explain to the court what it is?

A Yes sir.

Q I wish you would.

MR. WEDGWOOD: Is it any different from Mr. Wentz's explanation?

MR. CLUFF: I do not know that it is except a little explanation on the whole part of the diversion channel there.

THE COURT: Proceed.

A When we made our appropriation we had an engineer make a survey of the whole system, and we decided that the best place to divert the water from the river would be at this point here.

From here to here was an old channel, small, but had been an old channel of the river.

MR. JACOB EVANS: Now, I might suggest, if the court please, if he testifies in that way there will be nothing in the record anybody can tell.

A At this point here we put in a dam.

THE COURT: Mr. Belmont, let me suggest, when you say "at this point here" that doesn't mean anything.

MR. JACOB EVANS: Give the points.

A All right, Mr. Wentz gave all these points and you have them in evidence, but I will have to read the notes.

THE COURT: So as to make it so as to indicate what you mean when you say this point.

MR. WEDGWOOD: Say from point of diversion to point marked dam.

A From point of diversion to point marked dam was an old channel of Provo river where it had overflowed. This was widened and made so that it would carry the amount a hundred second feet we appropriated. From here, or from point marked dam to this intersection, where it intersects the City Creek, there was no channel. We bought a right of way from Mr. Samuel Cluff and made this channel from here to here to carry this water, from the dam to where it intersects the City Creek, reached City Creek. From where it intersects at this point down to here we bought a right of way from Mr. Cluff to enlarge City Creek to carry the amount of water we had appropriated. That deed from Mr. Cluff includes all the course here made with a double red line.

MR. A. C. HATCH: If the court please, I think that is wholly immaterial, we are not attacking their works or point of diversion or their use of such water as is coming to their wheels. The whole matter he is now testifying to was in substance testified to by him when he was on the stand before.

THE COURT: I take it this is largely preliminary

to some definite matter you want to show by this map. Lead right up to it as rapidly as you can, Mr. Cluff, so you can get the substance of what you want to show by Mr. Belmont.

Q Continue just as rapidly as you can.

A From this point here marked bridge to-- it is the bridge on the Denver & Rio Grande Railroad-- the water originally for City Creek and Tanner's race flowed to the west.

MR. A. C. HATCH: Pardon me, you say City Creek, City Creek or City race?

A City race and Tanner's race. I will say that is known by a number of different names, but this point Bridge 2-B on the Rio Grande was where the water originally flowed off to supply these irrigation ditches which was below our tail race. In our application we asked to take that water through the Upper East Union and through our wheels.

MR. JACOB: Wait a minute, we object to what he says they asked in the application. The application speaks for itself.

THE WITNESS: It speaks for itself.

MR. JACOB EVANS: We object to his stating what the application states.

THE COURT: If it is not correctly stated, there is no harm done.

MR. A. L. BOOTH: It is not the Upper East Union.

A The East Union. The East Union from the point marked Bridge B to point marked Water wheel was enlarged by the Provo Pressed Brick Company for to take additional water which we had appropriated, and put it through our wheels. This tail race from point marked water wheels to concrete culvert under the Denver & Rio Grande Railroad track and from there back to the channel of Provo river was constructed by the Provo Pressed Brick Company to take care of the surplus water over and above what went to these races.

Q Now, Mr. Belmont, what did you do during the low water season

of each year relative to turning the water or damming the entire stream of water from the natural channel of Provo river?

A We would put in a tight dam in the river as soon as the water was low enough that we could control it, by logs and manure and other material.

Q Now, has there been any season of the year during the time you have been operating there that you have run more water through your diverting channel ~~that~~ and through your wheels than was taken by the three races, City race, Tanner's race and Factory race?

MR. WEDGWOOD: Let me understand that question, it is, was there any time during the year.

MR. CLUFF: During the year, yes.

MR. A. C. HATCH: We are only claiming for the irrigation season here and their winter use is admitted. No objection to their taking the entire Provo river.

MR. CLUFF: It is finding out what we appropriated here.

MR. A. C. HATCH: It is the use when other people were using it, when the water was being used for irrigation purposes, or when it was being used during the high water period. When it was being used by others-- there are months when nobody was using the water except for power purposes, and that is unquestioned by us.

THE COURT: The objection is overruled. He may state and then we will find out when it is. If it is at a time when it does not affect this controversy the court will not consider it.

Q Do you remember the question?

A You ask if there was any time the water would be flowing back to the natural channel through our races; yes sir.

Q When?

A Practically the whole season, practically half of the year or

more, we always figure on about eight months we would have water running back through those gates into the river, later than that, probably, be all the water we would have would be going to the Factory race, Tanner's race or the City race. The overflow there is regulated by the watermaster, if he has more than can go down the City race, goes on over, and, in fact, the gates are so constructed if there should be a fluctuation in the amount of water that is going it will overflow and go back into the river. So as long as they have their appropriation, the measuring weir and gates for the City race are close together, so in case there should more water go than could go directly down the City race, it would go back directly as an overflow.

CROSS EXAMINATION by Mr. Wedgwood:

Q You spoke about this construction, when was the first construction, you said you enlarged from point marked on the map point of diversion to dam, you said you enlarged that, when did you do that?

A We done that early in 1907.

Q Early in 1907?

A Yes sir, early in the spring before the water came.

Q And the other work you done subsequent to that time?

A No sir.

Q Before?

A Lone before.

Q Long before?

A Enlarging of the East Union ditch was done in 1902 by agreement with Provo City, which we had. This was our second-- what we are talking about was our second appropriation. We had an appropriation of water for power purposes that went down the Factory race in 1902. This that we have been talking about is an additional appropriation. We did not return the water. In the first place we only used one wheel

and used only the water in the Factory race, but we made our headgates and enlarged the East Union at that time, in 1902.

Q In 1902?

A And then we made this additional power appropriation and brought the river-- the water direct from Provo river and turned it to Provo river. In 1907 the application was made, February 22, 1907.

Q Everything was done except the enlargement you speak of prior to 1907? A. Yes sir.

Q When you speak about taking the water as you do, you take the water which before the construction of your works formerly flowed to these three canals, Factory race, City race and Tanner race?

A We appropriated water--

Q I don't care what you appropriated.

A We take water as much as we can get through our channel of Provo river, and return it to Provo river.

Q Pardon me.

A During the irrigation season we considered practically all of it went into these particular streams.

Q All I want to get at is this: Prior to the time you made the construction you state the water went off the west into the Tanner race? A. Yes sir.

Q By making this construction you take it to your wheels, then turn it into the river to reach the Tanner race again?

A At the same time we made this we made a new work here. This had more water than ever came there.

Q Mr. Belmont, I didn't ask you about that. Before your construction at all the water was turned off went to the Tanner race? A. Yes sir.

Q Now then you made the construction--

A That was only--

Q Never mind.

A I want to understand that was only an overflow there, the

original water in the Tanner's race come direct out of Provo river, that is only an overflow from City Creek here, you don't seem to understand how that water was divided at that point.

Q I may be dense and may not understand, but now if you will advise me.

A I will try to.

Q Will you kindly answer the question.

A Yes sir.

Q Before you made your construction at all, if I understood your testimony correctly, you said the water from the Tanner race and old City race turned to the left?

A A portion of it.

Q What?

A City race and Tanner, portion of it turned at that point.

There is another race here that is not marked. The old Factory race come up here directly out of Provo river here. Now, the overflow from the City Creek came here and joined with the Factory race, and this supplied these other races.

Q Now, Mr. Belmont, I am perfectly willing you should tell all you want to tell, all I want is just a little information, it may be of no importance at all, it is immaterial to you whether it is or not.

A I want to tell it just as it was is all.

Q The fact of it is you say part of the water of the Tanner race limiting it now to the Tanner race, before you began construction all the water was turned off to the left or west, did you say?

A Yes sir.

Q All of it for all the Tanner?

A Not from that point, turned to the west, there were gates here, to regulate it.

Q Now, by your construction there you utilized over your wheels that water that went to the Tanner race?

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Q All of it for all the Tanner?

A Not from that point, turned to the west, there were gates here, to regulate it.

Q Now, by your construction there you utilized over your wheels that water that went to the Tanner race?

A Yes sir.

Q That's the point I wanted to get at, so that explains the three races?
A. Yes sir.

HYRUM F. THOMAS, called by the Provo Pressed Brick Company, testifies as follows:

DIRECT EXAMINATION by Mr. Cluff:

Q Your name is Hyrum F. Thomas?

A Yes sir.

Q How many years were you acting as water commissioner?

A Nine, I think.

Q In this valley?

A Nine.

Q What years?

A 1902 to 1911.

MR. JACOB EVANS: If the court please, this was all gone into, I don't see any necessity going over it again.

Q Mr. Thomas, were you familiar with the Provo Pressed Brick Company diverting works?

A Yes sir.

Q Power plant and so forth? A. Yes sir.

Q Do you know whether or not-- first I will ask you did you ever make any measurements of the waters used by that company prior to the season of the year when you would begin to distribute the water?

A I didn't make any particularly for them excepting I made measurements of the canals before the distribution season.

MR. WEDGWOOD: What do you mean by the distribution season?

Q You may explain.

A You mentioned the distribution season in your question, didn't you?

Q Yes, what do you mean by that?

A The decree under which we operated provided there need not be any distribution of the waters of Provo river until the canals became less in capacity than their full carrying capacity.

Q And you did not make any distribution or measurements for distributions until the waters got reduced in that quantity?

A That is right.

Q Was that before the Provo Reservoir people were diverting water from Provo river?

MR. A. C. HATCH: If the court please this has all been gone into in this case, if I remember correctly, at the former hearings.

MR. CLUFF: I don't care for that question, I will withdraw that.

Q Mr. Thomas, before the distribution season that you speak of, before you began distributing the water do you know whether or not the Pressed Brick Company diverted water through their works, through their wheel more than was used by the City, Factory and Tanner races?

MR. A. C. HATCH: Now, if the court please, we object to that as being immaterial, irrelevant and incompetent under our construction of the proofs.

THE COURT: I don't remember Mr. Cluff, wasn't this matter gone into fully what they used at all times?

MR. A. C. HATCH: Yes.

THE COURT: What is the object of this. As I understand this hearing the court was to hear nothing except such evidence as would in some way throw some light upon this evidence that the court subsequently-- that is, subsequent to the closing of the case, permitted the plaintiff to introduce which was the original application, and later the proof of work. Now, does this throw some light upon that?

MR. CLUFF: I think so, to show what was actually done

all these years by the company with this water.

THE COURT: Didn't you show that in your proof?

MR. CLUFF: I don't remember whether that was shown definitely or not. The only object of this question is to show that prior to the time the commissioner would begin measuring and distributing water to the various canals as he did under a former decree the Pressed Brick Company always had all the water it could get, all it needed through its wheels, and water ran through its wheels and back into the natural channel of Provo river as it understood it. That is the object of this.

THE COURT: During the high water season?

MR. CLUFF: Yes.

THE COURT: There is no question about the matter in high water season, is there?

MR. A. C. HATCH: There is some ~~wk~~ question when there is not a surplus. There is a surplus certain parts of the high water season in every year, so far as we have any knowledge, and there is no question as to the use of the water.

THE COURT: I will suggest the view the court has of this matter. Upon the evidence introduced, the court in its decision found your appropriation for a hundred second feet of water, not being limited to the water that went down through these races or used below. After that decision was rendered the court-- the case was opened to the extent of permitting the plaintiff to introduce in evidence the application and later now the proof of the work. I am of the opinion if the decision of the court arrived at and announced heretofore is to be modified at all, it must be modified by the language of that application and nothing else, and if that language controls the court must then make the modification. If it does not the court does not. I do not regard any of this evidence you have been introducing this morning as having any bearing on this question to be considered now. It would

have a bearing on the question the court has already decided, but the court decided that as you contended and my view of it, if that decree is to be modified it must be modified by virtue of some of the documents introduced by the plaintiff, unless you have some evidence that would in some way militate against the weight of that evidence it would not be material. If there has been an error in some of those documents or for some other reason they do not-- should not have the weight that on their face they purport to have, that evidence, of course, would be very material and important. Otherwise merely a question of argument and question of law what the effect of those papers that have been introduced may have on this hearing. That is the view the court has of it.

MR. CLUFF: With that understanding then we rest. That is all, Mr. Thomas.

MR. WEDGWOOD: Your Honor please, we see nothing to be gained by the introduction of any evidence at the present time. Without making any statement, I think the court from what has already been heard will understand under some conditions which might arise, from the rulings of the court, a situation would arise as to which we might want to make some showing, but I take it the court will give us a chance if that situation should arise.

THE COURT: I do not want to promise anyone to reopen the case again.

MR. WEDGWOOD: No, this would not reopen, only be the result of your Honor's decision so as to do as little damage as possible. We want to give notice in certain cases we might want to make further application for certain other orders.

THE COURT: Then I take it there is nothing further but your argument upon the effect of this evidence, what the law is. We will take a recess until one thirty.

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

MR. A. C. HATCH: What will be the order of procedure in this, your Honor?

THE COURT: It is immaterial to the court.

MR. A. C. HATCH: Do you desire the opening?

MR. CLUFF: No, I suppose it is up to you, we are satisfied with the decree as it is.

(ARGUMENT)

MR. WEDGWOOD: I am going to ask that pending this decision they be confined to the waters of those races, If there is any question of damages it is so much easier on a question of small amount of power damages than it is for four thousand acres of growing crops. In other words, want the matter to stand in statue quo pending the decision.

THE COURT: What is statue quo?

MR. WEDGWOOD: Nothing has been done except they have been using the water of the races.

THE COURT: Is that all?

MR. CLUFF: Nothing was done but that. We made application for the water and that is why we made this application.

THE COURT: It will be a very short time, I will determine this in a very few days after I get the final brief, and in the meantime, I take it it will be only a very few hours, if the court should determine adversely to the contention of the plaintiff, it will not be a difficult matter for the Pressed Brick Company to keep account how much their damage is if they have to use steam, and that can be a matter of adjustment.

MR. WEDGWOOD: Very easy.

MR. A. C. HATCH: If the court please I understood the commissioner was under an erroneous impression, he was not distributing just according to the findings by reason of

not having knowledge of the stream being turned from the Weber river into the Provo river by the plaintiff, amounting to fifty or sixty second feet.

THE COURT: That is a matter that does not require an order of the court, if you are turning water in from some other source.

MR. A. C. HATCH: Of which the commissioner had not knowledge at the time.

THE COURT: He has as soon as he has obtained knowledge.

MR. A. C. EVANS: However, it may be turned in any time. If that should be turned off then we should need this water.

MR. A. C. HATCH: Up to the present time there has been no cause for complaint on the part of the Brick Company because we are only getting what the findings entitle us to.

MR. WEDGWOOD: Of course this matter is of vast importance as the court can see, but when this matter is closed I believe the parties represented by the plaintiff would like very much to close the matter up fully and finally. Life is uncertain for all of us and there is too much responsibility resting as it is, if it is possible to close it up.

THE COURT: My present impressions are somewhat during the latter part of June will be the earliest I can do that. Will that be satisfactory?

MR. WEDGWOOD: Of course it will have to be satisfactory. Will the court notify us of any steps necessary to take to do that.

THE COURT: I will determine the date and notify some of you. Now, Mr. Cluff, can you indicate what time you want to send a reply?

MR. CLUFF: I think I can mail your Honor my brief by Saturday.

THE COURT: Very well, if there is nothing further, the court will adjourn at this time.

IN THE DISTRICT COURT OF UTAH COUNTY, UTAH.

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PROVO RESERVOIR COMPANY,

Plaintiff,

v.

PROVO CITY, ET AL.,

Defendants.

June 26, 1918.

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MR. NIELSEN: May it please the court in behalf of Mrs. Anderson I wish to hand you some papers and ask you to look them over. She asked me to hand them to you, I don't know about their contents.

THE COURT: Very well. The matter of the motion or application of the Utah Power & Light Company I think is the matter that comes up this morning.

MR. WILLIS: If the court please, pardon me just a moment. I have been asked to represent the Timpanogas Irrigation Company, and would like to have my name entered. However, if it shall develop there shall be a conflict of interest between them and the other clients, of course, I could withdraw, but until such time as there is a conflict, I would like to have my name entered as counsel for the Timpanogas Irrigation Company. I understand that there is nothing definite in the decision as to the rights of the Timpanogas Irrigation Company to reservoir waters, and I would like the privilege of course of making an examination and perhaps later ask that be defined, and perhaps there may be a question as to the defining of the rights of the Heber Light & Power as to prior appropriators. While we were granted under that decision one hundred and fifty second feet of water, we do not claim that as against prior appropriators, at least in so far as it interferes with the rights of prior appropriators, and later on I may come in after I

have made an examination and ask some of those rights be defined in the decree.

MR. WEDGWOOD: The company you refer to is the Wasatch county?

MR. WILLIS: It is the Timpanogas Irrigation Company of Wasatch. X There is one other matter that I would like to call your attention to. In that decision there is awarded to the estate of John Kummer six acres of water right, and since that time Elizabeth Hamilton-- Elizabeth Kummer Hamilton, has purchased all the rights of the John Kummer estate, and we ~~wk~~ would like when the decree is finally entered she be substituted in lieu of John Kummer estate interest.

THE COURT: You can call the court's attention to that at the time. Now, I am ready to hear the Utah Power & Light Company matter. I think it apparent from the presentation Mr. Willis made and the others, the terms of the order I made fixing this hearing were not communicated to the attorneys.

MR. A. C. HATCH: I didn't understand the court.

THE COURT: The order was a session of the court would be held today at which I would take up the matter of the Utah Light Company, and commencing tomorrow morning, the City's and any other matters would come up. I state that because some of the parties in the matters you are suggesting will not be here this morning, knowing no questions would come up today except the Utah Power & Light Company question, so all those other matters, call the court's attention to it later, because there may be some interested parties that would want to be heard that would not be here today.

MR. STORY: Your Honor please, while this is perhaps an unusual proceeding, it is in the nature, I take it, of a motion which would be filed after the court's final findings had been made were it not for the fact that it is desired to

have these matters threshed out before rather than after the work of preparing the findings is done, and so I have filed, as your Honor will recall, specific objections to the decision as rendered by your Honor, with the view, as I say, of determining, having these matters determined before these final findings are made. With your Honor's permission I will go over the different objections which I have made to the decree. First, the defendant objects to that part of the said decree setting forth and contained in the 18th paragraph thereof (Reading).

(ARGUMENT)

THE COURT: Is there any contest this decision does not give you the water during the entire year?

MR. STORY: I do not know, but I am objecting to your Honor's decision it does not state specifically we are entitled to it during the entire year.

THE COURT: Is there any contest on that, gentlemen?

MR. A. C. HATCH: I do not think so, we have not questioned the right to take the quantity to which they are entitled from any source that is available. We have not questioned that right. We have rather insisted that all the water they have used be included in the sum total of their use.

MR. WEDGWOOD: And intend to so insist.

MR. A. C. HATCH: And intend to continue to so insist. Whatever the quantity to which they are entitled is should include all of the water and all of the sources from which they have derived it. We have objection, I say now, to the decree, that part of it, that gives them the quantity that we contend is the capacity of the flume, and has produced the highest output, and then awarding to them additional water from springs and from the Ontario

drain tunnel elsewhere. There is a question as to whether it is intended they shall have the capacity of the flume and the waters to produce the entire output and then have the right to enlarge their flume to take in additional water. That is a question in our mind whether or not that is intended by the decree.

THE COURT: In answering your question-- I did not intend to interrupt, Mr. Story, but I had assumed that the court had given you this water during the entire year. This decision was not intended as findings of fact and conclusions of law, but merely indicating what the decision would be, and I suppose it was generally understood that the power right was for the entire year.

MR. STORY: I presumed so, your Honor, but inasmuch as your decision would necessarily be made the basis of the findings of fact, I thought it proper to call attention to the fact that that was not specifically mentioned, so that there should be no mistake about it. Of course, Judge Hatch's statement ~~in~~ eliminates further discussion in the matter except in connection with the sixth objection which I have made and which relates to that portion of your Honor's decision covering the right of the Provo Reservoir Company to store water in Wasatch and Summit counties. Your Honor has given them the right to store all the waters between the 15th day of September and the 15th day of the following April. Now, there is no limitation placed upon that right.

(ARGUMENT)

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

(ARGUMENT)

MR. STORY: I will say, your Honor, since the noon adjournment I have examined the stipulation and there is a clause in that exactly in accordance with the clause in the decision, but I do not think it will be contended by any of the parties to this case that it was the intention on the part of the Utah Power & Light Company to limit its rights to winter water. In other words to surrender it for the purpose of storage by the other parties in any considerable amounts.

MR. A. C. HATCH: As to that the parties generally supposed this was a contention as to Utah county. I do not know whether the Summit county people are represented at this hearing at all.

MR. STORY: I have particular reference to the Provo Reservoir Company, which is represented here.

MR. A. C. HATCH: There are some half a dozen different parties in the other counties.

MR. STORY: I wish to say, your Honor, from information which I obtained from Mr. Wentz, I am rather inclined to believe that the storage rights of the various reservoirs which have been constructed, that the winter rights are not of sufficient importance to make any particular difference, that is, so far as the Utah Power & Light Company is concerned. I desire, of course, to look into that matter a little further before I would say I did not care to make any contention in regard to the stipulation, but it does accentuate the position which I took with reference to the adjudication of rights involved in applications to the State Engineer, because, if I am correctly informed the Provo Reservoir Company has applications on file for storage of water in additional reservoirs to be constructed hereafter, and it may become a very important feature, that I would be very grossly derelict in my duty to my client if I did not take steps necessary to protect them against taking away

all the winter waters. I have no desire on earth to prevent such storage of the waters as will be beneficial to the other parties of this case, and yet not seriously interfere with this company's power rights, and if it should be contended that we have stipulated away our rights to any of the winter water these reservoirs may now impound or which may be impounded in reservoirs to be constructed hereafter, I would certainly desire to make a showing the stipulation had been signed by a mistake without any intention of that kind. However, that is as far as I desire to contest that matter at present. Referring to the argument now which I was making.

(ARGUMENT)

MR. SOULE: There is a matter I wish to call the court's attention to, and that is there is a small claim in Wasatch county omitted from the decision, Henry Bisel, water for one acre of land under a first class right. I have not had the opportunity to look up the record to see whether he is in the record or what the land is. I intend to do so.

THE COURT: Did he file an answer?

MR. SOULE: I do not know that, I am going to look it up.

THE COURT: The reason I asked that there were a number of parties that it was suggested as soon as the decision was handed down they were omitted, and they were purposely omitted for the reason there was no pleading in their behalf. I am powerless to render a decree if there is no pleading. You might examine the answer Mr. Thomas filed and see whether he is included in it so I can bring him in the award.

(ARGUMENT CONTINUED.)

MR. SOULE: I find our answer for the Summit county people has never been verified, and I ask leave to verify it at this time.

THE COURT: If there is no objection it may be verified.

(ARGUMENT CONTINUED)

5:00 P.M., RECESS TO 7:30 P.M.

(ARGUMENT CONTINUED)

THE COURT: There appearing to be no objection upon the part of any of the parties interested in the application made by Mr. Soule in behalf of his client, Mr. Henry Bisel for sufficient water of the 1st Class in the Summit county water users' list to irrigate one acre of land that computation made be made, and it may be put in in second feet, the fraction of a second foot, in accordance with the stipulation and he may be included in those to whom water is awarded to that extent, and a decree may be made following that.

MR. WEDGWOOD: We will file a brief by Monday, and I ask the other side have not over a week to file a reply brief.

THE COURT: Is that satisfactory?

MR. STORY: So far as I can tell at the present time. I have some matters coming up that may force me to take a hurried trip to Colorado, I think, however, I can get it within that time.

MR. A. C. HATCH: I would prefer not filing our brief at all as to filing it and causing a delay.

MR. STORY: I shall not cause any delay.

MR. A. C. HATCH: For that reason I suggest if it going to cause any delay in the final determination of the case we will withdraw our offer to hand to the court--

THE COURT: I want the benefit of the computation to be made and illustrations.

MR. HATCH: Very well then, your Honor.

10:30 P.M., RECESS TO 10:00 A.M., JUNE 27, 1918.

IN THE DISTRICT COURT OF UTAH COUNTY, UTAH.

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PROVO RESERVOIR COMPANY,
Plaintiff,

v.

PROVO CITY, ET AL.,
Defendants.

June 27, 1918.

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MR. MCDONALD: If your Honor please, there is one item of Levi M. North, successor in interest to Ed Dillon in Wasatch county. The stipulation entered into by the parties provides that the Fulton decree should determine the rights so far as it did provide in Wasatch county, and it awarded to Edward Dillon or Ed Dillon half a foot of water for thirty acres of land, and in the decision there is nothing awarded to Dillon, and Levi M. North has filed an answer claiming to be the successor of Ed Dillon, and that half a foot as fixed by the Fulton decree should be awarded to Levi M. North. It is not awarded to either of them. However, North did not file his answer until January of this year, and he was never served with a summons, so, of course, if he had remained out his rights would have remained the same, but his answer is filed, and having been filed, I think it should be disposed of, and that water awarded to him.

THE COURT: Any objection to the court making that award asked for by Mr. North?

MR. A. C. HATCH: We know nothing about his succession to Dillon's interest.

THE COURT: Dillon, I understand, was not a party to the suit.

MR. MCDONALD: I think Dillon was not a party and North was not served.

MR. A. C. HATCH: Dillon, I think, was served.

MR. MCDONALD: I am not certain, but I think he was not. In any event it would make no difference whether he was or not because he had sold out years and years before the action was brought, moved out of the county, claims no interest.

MR. A. C. HATCH: Do you know that North is the successor?

MR. MCDONALD: I do know of my own knowledge he is the successor of Ed Dillon. He is asking for nothing only to be substituted to half a foot.

MR. A. C. HATCH: Upon the statement of Mr. McDonald, I think we have no objection, as far as we are concerned.

THE COURT: 1st Class is it?

MR. MCDONALD: Yes-- I am not sure, your Honor.

MR. A. C. HATCH: It is as provided by the stipulation, whatever was awarded to Dillon by the Fulton decree.

THE COURT: You can find out what it is.

MR. MCDONALD: I have a copy of the decree here and can find out.

THE COURT: The order may be that the answer and cross complaint of Levi M. North successor to Ed Dillon may be filed. You got permission to file it?

MR. MCDONALD: Yes, I got permission heretofore.

THE COURT: Pursuant to the prayer in that petition he may be awarded of the class shown in the Fulton decree one half second foot.

MR. MCDONALD: Now, I have another item here that I called attention to heretofore, and furnished the court with a copy. That is in the matter of the answer of-- I think it is James F. Clyde is the first name. However, there is about thirty three of them. It may have been James Bonny, first name in it. There are thirty-three

owners who reside in the river bottoms little northwest of Provo. They entered into a stipulation with the plaintiff fixing the area of each of their tracts of land. That stipulation was filed during the course of the trial, and attention was called to it in open court and all the parties acquiesced in the stipulation, and, of course, that stipulation was relied on as fixing the area belonging to those respective parties. Now, in the decision some of them-- some of their names are entirely omitted, but I take it that is a clerical error, and some of them are reduced in area. While it does not amount to anything in the whole, yet the circumstances are such that it becomes a serious matter with those who own little tracts of land, for instance, one person owns six acres and has lived on it for thirty or forty years and cultivated it, and the water right by reducing the area has cut it. Mr. Wentz has taken care of the matter, I am informed for this season in these various instances until your Honor could correct the decision. Now, I have furnished the court with a copy of the lands fixed by the decision that is the area of each tract and then the amount fixed by the decision so that one is opposite the other, and if there by no objection--

THE COURT: You mean copy of what is fixed by the stipulation?

MR. MCDONALD: Yes, copy fixed by the stipulation. Now, there is probably five or six or seven of these rights that are affected, some one acre and some two acres and some three acres, but it is the whole of these people who have lived there for so many years. While it is a small thing as a whole, it amounts to considerable with each individual.

THE COURT: It should be corrected.

MR. MCDONALD: We would like to have that corrected, I call attention to it again.

MR. A. C. HATCH: There was testimony given on those matters too, is there not?

MR. MCDONALD: I think so, I am not sure.

MR. A. C. HATCH: Testimony was taken, and it is my impression that the area, the entire area in each instance was non irrigated, and not necessary to irrigate it, some of it swamp land.

MR. MCDONALD: No, the land is there and it is actually irrigated every foot these people are claiming, and has been for many, many years. It is their home.

MR. A. C. HATCH: I have no doubt of that, but there is some swamp lands in that river bottom. It is my impression that was the testimony.

MR. MCDONALD: Yes, but that is not included in anything claimed by these people, neither swamp land or land not used for farming purposes.

MR. JACOB EVANS: How much of a difference is there?

MR. MCDONALD: Probably twenty acres. Mr. A. L. Booth and myself went over the stipulation and checked it and compared with the decision and then fixed the result, and will furnish your Honor a copy of it.

MR. WEDGWOOD: Can't we get at it out of court this noon and see whether or not there is any substantial difference between us?

MR. MCDONALD: There is about twenty acres.

MR. WEDGWOOD: No, if there is any substantial reason why there should be a difference.

MR. MCDONALD: It has been called to the attention of everybody when everybody was present, and no objection was made, and we relied on that stipulation.

MR. A. C. HATCH: As to the area?

MR. MCDONALD: As to the area.

MR. WEDGWOOD: Can't we get together this noon and determine whether there is any difference?

MR. MCDONALD: Probably so; that will be satisfactory to me.

MR. A. L. BOOTH: I remember going over the papers and with Mr. McDonald some months ago there was some discrepancy but the details I don't recall.

MR. JACOB EVANS: I would like to know from Mr. Wentz whether that statement is correct there is twenty acres more should be given under that area than is given in the decree?

MR. WENTZ: Yes.

MR. HATCH: The decision is on the testimony of Mr. Stewart who made the survey, I didn't make the survey.

MR. JACOB EVANS: The decision is based on the evidence given in the case?

Wedgwood
MR. WENTZ: We withdraw any objection and consent the correction be made as the stipulation provides.

THE COURT: Are there any objections from any source. If not, the correction may be made.

MR. WEDGWOOD: There is some difference here and can't the making of this order be postponed until this afternoon? (*Underline inserted by us*)

THE COURT: Yes.

MR. WILLIS: May it please the court, I wish at this time to renew my motion of yesterday permitting the substitution of the name of Elizabeth Kummer Hamilton in lieu of the administratrix of the estate of John Kummer, deceased, as she has purchased all of the interest of the estate and would ask that her name be substituted so that the decree may award to her the rights of the six acres of water right that was stipulated and entered in the decision of the court to the estate of John Kummer, deceased.

THE COURT: Any objection to that, gentlemen? The substitution may be made then.

MR. WILLIS: Furthermore, your Honor, it seems there is some little misunderstanding with reference to the rights

of the Heber Power & Light. I will say I don't see how there can be any misunderstanding. We took under the date of our application, and it may be understood now that the award of 150 second feet to the Heber Power & Light is subject to any persons' interests who has appropriated prior to the appropriation of the Heber Power & Light. I think the court understand it is subject to their application and not any intent to interfere with any prior appropriator's right.

Now, I will ask at this time further, your Honor that it seems through some inadvertence that some interests of the Timpanogas Irrigation Company have been overlooked in this matter to reservoir rights, and I would like to have the privilege of filing a written motion asking their rights be determined and finally decreed. I do not think there will be any objections. It is understood they have certain rights in the reservoirs and the decree allowing them to flow that water down to the intake of their canal and then to divert and use it. I do not think anyone would have any objection. I feel it ought to be by written motion.

THE COURT: I do not think so. If the court has not determined the issues all you need to do is call the court's attention to the fact some issue has been overlooked.

MR. WILLIS: I do not know whether it was brought up or not. Judge Thurman represented the Timpanogas Irrigation Company.

THE COURT: If it is not presented by the pleadings a motion will not help it. I cannot decide anything not set up in the pleadings.

MR. A. C. HATCH: If the court please, a certain application to store water was filed in evidence here, and the Provo Reservoir Company is awarded all of the rights of the Timpanogas Irrigation Company under that application, application 944. Now that is here and by striking out one line in that finding it could be corrected. As to that application the proof is that the Provo Reservoir Company

owns 12/28, the Sege Lilly Irrigation Company 2/28, Wasatch Irrigation Company 1/4, and the Timpanogas Irrigation Company 1/4 interest under that application.

THE COURT: That was the proof and your pleading?

MR. A. C. HATCH: That was the proof and the pleading as I understand it. We do not claim more than the 12/28, but the decision in one section gives to us all of the right acquired by the Timpanogas Irrigation Company under that.

THE COURT: That can be corrected then, I do not think it needs any written motion.

MR. WILLIS: I will say further there are some water rights in which the Timpanogas Irrigation Company is interested in water from Beaver and Shingle Creek, and that has not been defined here, and we feel it should be definitely defined.

THE COURT: Certainly, if it is in issue. I do not think, Mr. Willis, in the statement you filed you referred to that.

MR. WILLIS: Yes, I think these rights should be defined in determining issues in this case and perhaps a motion may not be necessary, I am sure, but at least a statement setting forth what those rights are, so that they can be properly defined in writing, I feel should be filed.

THE COURT: The reason I asked the question, I thought I made an award, went through very carefully and made the award in relation to everyone of the defendants that you gave me in your statement of your claims.

MR. WILLIS: That is right, Your Honor, but remember Judge Thurman represented the Timpabogas Irrigation Company up to the time of his appointment to the Supreme Bench, and in going over the stipulation and also over the decision of the court these interests I suppose have not been

specifically mentioned, and I desire to have it done.

THE COURT: I understand that, but I think you did not understand my question when you said it was in your statement.

MR. A. C. HATCH: My attention has been called that I made an erroneous statement as to the interests under application 944, and wish to have the statement corrected. We will present it in writing this afternoon.

THE COURT: Very well.

MR. A. C. HATCH: There is one or two matters of clients represented by Chase Hatch. There is under the decree awarded to Ruth Hatch and Abram C. Hatch as executors of the estate of Abram Hatch, deceased, certain mill rights. A motion was filed and an order made substituting for those executors Joseph Hatch, A. C. Hatch, John Turner, Minnie Dodds and Lacy "arnsworth as common owners, as successors to Ruth Hatch and Abram C. Hatch as executors, and I ask that that be substituted in the findings when finally made; paragraph 55 of the decision which finds that Ruth Hatch and Abram Hatch should be Abram C. Hatch, executors of the last will of Abram Hatch, deceased, are the owners and entitled to the use of 18.84 second feet of the waters of the river. We ask the names of the prior parties I mentioned be substituted as they were substituted by motion regularly filed.

THE COURT: Very well, that may be done.

MR. A. C. HATCH: There are several other matters, if the court please, but I will wait until the afternoon before presenting them.

MR. CLUFF: There is just one item on page 4 of the decision under the parties interested as tenants in common to the rights of the use of the Baum Ditch, Alfred Young ditch and so forth, S. S. Cluff, Jr. The award there is nine acres. Now, the testimony^{and}/~~of~~ Mr. Cluff's deed calls for

thirteen acres. There is about one acre that perhaps is used by City Creek going through that land. The award there should be at least twelve acres instead of nine.

MR. JACOB EVANS: It was a contested claim, was it not, and evidence introduced concerning it.

MR. CLUFF: Yes, there was evidence introduced.

MR. JACOB EVANS: The court has made a finding upon the evidence.

MR. CLUFF: The only evidence was the testimony Mr. Cluff owned thirtgen acres, that is what his deed calls for.

MR. JACOB EVANS: I think the survey of Mr. Stewart covered all those matters and the court has probably followed the survey instead of taking the evidence of the parties, and I think probably in that case the decision is correct.

MR. CLUFF: I do not know what Mr. Stewart's testimony was, but I know that is the testimony given by Mr. Cluff and it is correct.

MR. JACOB EVANS: We introduced a survey of Mr. Scott Stewart as to all that land and the court probably has taken the survey instead of the evidence of the parties.

THE COURT: I do not remember each individual case, I would have to see the evidence. This may be a clerical error.

MR. CLUFF: I wish to call your Honor's attention to that because that is the award that should be made there. There is no dispute about that.

MR. A. C. HATCH: Yes, we contested all those claims, and testimony was taken on both sides, as I remember.

MR. JACOB EVANS: And surveys introduced of all that land up there. Mr. Scott Stewart surveyed it all.

MR. CLUFF: That may be true, I do not know what Mr. Scott Stewart's survey was, I don't remember.

MR. JACOB EVANS: I think you will find if you

look up the record you cross examined Mr. Stewart on that acreage.

MR. CLUFF: No, I never cross examined him, I was not in court at the time he testified.

THE COURT: What do you claim your evidence was?

MR. CLUFF: Twelve acres.

MR. RICHARDS: Your Honor please, at the proper time we have something to present for Provo City.

THE COURT: I thought I would dispose of these miscellaneous small matters first.

MR. RAY: I understand, your Honor, at this time the court is hearing objections to the decree solely upon the basis of inadvertance or clerical errors.

THE COURT: Yes.

MR. A. C. HATCH: The name of George Schear who was a party defendant and who claimed waters from the Snake Creek separately from the Midway Irrigation Company, and gave testimony in regard to it, is left out of the decision.

MR. JACOB EVANS: I understand from Mr. McDonald that in copying the original decision that some names were inadvertently omitted in copying some of the decisions that were sent out, and some of the acreage in some of the copies is not identical with the original so that it may be that some of these corrections that are being asked would appear to be in the copies furnished the various attorneys and they possibly may be correct on the original filed in court: I make that statement that it may be the case that Mr. Shear and some of those--

MR. A. C. HATCH: The name of Nephi-- there is a motion filed that the award to Nephi and Joseph Huber also gave testimony as to the use of water from Snake Creek-- any award be made to them be made separate from the quantity awarded to the Midway Irrigation Company, as their claim

was that they had used it not in connection with-- portion of the water at least, and not under the direction of the Midway Irrigation Company. That is a motion filed by Chase. He was at Coalville until last yesterday, and will not be present in court, and asked me to call the court's attention to these matters.

THE COURT: Was the Huber award made in connection with the Midway Irrigation Company?

MR. A. C. HATCH: I did not go into it.

THE COURT: I didn't remember it was. I remember the two Hubers.

MR. A. C. HATCH: There were two, there was Nephi and Joseph Huber who claimed a right to the use of water, and it was contested.

THE COURT: I remember it.

MR. A. C. HATCH: And they claimed it as being separate and distinct from their right as stockholders under the corporation and John Huber as administrator of the estate of John Huber, deceased, also claimed some rights. The Huber estate has been closed and the widow was awarded the entire estate by decree of the court, and I will submit her name and ask she be substituted for the administrator, John M. Huber.

THE COURT: My recollection is the Hubers were awarded water independent of the irrigation company. I notice John Huber is mentioned among those having water in connection with the Midway Irrigation Company, not as a stockholder, but having a joint interest in the five second feet from the Ontario drain tunnel.

MR. A. C. HATCH: It is used through the same ditch. Nephi and Joseph Huber conducted part of the water claimed by them through a separate and distinct ditch.

THE COURT: I remember that. I think it is in here some place, I will look and see. Now, are there any other matters before we take up the city. Mr. Richards, you may proceed.

IN THE DISTRICT COURT OF UTAH COUNTY, UTAH.

PROVO RESERVOIR COMPANY,

Plaintiff,

vs.

PROVO CITY, ET AL.,

Defendants.)

June 27, 1918. *and Dec 15, 1917*

THE COURT: Now, are there any other matters before we take up the city? Mr. Richards, you may proceed.

MR. RICHARDS: May it please the court, at a previous session of the court we asked for time in which to have a transcript made of the testimony in this case so that we might have an opportunity to examine it and ascertain the real status of the case and determine what action, if any, we thought ought to be taken in behalf of Provo City. The transcript was prepared, and here in court, portion of it. We have examined this transcript with as much care and thoroughness as the circumstances and time would permit. We have also had investigations and experiments made for the purpose of determining what additional evidence could be obtained, and we have reached the conclusion that the decision which your Honor has prepared does not give to Provo City the water to which it is entitled, that it would be unjust and not in accordance with the legal rights of the city to have a decree entered along the lines of this decision, and for that reason we will move the court to reopen the case for the purpose of permitting additional evidence, and I will now read the city's claim.

The defendant Provo City moves the court to re-open the case and permit said defendant to introduce competent, material and relevant testimony which will show: first, that the actual

irrigated area of the lots referred to in the testimony heretofore given as the city lots in Provo City (Reading).

Now, it appears from the testimony no actual survey was made of these lots originally, and the area was arrived at in a somewhat uncertain and unsatisfactory way, but now we have an absolute determination of the matter, and we present here as an exhibit the name of every owner of the lot, the area of the lot, the deduction that has to be made from the area by reason of any building or other reasons why a portion should be deducted. Some lots are irrigated in full. Then we give the net acreage and the number of the lot and block, which will be filed for inspection. Verification filed by Mr. Bostaph and Mr. Scott Stewart.

MR. JACOB EVANS: May I ask whether or not this area includes as irrigated land that portion irrigated from the city water works, that is the lawns.

MR. RICHARDS: No, I understand not.

MR. A. C. HATCH: In paragraph 10 of the affidavit of Scott Stewart, the third line, the figures are-- I cannot tell whether it is 25 or 35 feet of water.

MR. C. C. RICHARDS: It is 35.

MR. RICHARDS: I desire to refer to this briefly as I go along, and later I will read the affidavit, but to make the connection and show to the court how these statements and allegations are supported by the affidavit.

Now, the second ground of our motion is: We offer evidence that the lots referred to in the testimony heretofore given as farm lots, and which the decree shows an acreage of about 134 acres (Reading).

Third, that the character of the soil is such--

Now, in order to determine that, as I read the original testimony, there was no evidence as to the actual application

of the water to the land, or at least, not sufficient evidence to be relied upon. Of course the irrigation season is not far advanced, but water has been applied to different sections of Provo City during the present irrigation season. We have a map here showing the location of the different areas to which the water was applied, and showing the crop that was being raised on each tract, the number of irrigations that were required to mature that crop, the time of rotation whether one week or two weeks, the number of inches applied, the acre duty, the transmission loss from the head of the system, at least from the place--yes, from the head of the system where the water is received from the common source, the river, and the distance down to the place where the water is applied to the land, and the data with reference to that. Now, there is a note accompanying this. Each one of these tracts is described in the manner in which I have stated. The note says tract No. 2 is the garden soil (Reading)

Whereupon the counsel reads the affidavit of Mr. Bostaph, Mr. Stewart, Charles E. Jones, H. J. W. Goddard, George C. Swan, Arthur Snow and George Duke.

Now, if your Honor please, it seems to us that there can be no question as to the facts that are stated in this motion. The area of these lots has been determined. The duty of water with reference to them has been determined with as much accuracy as it is possible to determine it in the time that we have had. Of course, if we could have until the end of the irrigation season, we would have then an absolute demonstration of the water that had been applied for the raising of these crops. The fact that these farm lots are situated practically the same as the city lots is established. The fact that change should be made in the time of period, commencing the period of irrigation be-

cause of the maturing of the crops under the Provo system later than the crops on the higher land, that seems to be clear; and the matter with regard to the East Union, of course, it is a well known fact to the court and everybody, that water cannot be applied as effectively and efficiently and economically in the night time as in the day time, and there is a disadvantage in that regard. Also this loss in transmission from the time the water is turned into the ditch until it gets down to the place where it is to be applied.

Then we go to the water works system. No mention is made in the decision, as I understand it, of this water works system. That it exists no one denies, no one has, I suppose, disputed that. It seems from reading over the record to me as though it had been taken for granted that the system did exist and perhaps nothing further was necessary than the introduction of the Chidester decree recognizing the rights of the city to the waters of these springs, and that decree provided that the city should be entitled to the waters of the springs and it might divert these waters into the water works system of pipe line. There is nothing in the case, as I understand it, that shows the construction and operation of this system. There is evidence showing that certain spring or springs, particularly the Maple Spring, so-called-- called by us the Yellow Jacket spring, seems to be another name by which it is called-- that that was diverted into the pipe system as late as 1915, but any evidence as to the construction of this system, the diversion of the water into it, the use of the water and the necessity for the use, that does not appear to be. There is nothing in the decree with reference to it, and I assume the reason why, there is no evidence in the record to justify a decree. It seems manifest to us it would be a great oversight or misfortune for this case to be closed and no decree to Provo City of its rights to these

waters. As to the necessity for the water and use and conditions that are existing here, we have not only the affidavit but it is a matter of common knowledge, I am told, in this community as to the deficiency, and I have in my hand here a letter from the State Mental Hospital, dated June 26, 1918, and addressed to Hon. Leroy Dixon, Mayor of Provo City, which I desire to read. This letter was written yesterday. "Our institution has been suffering greatly the last two months from the low pressure of the city water. (Reading)

MR. RAY: Mr. Richards, will you permit a suggestion there so that the facts upon that letter may be all before the court?

MR. RICHARDS: Yes.

MR. RAY: Until June 27th, this month, there has been no limit upon the quantity of water Provo City could have in its pipe system.

MR. RICHARDS: I don't know about that.

MR. RAY: And they have been operating on four second feet of water until the 22nd of this month.

MR. JACOB EVANS: May I ask one question, don't you know that it is a fact that the State Mental Hospital has been complaining about that water almost twenty years, from time to time?

MR. RICHARDS: I don't know that, but I don't think it makes any difference whether they have or not. I am not relying upon the letter of the Mental Hospital at all, let counsel understand that right now, I am not relying upon that letter. It came after the motion was prepared and the affidavit upon this point was prepared, and I read it as a part of my remarks, and it is very pertinent, it seems to me, and will counsel tell me that it is not an actual fact here in Provo City that is recognized by the plaintiff, the officers of the plaintiff, and attorneys

in this case that this condition to a certain extent exists? In other words, that right here in this city in private residences there is no water to flush the toilet and people said they had to go out of their houses in order to meet the calls of nature. I don't think counsel and the gentlemen interested in this will deny that is the situation here in Provo City. I simply mention that--

MR. A. C. HATCH: I deny it at this time, excepting it be on the mountain side somewhere.

MR. RICHARDS: Judge, I did not design to be facetious in this matter. Of course in the hotels where you and I put up they have these accommodations and if I am mistaken in the statement I have made I will be glad to have these gentlemen tell me if that is not true, in Provo City, the inhabitants of the city, some portions of the city are laboring under the disadvantages and conditions I have stated right now.

MR. A. L. BOOTH: Personally I don't know.

MR. RICHARDS: I don't ask you to answer unless you are prepared to deny.

MR. A. C. HATCH: Can you name one of the inhabitants that we may make an inquiry?

MR. C. C. RICHARDS: We will be glad to tell you who our informant is and he is connected with your company.

MR. RICHARDS: Not only one, but we can furnish a number of affidavits to support this.

BYSTANDER: Mayor Dixon is one, and we can bring you a thousand if you want them.

MR. RICHARDS: We are not here attempting to prove our case, we are simply showing reasons why we should be allowed to open our case, and I submit in this matter we can furnish any amount of proof that might be required if it becomes a question in the mind of the court or a controlling question in reference

to this matter, which I assume it will not and cannot be because of the other circumstances and facts in the case-- bring out that statement from the lips of witnesses for whose veracity I would at any time vouch-- so I make that statement. However that may be, this motion don't depend upon that.

Just one more word with reference to the character of this proof, what our theory and idea has been that we wanted to support the motion, the different grounds upon which we base the motion, with some evidence, that it might not stand upon our unsupported statement. We have not, as I have already stated, supposed it was necessary or desirable, or would be permissible by the court, that we should attempt to introduce a lot of evidence to establish any of these facts at the present time. We hope to have an opportunity of doing that later.

Now, if your Honor please, we appreciate the extreme reluctance of the court, of this court, of any court, after having spent days and weeks and months extending over years of time in the careful consideration and determination of the trial a case of this importance to reopen the case and take additional evidence. We appreciate that, we realize that, but at the same time we realize the fact that in a case of this importance that appeals so strongly to the conscience of the chancellor a court will be much more reluctant to place upon the records of the court a decision that is unjust and unfair. Now, it may be said, you had opportunity, your clients had opportunity to make this showing heretofore, but they did not do it. Admitting that and saying nothing about the reasons why it was not done, because I am not conscious as to what they were, and probably perhaps would feel a delicacy about discussing them even if I knew; if the present counsel in this case had tried this case in the way that it has been tried and had overlooked these things, and the

case stood today in the position in which it stands, and we had come forward, or anybody else, presented these facts to the court, I say no chancellow would enter a decree under such circumstances as that. No sir. We say it is of the utmost importance, it is of the first importance, it is of the greatest importance, it is of paramount importance that this decree and decision shall be right when it is entered. Is it to be thought of for a moment that the court will penalize the municipality of Provo and the inhabitants of Provo City, ten thousand people, because of some oversight for any reason, no matter what it was, oversight and neglect, failure, omission, call it what you please? I am not assigning the reason why it happened, I say that a court of chancell^{er} will not do it. Whenever a time arrives that it is made clear to the court that a manifest injustice and wrong would be perpetrated and perpetuated by the entering of a decree the court will say no, we will take the time to get this thing right, and that is what we expect of this court, and it is upon that ground we make the appeal to the court at the present time, because we think it appears, and must appear to the court from the motion that we have made, from the evidence that we have offered in support of the motion, that a grave injustice and wrong would be done to Provo City if a decision, if a decree were entered in conformity with the decision of the court as it now stands.

Of course, I regret the necessity of asking this. I have had some little experience in these matters. I know how my brethren at the bar feel at the suggestion of the reopening of a case of this kind. I know how I would feel, I know how I have felt, but all that does not change the situation one iota. It is not desired to open this case a particle more than is absolutely necessary to establish these facts that we now present to the court.

Now before closing there is one other thing I ought perhaps to call the attention of the court to-- I have not put it in the motion because I don't think it belongs in the motion-- and that is this; we desire on the part of Provo City, desire to be heard -- we shall at the proper time desire to be heard as to the nature of the award, or that portion of the decree that will be made awarding the water that goes to the Factory race for power purposes. We have said in the motion we have asked for permission to offer additional evidence to show that the award that has been made is insufficient, and we take this position-- I am not going to argue it now, but am going to state it, because I want to be absolutely fair with the court and with counsel, and want everybody to know what our position is, and I want to say now parenthetically that I regret we have not enough copies of these papers to serve upon every member of the bar interested in the case, but will try and get them out as soon as we can. We had supposed there would be additional copies, and another thing, we had no opportunity to serve them in advance, give you notice, these papers were not finished, some of them, until after I came into the court room this morning, so we have been in no position to afford you gentlemen any information or furnish you copies in advance, and, as I say, I regret we haven't them this morning, but will be glad to furnish them.

MR. WEDGEWOOD: We make no complaint as to that.

MR. RICHARDS: No, I know that. My knowledge of the character of the gentlemen who are engaged in this case assures me of that. I know of your magnanimity, your generosity and of the pleasant and brotherly way in which you try law suits. I am reminded at this time of my experience a number of years ago with a distinguished judge who came to Salt Lake to try a case in the Federal Court. He was to relieve Judge Marshall,

and after serving a term there-- I had some important litigation before him involving large sums of money, and very interesting questions, and I got along very nicely. Before he left I called to pay my respects and thank him for his courtesy. He says, "Mr. Richards, I have never seen yet the necessity for having a pall of gloom hanging over a court room in order to preserve the dignity of the court. I want to tell you," he says, "that the life of the lawyer is hard enough if the court does everything he can to make it easy, and if the lawyers do all they can to make it easy for each other"; and I thought that was a mighty good thing. It coincided exactly with my notion of things, and my experience, and I am glad to say the members of the bar I see here in this case, judging from their conduct heretofore, believe in that.

Now, the point I want to make--

MR. JACOB EVANS: I might suggest you make it easy for us by withdrawing this motion of yours, make us all happy.

MR. RICHARDS: Well, my friend, if I was to suggest now the withdrawal of that motion my friend would be one of the first to protest against it. Why? Because he would know we were doing an injustice and wrong to my client, and he is the last man that would want an attorney to do something that he ought not to do to perpetrate a wrong. We ^{may be} ~~made~~ be facetious, but that is the fact.

Now, I had concluded my argument but for this one thing. I want to say as to the decree with reference to the water in the Factory race we have made no reference to this part of it because it does not relate to the opening of the case to take additional evidence, but it is upon the question of the construction of the stipulation between the parties, and of the relation that Provo City bears to the people who are using the water; and our position is that the relation of Provo City to the

people who use the water for power purposes as appears from the stipulation and from the record-- and I am prepared to argue it when the proper time comes-- is practically the same as the relation that exists between Provo City and the irrigators, the people who use water for irrigation. I state that simply that you may understand our position, and it may not be said hereafter that I have withheld anything, because I want you to understand fully and completely what our position is with reference to this matter.

MR. RAY: May it please your Honor, on behalf of my client I desire to resist any motion to reopen or take additional evidence in this case.

(Argument)

12:00 Noon, Recess to 2:00 P. M.

THE COURT: Now, gentlemen, are you prepared to proceed with this hearing?

MR. WEDGEWOOD: If your Honor please, there is a situation here that is somewhat novel and somewhat embarrassing, better known to other counsel than to myself, because my own comes only by association-- is the fact that this case has been litigated, to use a slang expression, to a finish. I might further say that the parties had exhausted themselves. From that view point it would seem as though it was idle and childish to start in and play the game over again because this party or that party, as Mr. Ray suggested, has not played the game along the same lines that they would play it if they were starting in anew. When we look at it from that standpoint it would seem that it commands but little consideration or patience from

the court or the various counsel. On the other hand the issues here are large and they affect numbers of people. If, as has been said, there was a mistake in some regards nobody wants to force this court to make an offhand (we might say) decision in the face of a mistake, if there is a mistake. As to those matters a little later I will make a suggestion. There are matters, however, in this case which surely should not command consideration of the court for one moment, or the consideration of counsel. One of those is the duty of water. It would be a force in legal proceedings in my judgment, beneath the dignity of the court, and wholly outside of the realm of legal trials and legal proceedings to open up that question at all. That is closed. So far as the question of Provo City is concerned, its mill race and waters that is closed. It would be a force to attempt to open that up. The water awarded them is there. They may use it for power. They may use it for irrigation. They may do as they see fit. Irrigation, as we said time and again, and it says itself, is the one important consideration, that is real life, the foundation of life, foundation of progress and the rock and anchor for all this country. Power during the irrigation season can be easily supplied. If Provo City sees fit in its wisdom or lack of wisdom to use water that is wholly available for irrigation for power, except as citizens of the city, those of us that happen to be, we have no cause of complaint, that is their question entirely. That ought to be absolutely closed in this court.

There are three questions, however, which have been submitted to the court that challenge fair consideration. The first is, and the one with which there is little difficulty, is whatever water Provo City is entitled to for municipal purposes I take it there is no question but what comes from springs. Since these water works were first remodeled, the water has come from

springs and never seen daylight unless it be at a manhole or some physical construction in the water system, outside of the spillway, and I see no reason why water for the pipe line should not be fixed in the degree as coming from the spring, as in fact it does, so that question is very easily disposed of.

Now, the question of the quantity of water to which they are entitled seems to arise on the question of pressure. Now, pressure does not rest upon quantity of water, except the quantity of water is one factor. If you will go into the history of this water works system you will find and we will find that as a part, an integral part of it, a pressure basin was provided for, located and situation for, appliances provided for. In other words, a pressure basin was part of the system. The only reason why it is not a part of the system today is because Provo City has not completed the system, that is the only reason. As suggested by Judge Richards by the production of the letter from the asylum this question of lack of pressure under certain abnormal conditions which occur to more or less acuteness each year is a lack of pressure, and I think I can say advisedly if Judge Richards will look into the record as Mr. Ray suggested, you will find the same complaint as from the asylum in other places, in regard to the lack of pressure, that he has submitted somewhat outside of the record today. Now, Provo City is not entitled to maintain pressure at the expense of public policy, and by the ~~right~~ waste of water. What I mean by that is this pressure is due to water head. Water head may be maintained in two ways, by having a sufficient quantity of flowing water passing over the intake of a pipe so that regardless of the amount of water taps along the pipe called for there is sufficient water flowing in the pipe to keep the pressure, that is if the pipes are full all the time. That on the face of it shows that that water, so far as Provo City is concerned which does not go into

the pipe is a waste of water, while with a pressure basin at times there is not the maximum taken from the pipes the pressure box is filling. When the maximum amount is being taken from the pipes, the pressure basin lowers and it responds and balances itself, and the pressure is kept of course. Every foot of water in height adds $62\frac{1}{2}$ pounds per cubic foot to the pressure in the pipe, and when you figure the capacities of pipe itself to give pressure--

THE COURT: How much do you say a foot in depth would add?

MR. WEDGEWOOD: It weighs $62\frac{1}{2}$ pounds. It wouldn't give that much pressure down here by any means, that depends upon the height.

THE COURT: In that connection may I ask does the evidence in this case show what the head of this water was?

MR. JACOB EVANS: It has not got any head.

MR. WEDGEWOOD: I don't know. That comes right in line with what I am going to say.

MR. A. L. BOOTH: There is a basin up here, I understand, out of which the water goes directly into the city?

MR. RAY: What is the fall?

MR. A. L. BOOTH: I cannot answer that.

MR. WEDGEWOOD: The point I make when I say each cubic foot height added weighs $62\frac{1}{2}$ pounds is that under the situation as it exists now they are bound by the pressure they get from the static head of their pipe. They are not entitled as a matter of right to create any artificial head any more than what a fairly good pressure box would give there, and the point I make is that with a pressure box there then the pressure would be equalized and they would overcome these difficulties of which they complain, and I say the system as planned intended that a pressure box should be built, or pressure reservoir, whatever you

want to call it, and the only reason it has not been built is because they have not done it.

Now, the other point is a question of these city lots. They squarely allege there -- with how much force I am not saying, but it comes to the court there has been a palpable mistake. If there has that mistake is entitled to fair consideration, I don't know whether there has been or not. I am incidently informed that one man looked up the acreage attributed to his ownership and he found there was four square rods more attributed to his ownership, his little piece of ground, than what he has irrigated for years, in this table here.

THE COURT: You mean in this last one?

MR. WEDGEWOOD: Yes.

THE COURT: The evidence, as introduced at the time of the trial was of several witnesses who made estimates, but no accurate measurement was testified to as I remember it with reference to the city lots. Of course, the acreage outside was -- but estimates were made and the highest estimate, I think, which was given by Mr. Thompson was taken as the correct one by the court. That was the situation of the evidence.

MR. WEDGEWOOD: Now then, if the court should feel inclined to extend any further time as before closing this case upon the showing made in regard to the particulars that I have specified, that is, these three, putting in the decree the question where this water comes from from the pipes and springs, and any question in regard to the amount of city water storage and the pressure or otherwise as water in pipes--

THE COURT: Water for culinary purposes?

MR. WEDGEWOOD: water for culinary purposes, or number of acres for these city lots, we would not object to a reasonable time being given within which we in the company of Mr. Bostaph could check over this city lot question and become advised as

to each one of these areas, as to what the area and acreage of the city lots was, and how far there was a mistake, if there was any mistake in regard to that acreage.

THE COURT: There is quite a discrepancy there, quite a difference; there is almost a hundred per cent more than the court awarded, and it struck the court at the time there must be surely some mistake, and if I remember the matter it was merely estimates and not measurements at the time, so that a hundred per cent or nearly so, is quite a wide range.

MR. RAY: Captain, how long do you think the persons opposing this motion ought to have to check the truthfulness of the affidavit as to the irrigable area within the city as to the lots.

MR. WEDGEWOOD: Let me ask Mr. Bostaph, if he is here, how long would it take to go over this and check it?

MR. BOSTAPH: Do what?

MR. WEDGEWOOD: Go over this map of yours which gives the city acreage and check it.

MR. BOSTAPH: It has been checked.

MR. WEDGEWOOD: How long would it take us to do it?

MR. RICHARDS: How long would it take you and the engineer from the reservoir company to go over these lots and check up, see if your statement is accurate or not?

MR. BOSTAPH: It would take about twelve or fifteen days.

MR. RICHARDS: How many tracts are there?

MR. BOSTAPH: Tracts, there are approximately eighteen hundred. I have not counted them exactly.

MR. WEDGEWOOD: Take a couple weeks then. If the court feels that there is such a substantial showing that he feels bound to investigate the question as to whether there was a mistake or not, or take evidence in regard to that, my suggestion

would be that it be understood that a reasonable continuance is granted and that we check over those two questions and then present the matter as to just exactly what our position will be in regard to the matter. If the court is satisfied the showing is not sufficient, we do not urge it be done.

THE COURT: I feel this way, Captain Wedgewood, with reference to the award of water that was made to Provo City for its domestic purposes, that is through the pipe line, that the court is not entirely satisfied with reference to that. The showing is such I would like to hear something further upon it, and especially in view of the fact there was no evidence introduced at all with reference to the source from which it comes, except the fact it is running through the pipe line from springs.

MR. WEDGEWOOD: That we can settle by stipulation in a minute, source from which it comes.

THE COURT: And with reference to these city lots. I will say with reference to the other matter I do not feel any particular uncertainty as to the correctness of the decision the court has rendered as to the irrigation water. I will indicate the views I have with reference to this suggestion 35 per cent loss carrying this water. I don't think any irrigator is entitled to waste 35 per cent of their water in carrying it the distance Provo City has to carry its water. I don't think they ought to be credited with that amount of water as they convey it to their land. I think an irrigator must provide some means by which he can take his water with a less loss than that, the distance they have to take it, and if it requires puddling or something of that kind, it must be done, at least, they would have to take the loss above a reasonable loss.

The duty of water which affords all the way from 10 to 11 or 12 feet depth of water upon land during an irrigation

season, I am of the opinion is an ample award of water. I don't think there is anything shown in the affidavit that would justify the court in opening up the question with reference to that; but with reference to the quantity of land, there is apparently a mistake some place, a very serious mistake. Either Mr. Bostaph and result of his investigations is in error, or the evidence which was produced to the court is in error, so there is a serious mistake, and the court wants further evidence on that, wants further light on it, and they ought to be awarded the water for the land they have. Now, upon those matters the court wants to hear further and wants to open the case for that purpose.

MR. A. C. HATCH: That only refers to the city lots?

THE COURT: That is all; that is all the application was for.

MR. RICHARDS: It includes farm lands.

THE COURT: As far as the quantity of land whatever it may be.

MR. WEDGEWOOD: There has been no showing as to the quantity of farm lands.

MR. RICHARDS: I am told it is not a mistake as to area, but classification with the farm acres. They are in substantially the same condition as the city lots, farm lots.

THE COURT: You say they are, I don't so understand it, I didn't so understand it.

MR. WEDGEWOOD: He don't say as to acreage, but wants more water for them.

THE COURT: He says they are in the same situation with reference to the requirements of water.

MR. RICHARDS: Yes.

THE COURT: I don't so understand it; I understand the farm acres don't have to take their water in small areas.

MR. C. C. RICHARDS: There are farm acres and farm lots. The farm acreage we don't claim extra water for. There are 134 acres of farm lots that are little small tracts that our contention is are identical with the five hundred and forty or fifty acres of the same classification.

THE COURT: The farm acres are treated separately.

MR. C. C. RICHARDS: Yes, we think the farm lots should be treated the same as the city lots.

MR. TUCKER: A stipulation was entered into agreeing there was 701 acres in the platted portion of Provo City not irrigated, and that was the aggregate acreage. Now just outside of the platted portion of Provo City there are lots which are of the same size and raise the same sort of crops as the platted portion of Provo City. Evidence went in to show those lots comprise 134 acres, and they were called farm lots in contradistinction to farm acres. In the decision there is no distinction made between farm lots and farm acreage.

THE COURT: In the 2058.6 acres did I include---

MR. TUCKER: You included the 134 farm lots, and we take it those farm lots are in the same position as the city lots so they should go in that category and subtracted from the farm acreage,

MR. JACOB EVANS: Then these 134 farm lots should be deducted from the farm acreage and added to the city lots.

MR. TUCKER: That's it exactly.

THE COURT: Mr. Stewart, in his report of the property he had surveyed and determined the quantity of it included the farm lots.

MR. TUCKER: There were three classifications of land as I understand it, platted portion of Provo City comprised 701 acres, the farm lots of Provo City which comprised about 134 acres, then the farm acres which comprised the difference between

2058 acres and 13¹/₄ acres. In the decision the court has combined the farm lots and farm acres.

THE COURT: I was not asking what the court did, but asking what Mr. Stewart did.

MR. TUCKER: He evidently included the lots in the acreage.

MR. JACOB EVANS: I don't think Mr. Stewart made any such distinction. I think the distinction was made in the evidence on the part of the witnesses for the city. I think so far as Stewart's survey was concerned, these farm lots were included within the farm acreage, but the distinction was attempted to be made in the evidence in this case.

MR. TUCKER: The record will show that Mr. Stewart feels sure of it himself.

MR. RICHARDS: That can be ascertained.

THE COURT: I understand you are going to check over with Mr. Bostaph, or someone representing the city with someone representing the plaintiff and the other parties. You might check this matter as well and see what the situation is with reference to it. If the situation that applies to the city lots would apply equally to the farm lots they ought to be included if they are in the same situation as the farm acreage.

MR. WEDGEWOOD: That would leave just three questions to the mind of the court, number of acres in Provo City entitled to irrigation; question of whether the farm lots should be considered on the basis of city lots or farm acres, and the question of what should be done, if anything further in the way of culinary and domestic water through the water works.

THE COURT: Yes.

MR. WEDGEWOOD: The other, I understand, the court considers closed?

THE COURT: I will not say now that is all. I want

to hear any suggestion Mr. Richards may have, whether anything further should be included or not, but that is in my mind at this time.

MR. WEDGEWOOD: Now, going just a little further, would it meet the approval of the court that we do check up together so that we will both know what the other does and come in with an understanding between the two.

THE COURT: Yes.

MR. C. C. RICHARDS: What is your suggestion?

MR. WEDGEWOOD: Mr. Bostaph and any other engineer we select go over these.

MR. C. C. RICHARDS: What is the suggestion now, postpone the hearing this length of time, I understand the other.

MR. WEDGEWOOD: Instead of opening the hearing for any purpose.

MR. C. C. RICHARDS: We are in open court here. Is it your idea that we postpone this hearing, couple weeks until you can ascertain the fact, then take it up where we leave it.

MR. WEDGEWOOD: No, my position is exactly this, that we determine now. The court says it is excepting it will hear from you, that the matter is closed except as to three points which I named a moment ago. Upon that theory my position is this that the court set a day substantially two weeks from this time, and in the meantime Mr. Bostaph-- Mr. Scott Stewart go over with a man we select this map and lots they represent, and be prepared then with knowledge on our part what the situation is, and you have knowledge what we have done, and we will tell just where we object to the data set forth in this exhibit. Then we come into court and tell the court what that is, and if we can agree on that all right, and if not we will fight it out to the last limit.

MR. C. C. RICHARDS: You nominate your man and we will

do the same.

MR. WEDGEWOOD: Of course we could not dictate to you.

MR. C. C. RICHARDS: We may send the man you suggest, but leave it to us to send our representative, which of the engineers we send. You send your representatives, we will check the matter up with you. May send Mr. Stewart over the lots he examined and Mr. Bostaph over the ones he examined.

MR. WEDGEWOOD: We could not object to that.

MR. C. C. RICHARDS: Now, we don't acquiesce in the balance of it. We have no objection to this examination being made and the hearing being postponed, but there are some other features, the features of considering nothing else we don't acquiesce in. Now, the matter of factories, we have our well defined notions and we think the record there discloses, and either now or another time we shall desire to present our views squarely to the court as to what we view the stipulation that has been entered into as shown by the record to mean, its construction.

THE COURT: Mr. Richards, let me suggest the view I have with reference to that, and the view I have with reference to that, this court has nothing whatever to do with the effect or the situation between Provo City and the power companies, the users of water for power. I think that has been withdrawn from any issue in this case, just as the court has nothing whatever to do with any individual irrigator who has a lot twenty-five feet wide and hundred feet deep, as to what quantity of water he is entitled to have delivered to him from the quantity awarded to Provo City. I don't think the court has anything to do with that controversy, it is not presented in this case. Now, as to the rights of the people using power, using water for power, some arrangement has been made with Provo City, it may be a valid contract that can be enforced, it may not be. They may be using

that water under mere license and privilege given that is revocable at any time. There is no issue, I don't know I care to hear from you what their relations are because I cannot determine any. The only thing that was done by this stipulation was, as I understand it, that any question as to the rights of the several parties on the one side and the city on the other was withdrawn from this case, and it was consented whatever award be made be made to the city. Now, whether they hold as trustees or whether they own it and these people have no interest in it, the court cannot decide in this case. I merely make that suggestion so that anything you have to say at any time may be with reference to that condition of the court's mind.

MR. C. C. RICHARDS: This position I shall certainly take at the time we discuss these matters, and I have no objection to its being known right now. If there is awarded or shall be awarded to Provo City a certain number of feet for power purposes, ^{that} we cannot be heard with the suggestion if you be the owner of enough feet of water to run the mills and then run the mills and you are short in your water system you must be required to take from your mills and stop your mills to supply your water system.

THE COURT: I will suggest, Mr. Richards, the court is not going to award any water to Provo City and limit the use of it to power. I don't think there is any issue that will permit the court to.

MR. RICHARDS: I don't think so either. The only point I present is this. My brother suggests there is so much water awarded to Provo City, if you are short in the water works, you are long in the other. In one view that is right, in another view that is wrong. If we have not been awarded sufficient water-- not what we want but the water we are fairly entitled to for our water system we may not be met with the suggestion it has been awarded to us for power purposes and stop your mills and use it

in your pipe line.

MR. RAY: We are going to make that contention.

MR. RICHARDS: We shall resist it because if we have a right for both purposes, we insist upon having both purposes accorded to us, and not say because you have it within your power to suffer a less evil you must do that and we will inflict the other upon you. I don't mean by that to pretend to say we are entitled to more water than we are entitled to, but what we are entitled to we may not be deprived of, and suggested you may get it from another source, because you are owner in another source.

MR. WEDGEWOOD: Now, in order that I may be understood, we are willing to take those three questions as I said, under consideration, and report back as to what we understand the facts to be in regard to them for the court's then determination. Outside of those three questions, we insist all other questions be determined at this session if the court will determine them.

MR. RICHARDS: We are agreeable.

MR. JACOB EVANS: I just want to say one word concerning this Mill race water. I think it has always been the practice here and probably will be in the future, that whenever Provo City wants the use of the water of the Mill race for irrigation purposes they have always contended they have had the right to take it, and uniformly gone and taken it, and that has been the contention in every law suit we have ever had concerning this river, and that is why they were made parties the way they were to determine this question, and that is a matter for Provo City and the mill owners to determine. In other words, if they should not have sufficient water at some low period whether or not this year or some other year, they could resort to that water to irrigate the farm lands.

THE COURT: The impression the court got from this entire evidence, all the evidence that would throw any light on that situation was that the city had always claimed the right and had exercised it and the other parties had acquiesced in it and recognized it, that the city had the right to take that water away from them whenever they cared to. That was the substance of the evidence.

MR. C. C. RICHARDS: I think, your Honor please, I can show you a number of places in the evidence where the watermasters-- I think they are called watermasters in contradistinction from water commissioners, whoever had charge of that work claimed they went and made application and by acquiescence and agreement, but that they did not claim the absolute right to take it without the consent of the mill owners.

MR. JACOB EVANS: They made that claim in every law suit we ever had.

MR. RICHARDS: I don't know of any other law suit, but I have spent some weeks in this one.

THE COURT: Gentlemen, we are not making any progress.

MR. RICHARDS: What I said this morning, we had no idea this particular question would come up on the discussion this morning to reopen the case. My first enlightenment on the subject was when Mr. Ray discussed it on the theory the city was the absolute owner of this water, therefore had plenty of water, if they did not have enough in the water works system take this water. Our position is this, and I am prepared to argue it now or any time it suits the convenience of the court, if the court will hear the argument. The stipulation made by these parties and the evidence in this case all the way through from beginning to end and discussion of counsel shows that Provo City has not the absolute right to this water. I am prepared to discuss that if that has any significance in this matter.

We want to be heard at the proper time. As I indicated this morning if it has no significance whatever--

THE COURT: I am not going to decide now whether it has or not, I have thought it had considerable significance.

MR. RICHARDS: Then whenever your Honor is ready we are prepared to discuss that question.

THE COURT: I think that discussion ought to come at the same time this report comes to the court, what the court ought to hear. If the court is to take some testimony I think that question ought to come then.

MR. RICHARDS: That is exactly in harmony with my ideas. I just want to add this, you cannot take this testimony one part of it and settle the case on it, and not take the other. Here is the testimony of the representatives of the city with regard to what they have been doing and what they claim. Then you have the power owners and they are concerned with what they claim to be right, and then you have the stipulation and then you have the statement of counsel and when all these things are taken together that is the question what they all mean and all show, and that is what we want to discuss when we get to that question.

MR. A. C. HATCH: If the court please, the same counsel represented the power companies, all of them, except the Provo Pressed Brick, that represented the city. There was no controversy in this case between the power companies along the Factory and Tanner races and Provo City.

MR. RICHARDS: There was a controversy between the witnesses.

MR. A. C. HATCH: That is immaterial. The pleadings and stipulations are here in regard to those matters, and they control, I take it, and counsel should not be heard to say at this time that because somebody testified contrary to the

pleadings and contrary to the stipulation that it changes the issues because it does not.

MR. C. C. RICHARDS: Permit me we are going to stand exactly where the counsel who have been referred to by Judge Hatch stood. We will reiterate his argument, and the stipulation we are not going to depart a jot or tittle from the position taken by Judge Corfman everytime he spoke in regard to it.

THE COURT: Gentlemen, I understand what is before the court with reference to it. Now, the court is not going to determine anything with reference to this unless we enter upon the discussion of it generally. I think there are some matters that are to be presented, however, this afternoon, and if this is not to be presented, it would be well probably not to enter upon the argument.

MR. A. C. HATCH: The court suggested there was nothing in the record to show from what source the city derived its water from the pipe line. The Chidester decree was introduced in evidence for all purposes, and I think it defines the source of it specifically, naming the springs and tells from what territory and kind of water fills the pipe.

THE COURT: When I made the statement I said except the Chidester decree, and as to that it was only as to the springs that were taken into the pipe line earlier. In 1914 or '15, the Maple spring, some water--

MR. A. C. HATCH: The Maple spring was diverted in 1915, after the commencement of this action.

THE COURT: Without any evidence upon what claim or what right the city claimed to have that water, but merely the fact they want and took that water in. There is no evidence, as I found, to support a finding they had any ownership or right to that water, not having appropriated it or purchased it, except took it into their pipe lines after the

suit was commenced; but the only evidence in relation to the other water, as I remember, was the introduction of the Chidester decree which did not bind all the parties to the action. There were many parties to the action who were not in the Chidester decree, but that matter, I understand, is a matter to be considered at the next session.

MR. A. C. HATCH: I don't understand the Maple spring would be --

MR. WEDGEWOOD: Where they get the water out of the spring they got it in 1904.

MR. A. C. HATCH: The water they got in their pipe line is wholly from the springs from which they have been taking. Whatever quantity is awarded to them from the pipe line they are entitled to take from the springs from which they are now taking it and have been taking it.

THE COURT: Now, gentlemen, is this arrangement satisfactory to you, presentation of these matters at some future time, limited as they are to the questions.

MR. C. C. RICHARDS: We are consenting to that conditionally, your Honor.

THE COURT: What other matters do you wish to include?

MR. C. C. RICHARDS: We have made our application and motion and want to stand on it. If the court wants to limit it we wish to have the benefit of our exception.

MR. RICHARDS: We wish to reply to every statement made this morning. We are willing to postpone that to a further hearing.

THE COURT: No, I think that should be determined now what the scope of this hearing shall be.

MR. A. C. HATCH: We will formally ask the court to deny their motion except as to the three matters suggested by Colonel Wedgewood.

THE COURT: I will not preclude them from presenting their views upon the question of the rights, relative rights of the city and power users if that should become material in the consideration of these other questions, but the only other question I understand you you have raised at all is the duty of water.

MR. TUCKER: There is one other question, that is the extension of the season, retarding of the season, retarding of the date when the quantity of water to Provo City is diminished on account of Provo City's crop season being later than the crop season of adjacent area. We think that is an important point, and we have some very definite opinions on that point and evidence on the point.

THE COURT: You mean when reduced from fifty to seventy acres?

MR. TUCKER: Yes, we ask that the time of reduction be extended to August first instead of to July 20th, as is provided in the decision.

THE COURT: In the decision it runs to September first, doesn't it?

MR. A. C. HATCH: October first.

MR. C. C. RICHARDS: Change date from July 25th to the first of August, the second period.

THE COURT: It runs to September first.

MR. C. C. RICHARDS: It is the period that terminates on July 20th.

THE COURT: There is no period terminates July 20th at all, it runs from May each year to September first.

MR. TUCKER: Second period from June 20th to July 20th, I ask it be changed to July 31st.

THE COURT: Why do you desire that when there is no change made from May 3rd to September first?

MR. TUCKER: On July 20th we are reduced from a 63 acre duty to a 70 acre duty on our farm acres.

THE COURT: I did not understand your farm acres was involved in this at all.

MR. TUCKER: Yes, that was our contention.

THE COURT: Your motion was with reference to city acres and city lots.

MR. TUCKER: Our motion included farm acres as well.

THE COURT: Because the city is put on the same basis from May first to September tenth.

MR. TUCKER: But the farm is on the outskirts of Provo City; they are reduced from 63 to a 70 acre duty on July 20th, and we ask that period be extended.

THE COURT: That may be included in the matters you may discuss at the time, as to what the evidence shows on that.

MR. RICHARDS: Now, in order that there may be no mistake in the record, I understand your Honor is not passing on any part of our motion.

THE COURT: Yes, I am going to pass on your motion with reference to the duty of water.

MR. RICHARDS: If your Honor does pass on that and denies it, we want a ruling and exception so that the record may be complete as we go along.

THE COURT: Certainly.

MR. RICHARDS: Is that the ruling of the court.

THE COURT: Not yet.

MR. RICHARDS: Excuse me, I did not want to be anticipating the court. There has been so much said here I don't want to be put in the position of consenting to anything. Whatever is denied of the motion we have made, if any of it should be denied, we desire the benefit of an exception, so that the

record may be clear.

THE COURT: Have you anything further to say upon that part of your motion that has not been disposed of by postponing it to further hearing.

MR. TUCKER: There is one point I would like to make. It seems the decision is based upon testimony which showed that the lands of Provo City, farm acres as well as the city lots, were in many ways similar to the lands of Provo Bench, and adjoining areas, and the duty for the farm acres of Provo City was made the same as the duty for Provo Bench, and for most of the lands adjoining Provo City. Now, take it for granted that the soil is the same, and that other conditions being equal, the duty should be the same, still we feel that three points in our motion should receive consideration, and those points are these, that inasmuch as the court has awarded Provo City 13.75 second feet for power purposes, it must be in the mind of the court that that water be applied for power purposes during the day time and applied for irrigation purposes during the night, because there is no testimony in this case which would show that Provo City does not need at least 35 second feet of water or which is the equivalent for six days in the week.

(Argument)

THE COURT: I have felt, gentlemen, that the court gave the city and the Lake Bottom land and the Provo Bench and these lands a high duty of water; that I gave them an exceedingly generous allowance of water. I felt that way, I may be mistaken, but I felt that way. I felt the court gave every drop of water, or more, than the most liberal construction of the evidence would justify or authorize the court to give. There has not been anything presented in these affidavits that

in any way changes the firm view the court has upon that subject. The application has raised very serious questions in the mind of the court with reference to the quantity of land that ought to have water upon this basis, and with reference to the situation as to the culinary water and those other matters, and the court wants to be enlightened further upon that, and wants to correct any other error, but as to the duty of water, the court has placed it so low and given such a large quantity of water I would not feel a discussion of that would really be a benefit. When you come to put six to ten feet of water upon land in a season it is an enormously low duty for the water, so that your application to reopen the case with reference to the duty of water will be denied, and you may have an exception in the record for it.

MR. C. C. RICHARDS: we desire an exception and the other matters are left open for further discussion and presentation.

MR. RICHARDS: Will the court now designate a time when that will be taken up again.

THE COURT: I will hear from counsel.

MR. C. C. RICHARDS: I think this general discussion does not modify-- I think you named four items upon which you would consider--

MR. RICHARDS: I understand your Honor is only passing upon one point.

THE COURT: That is all as I understand your motion, everything else is left.

~~(Discussion as to other matters)~~

~~MR. RICHARDS: May I ask the indulgence of the court~~

MR. JACOB EVANS: I have a paper here referred to during the morning session by Mr. McDonald concerning the names and amount of lands, quantities of land that were awarded by the court to certain persons named herein and referring to a stipulation between the Provo Reservoir Company and the persons named. I have checked this up with the original on file, and I find that the statements made here are correct in so far as the acreage as shown in the stipulation, but this stipulation was only a stipulation between the Provo Reservoir Company and these particular individuals. I take it from what I see on this paper that the awards were probably based upon the evidence in the case on actual surveys that were made by Mr. Stewart.

THE COURT: I cannot say as to that. Some of the awards were made upon the testimony of Mr. Stewart and evidence given by him, and some of the awards with reference to the irrigators in this district were based upon certain other evidence, so I don't remember now whether it was from Mr. Stewart's evidence or some other evidence. Certainly it was based on some evidence different from your stipulation.

MR. JACOB EVANS: There are one or two omissions entirely in this case. I make that statement so that if anybody desires to object to the change of this decree to conform to that they may have an opportunity to do so.

MR. RAY: May it please your Honor, we object of course to a change of the quantity of land as designated in this decree. Mr. McDonald desires to have them conform to the stipulation. That is not binding upon us, and Mr. Stewart was sworn as to these particular lands and testified as to the specific areas of certain lands, and I assume that--

THE COURT: Do you remember whether he testified with reference to these?

MR. RAY: My inquiry convinces me he had, and I had a particular interest in those lands because my clients

insisted the area as stipulated was an excess area, and we object to the decree being predicated upon a stipulation to which we were not parties and insist it conform to the testimony. Now, as to the names not included here, which are included within the stipulation, we cannot consent they be decreed rights, unless it shall appear they have introduced evidence as to an existing right. The stipulation cannot create one.

THE COURT: You have examined your pleading?

MR. MCDONALD: Yes.

THE COURT: Your pleading is in accordance with the stipulation.

MR. MCDONALD: Yes, two of us have checked it, Mr. Booth and myself and Mr. Evans and myself. The parties named in the stipulation are named in the pleadings with the exception of one, which I suggested should probably be stricken out. That was Samuel Lee, the last one named. He was not served with any summons, and he was included in the stipulation, and was understood by the parties who signed it at the time that he was not named in the answer.

THE COURT: All the rest are in the answer?

MR. MCDONALD: Yes. Now, with reference to this your Honor will probably remember, I repeatedly called attention during the progress of the trial to the fact this stipulation was on file and asked generally when counsel were present if there was any objection to it, and by silence everybody acquiesced in that stipulation. We ~~xx~~ therefore rested upon the stipulation, having been signed by the plaintiff and these particular defendants and acquiesced in by everybody else. Now, some of those Mr. Stewart testified to and some of them he did not testify to. If that stipulation is not to govern and not to control, we want to introduce testimony as to the area of those lands wherever there is a question there.

THE COURT: I remember, Mr. McDonald, on a number of occasions, not only yourself, but other attorneys called attention to stipulations and it was asked if there was any one objected to the conditions of this stipulation, and if it is a fact that you made that suggestion with reference to this stipulation and no one replied, and acting upon that you failed to introduce any evidence, the court will permit you.

MR. MCDONALD: That is the fact, your Honor, and the record will repeatedly show that.

THE COURT: I feel you should have an opportunity to put the witness on the stand and prove this acreage in rebuttal testimony.

MR. MCDONALD: There is no evidence as to some of them. It is fixed by the stipulation.

MR. RAY: Mr. Stewart testified--

MR. MCDONALD: Not to all of them, he did to some, but not to all, so if the court will fix a time at the next session, or such session as will suit the court, we will have our witnesses here.

THE COURT: You might arrange to have them here, and I will examine in the meantime and see what the condition of the record is, whether it is necessary for that to be done at the next session. You might have your witnesses here. They are available in town here?

MR. MCDONALD: Yes, they are just out of town.

THE COURT: Possibly upon examination of the record I may make the correction without evidence.

MR. JOHN E. BOOTH: I desire to have Mr. Allen T. Sanford entered of record as the attorney for Branch Young, Harriet Y. Goodwin, Ida Littlely, Rudolph Riard, Daniel B. McBride, Louis W. Nuttall and David S. Parks. He desires to be heard upon some matters.

THE COURT: Mr. Sanford's name may be entered as

as attorney for the parties mentioned.)

MR. A. C. HATCH: If the court please, I wish to call the court's attention to some errors that occur in the findings, as follows: To the Honorable C. W. Moree, Trial Judge in the above entitled action. Your attention is respectively called by the plaintiff to the following paragraphs of the decision in the above entitled cause, and request is made that the decision be amended in the following particulars. On page 1, paragraph 2, line 7 insert the words and including between the words "below" and "what" otherwise the Wright ranch is not included in either the Provo Division or the Wasatch Division.

THE COURT: That would be in the sixth line instead of the seventh.

MR. A. C. HATCH: Now, on paragraph, page 13, section 25, line 3 should be stricken out, "to all the water rights of said Timpanogas Company", for the reason that the plaintiff only claims and only offered proof that it was the owner of 12/28 of that, as your Honor will see by reading on in the same paragraph, which is this same application 944 offered in behalf of the plaintiff. I call the court's attention to page 13 and 14 Section 37 of the decision, is the successor of the Timpanogas Irrigation Company under application to the State Engineer of the State of Utah, No. 944, bearing date of June 12, 1906. That should be amended so as to read as follows: That the plaintiff Provo Reservoir Company as the successor in interest of the Timpanogas Irrigation Company under application to the State Engineer of the State of Utah, No. 944, bearing date of June 12, 1906, for seventy-five hundred acre feet of water from Shingle Creek and Beaver Creek, tributaries to Weber river, is the owner and entitled to 26/28 of all of said water and water rights, and is entitled to complete its appropriation and make final proof to the State Engineer.

THE COURT: You strike out "for storage".

MR. A. C. HATCH: Strike out "for storage". I called the court's attention to the exhibit which was originally filed for storage, but was long prior to the beginning of this action amended for direct use.

THE COURT: This is tributary to the Weber river.

MR. A. C. HATCH: Yes, your Honor, the evidence of the purpose of the appropriation is Exhibit 6.

MR. RAY: Judge Hatch, Mr. Wentz calls to my attention the fact that Shingle creek is a tributary to Provo and Weber rivers, it says tributary to the Weber river, it ought to be Provo and Weber river.

MR. A. C. HATCH: This is the application and this is the proof. Now, if there is any other tributary to the Weber, we have appropriated that water, and Beaver creek, no part of it I understand was ever a tributary to the Provo river and for many years Shingle creek has been diverted into Beaver creek at some seasons of the year.

MR. RAY: I know nothing about the facts.

MR. WENTZ: We have been using Shingle creek all the season, Judge Hatch.

MR. A. C. HATCH: Yes, but we have been using it under this application by diverting under a claim of right under this application, haven't we?

MR. WENTZ: It is naturally a tributary of Provo river, Shingle creek is.

MR. A. C. HATCH: If it was not diverted this way it would go to Beaver creek, wouldn't it, as conditions now exist, and have existed for ten years past.

MR. JOHN E. BOOTH: Thirty years, Judge Hatch.

MR. A. C. HATCH: Thirty years it has gone to Beaver creek.

MR. JOHN E. BOOTH: No, it has come this way.

MR. A. C. HATCH: Forty years ago it all came this

way. John Turner built a saw mill in an early day up there and for use of his saw mill used Shingle Creek water, and at that time there was a channel cut to the Beaver creek, and the major portion of the water in high water and all of it in low water, as I understand it, was going into Beaver Creek until we made an application and appropriated it and diverted it back and made it a part of the Provo River.

MR. RAY: If your Honor please, it seems to me whether or not that creek is a tributary of the Weber or Provo river is an important thing to the primary users in this case, and it ought not to be designated as a tributary of the Weber river, if it is a tributary of the Provo river, because if it is it is our natural supply.

MR. A. C. HATCH: There is no claim Beaver creek ever was a part of the Provo river. Our application was admitted in evidence here and when we made proof of the appropriation of water not theretofore used I take it we will be entitled to it.

MR. RAY: There is no evidence it was not theretofore used, if it was a tributary of Provo river it is theretofore used and it is secondary to whatever our rights were.

THE COURT: The court has not ruled they have a title to the water, but the decision is merely announcing in the decree the party has a valid application and is entitled to proceed under it, and that is all.

MR. A. C. HATCH: It is just a question of what right we have, whether storage right-- and the amendment simply changes the language of this decree to make it storage instead of --

THE COURT: Under the suggestion that has been made I will just amend this finding or this decision here by inserting from Shingle Creek and Beaver creek without saying what stream they are tributaries of, and that may be left as

an open question in the future if it becomes material. I do not know that it will. They might want to raise the question in the State Engineer's office.

MR. A. C. HATCH: We ask the storage part be stricken out.

THE COURT: Yes.

MR. A. C. HATCH: And the decree stand as it is. We suggest this amendment as it covers just what the decree now covers as to that application as to the storage.

THE COURT I have stricken out the words "for storage" and inserted after waters seventy-five hundred feet of water from Shingle creek and Beaver creek.

MR. A. C. HATCH: Now on page 14, section 29, line 5.

MR. JOHN E. BOOTH: Before you pass section 28, may I present a matter in regard to section 28?

MR. A. C. HATCH: Yes.

MR. JOHN E. BOOTH: It follows logically, I think with what your Honor has done. On page 14, line 9, the word "store" should be stricken out and word "release" stricken out; 10th line on the same paragraph and the word "and". It is in behalf of the Sego Irrigation Company I make this, and corresponds with what your Honor did with regard to paragraph 27.

THE COURT: This right is not only for storage but for irrigation.

MR. JOHN E. BOOTH: It is the same.

MR. A. C. HATCH: Now, those three words are stricken.

THE COURT: "Stored", "released" "and".

MR. A. C. HATCH: On page 14, section 29, line 5, insert the words "used directly and", between the words "To and stored", "to use directly and store". That is the way it will read.

Now, if the court please, the last amendment is section 29, line 5 on page 14.

THE COURT: That is the one we just had.

MR. A. C. HATCH: Yes, that is the one, so that it will read, "and are entitled to use directly and to store it."

MR. RAY: Now, may it please your Honor, I am not able to discuss intelligently what effect that may have in this case, because that goes to the question of whether or not Shingle Creek is a natural tributary to the Provo river, and whether the direct use of that must be subject to the priority of my clients in this case. I do not know. I have not looked into it with that in view ~~what~~ with that change because it has converted into a storage proposition during the next irrigation season and the use during the irrigation season, and, as I understand, they have never heretofore measured and captured that water. I do not know the history of Shingle creek it was not put in evidence here, and I do not know there is anything to proscribe any such decree upon.

MR. A. C. HATCH: If the court please, we have claimed in our pleadings the right, and we introduced the application and take it it is a matter to be determined by the state engineer, proceedings before the State Engineer, whether or not any surplus water in the Weber river that we may appropriate.

THE COURT: That is not the question of Mr. Ray. Mr. Ray suggests this, he is not sufficiently informed whether Shingle Creek is a tributary of Weber river or Provo river to enable him to say whether he wants to object to this amendment being made transferring the-- that is changing the right as decreed to an irrigation right in addition to your storage right.

MR. A. C. HATCH: If the court please, as to that matter I will call the court's attention to the time that

this was introduced, this application. The application was offered by myself in behalf of the plaintiff, and Mr. Ray says, "Is it an application to store", and I said "Yes", or in substance, and later, and before the matter closed Mr. Ray asked "where is your storage reservoir, application to store. It seems I misstated the matter and made my statement into the record, it is an application to appropriate water. The application itself states and I just read from the application, the water was diverted, will be conveyed to the said channel of the Provo river at a point which lies thirteen hundred feet north of the southeast corner, Township 2, South Range 7 East, Salt Lake Base and Meridian, and allowed to flow down the said Provo river to the point of diversion, where it will be recovered and used upon the herein described lands. The said water will be diverted at a point on the left bank of said river, south 48 degrees, 52 minutes west 1320 feet from the quarter section corner between sections 5 and 6, Township 6 South, Range 3 East, Salt Lake Base and Meridian in Utah county. That was in reply to Mr. Ray's question, as to this application at the time it was introduced.

MR. RAY: I do not care anything about that. It appears I was advised at the time as to the nature of the application, but, of course, that does not constitute any proof as to priority or whether or not it is part of the Provo system.

MR. A. C. HATCH: I will ask the amendment stand as requested.

THE COURT: The amendment will be allowed to stand at present and you may have permission at the next hearing to strike out this amendment if you are advised that the stream is a tributary of the Provo system, and the court will hear ~~up~~ you upon it and determine what the court ought to do in reference to it.

MR. WILLIS: If the court please, in connection with this I want to call the attention of the court that the Timpanogas Irrigation Company is the owner of the other half interest of application number 442 as I remember it, and they are also the owner of the interest of application 944-A from Shingle creek and Beaver, and I ask to be allowed to submit in writing the disposition of the interests of the Timpanogas Irrigation Company, and I can furnish Mr. Ray with a copy of that writing if he raises the objection as to Shingle creek and Beaver creek in regard to the plaintiff he perhaps would resist the same question as to the Timpanogas Irrigation Company, because there is a like number of feet that the Timpanogas Irrigation Company is claiming to be diverted from Shingle Creek and Beaver creek to the Provo river.

THE COURT: This paragraph recites the fact the Timpanogas is the owner and the plaintiff together.

MR. WILLIS: There is no disposition, I take it specifically made of the Timpanogas Irrigation Company's interest, but that was they are the successor to the combined one-half interest, but it does not make any disposition. However, the testimony shows it does, and it should be disposed of, I think, by the decree of the court, definitely, I mean.

MR. A. C. HATCH: There seems to be a misunderstanding either on my part or on the part of--

THE COURT: There is a definite disposition with reference to the Timpanogas right there. It states what their rights are.

MR. A. C. HATCH: 944 is wholly disposed of by decree to the Provo Reservoir Company and Sego Lilly-- Timpanogas has no interest whatever in that application, and the court finds that the whole of it is now owned by the plaintiff and Sego Lilly, 26/28 to the plaintiff.

442 is the application, 12/28 to plaintiff, 2/28 to Sego Lilly, leaving the remainder in the Timpanogas Irrigation Company, that is, to store water in the Washington and Trial lakes.

THE COURT: 944 in paragraph 28 is disposed of in a different way from what you suggest.

MR. A. C. HATCH: Now, 944-A is an application of Timpanogas Irrigation Company for the remainder of what was the original 944. The exhibit shows that the original application was for fifteen thousand acre feet. It is amended to seventy-five hundred acre feet, and from storage to direct use. Then, as I understand the matter-- I don't know what the evidence is-- Timpanogas Irrigation Company filed another application which is No. 944-A for seventy-five hundred acre feet of water for direct use from the same Shingle Creek and Beaver Creek. Now, if we have that in evidence before the court that is the manner in which they are interested.

MR. WILLIS: You understand, your Honor, that it is of course difficult to go into this matter as the counsel for Timpanogas Irrigation Company, Judge Thurman having had it heretofore, and I understand that is in evidence.

THE COURT: You are interested in that application?

MR. WILLIS: We would like to have the matter decreed. Of course, if that is not true we might not be able, but I understand that testimony was introduced.

THE COURT: I take it there is no dispute among you as to your interest, is there.

MR. WILLIS: No, none whatever.

THE COURT: You probably can fix it by stipulation at the next session of the court.

MR. A. C. HATCH: The Wasatch Irrigation Company is the owner of the fourth, the Timpanogas Irrigation Company of a fourth, the Provo Reservoir Company of 12/28 and Sego Irrigation Company 2/28 of the interest represented by

application 442.

MR. MCDONALD: I understand that was a matter between the parties, and there was no dispute between them.

THE COURT: I think you can arrange that by stipulation, and the other parties are not interested in it at all. They may be interested in establishing the right.

MR. WILLIS: If there is any question it can be stipulated. We feel it should be determined by this court and finally settled.

THE COURT: Certainly there ought to be a decision of it. Call the court's attention to it at the next session.

MR. RICHARDS: May I ask the indulgence of the court to determine when this matter with reference to Provo City will be up again so I may go out and attend to some other matters before leaving for home.

MR. A. C. HATCH: If the court please, it was suggested we wait until Mr. Sanford's matter was determined.

THE COURT: If it is more convenient to determine it now so these parties need not wait, we can determine it just as well. What time will be convenient for counsel?

MR. RAY: I will suggest September second.

MR. JACOB EVANS: I would like to ask another question that is whether or not it is intended at that time evidence shall be taken in these matters.

THE COURT: I am inclined to think the situation might arise where there would be-- situation may arise where it will not be necessary, if you, in checking over the data furnished by Mr. Bostaph and the others find they are correct, you may stipulate I take it those figures are correct, and with reference to the other matters you probably will have some agreement as to that.

MR. JACOB EVANS: Suppose we cannot reach an agreement then are we to proceed and supplement the evidence already in with additional evidence?

THE COURT: I think so, I think a situation might arise that you would.

MR. JACOB EVANS: In other words, the court will be open to receive evidence in case we are unable to agree concerning it?

THE COURT: Yes, upon those two questions.

MR. RICHARDS: I understand it, we will be expected to be prepared at the time to offer the evidence unless an agreement is had. In other words, we won't come in at that time and say we want to offer evidence and have a future time set.

THE COURT: Oh no, it will be heard that time.

MR. RAY: With that in view, your Honor, I have an important case set down for the fourth of September, so that if evidence is to be introduced, I could not be here for the second.

THE COURT: I don't think there will be enough evidence so that it will run longer than that on these matters. Is that satisfactory to all parties, second day of September?

MR. A. C. HATCH: We would prefer an earlier date.

MR. JACOB EVANS: Very much prefer an earlier date.

THE COURT: It may be continued to September third.

MR. SANBORD: In behalf of Brice McBride, successor in interest of Rudolph Riard, suggesting Mr. Riard died in December, 1915, administrator was appointed, no substitution was made to the administrator or successor in interest. He purchased interest in January, 1917, and Mr. McBride is now in the military service. That is briefly the proposition. Also call attention to the fact that the evidence at the time it was taken it was pointed out Mr. Riard was dead and no substitution was had. Now, I take it probably that may be adjusted at this time.

MR. WEIGWOOD: You ask to substitute now, do you?

MR. SANFORD: Our motion is judgment should not be valid because of the death without substitution.

MR. WEDGWOOD: What do you ask in regard to him?

MR. SANFORD: Simply ask this, there cannot be any judgment binding against a dead person at this time.

MR. WEDGWOOD: No, but somebody owns it now.

MR. SANDOERD: Yes, been substituted and he has not been made a party and was not made a party at the time of the trial.

THE COURT: Had he bought it at the time of the trial?

MR. SANFORD: He bought it in January, 1917.

THE COURT: He bought it during the trial?

MR. RAY: And Judge Booth represented Mr. McBride.

THE COURT: Have you examined the decision that has been rendered as to the land that was awarded Mr. Riard?

MR. SANFORD: Yes.

THE COURT: Is it satisfactory?

MR. SANFORD: No, it is not.

THE COURT: Weren't you awarded what he asked?

MR. SANDFORD: No. The motion is made in behalf of the otherdefendants, Young Estate, Goodwin, Littlely, Daniel B. McBride, Louis W. Nuttall, David S. Park, asking that further hearing in order that the defendants might by further testimony show each of them have a larger acreage. (Reading).

THE COURT: Let me call your attention to the fact in the second paragraph of your petition here, your petitioner further states that at the time of the trial of this action there was an agreement by which-- what was that agreement?

MR. SANFORD: I was supplementing that by an affidavit of Judge Booth.

THE COURT: I think you should state more, you had that agreement.

MR. SANFORD: I didn't know at the time I prepared my petition, but that is supplemented by Judge Booth's affidavit. (Reading affidavit of John E. Booth)

Now, I have affidavits of several of the parties, not all of them. (Reading affidavit of Mrs. A. C. McBride, Mr. Cutler, David S. Park)

I might say also I overlooked putting it in the affidavit he is allotted forty-one and a half acres, and he contends there is at least forty-five acres that is entitled to a water right.

(ARGUMENT.)

THE COURT: I will tell you what I am disposed to do, I am disposed to permit either Mr. Stewart or someone else to make a survey of those particular pieces of land you are challenging the correctness of, and if the survey shows the irrigated land is in excess, I am disposed to ~~xx~~ let that go in. I do not want to open this case for evidence that will raise a controversy and go into the details of the duty of water and so forth, and I will say very frankly if there is any evidence to support a finding at all, the court would not make a finding of a duty of water ~~higher~~ greater than fifty acres, if there is enough evidence to support a finding fifty acres, because I would not make a lower duty of water than that. In other words, if the weight of the evidence said thirty-five or forty, if there was four or five witnesses against one, I would believe one that testified to fifty, because of my experience which would lead me to give greater weight to that kind of evidence. Now, there is evidence this fifty acres is a proper duty for all that land up there, I merely suggest the court would not feel like opening that for the purpose of taking further evidence on that subject because the evidence was sufficient to

support this finding and if the other evidence was in I would not change it, because I must weigh the evidence on its reasonableness and from my experience and being compelled to do that I would not reduce the duty of the water.

MR. SANFORD: Of course, I do not know what the evidence was respecting the duty of water in this immediate vicinity.

MR. A. C. HATCH: Who is the person you say is dead and where is his land situated?

MR. SANFORD: It is right at the mouth of the canyon.

MR. A. C. HATCH: How many acres is there of it?

MR. SANFORD: I think there is forty or fifty acres.

THE COURT: What is the name?

MR. SANFORD: Riard.

MR. A. C. HATCH: If there is any question as to him and he is not prepared to substitute, we would ask the action as to him be dismissed, do not care to prolong this thing forever while the parties act, rather than begin a new action against him personally to quiet his title, than to prolong, and there will be some more of them dead, so by the time administrator is appointed and substituted we would never get through.

THE COURT: Possibly you can determine whether you want to do that at the next session.

MR. SANFORD: I can see my parties more definitely about that.

THE COURT: If the situation is such we cannot enter a decree, you will have permission to dismiss at that time.

MR. SANFORD: Your Honor, of course, I have not had an opportunity to examine the record in the case, what the evidence was in regard to the duty of water because my client

would not permit me to take the time sufficient to do that, having a small interest, and I do not know what Judge Booth's recollection is in regard to it.

MR. JOHN E. BOOTH: I do not think we produced any.

THE COURT: I do not think you did. I think the evidence in regard to the duty there was Mr. Wentz, I don't remember any other.

MR. RAY: Mr. Tanner I think testified to it and Mr. Wheelon testified.

THE COURT: There were a number of witnesses who testified not with reference to some particular tract of land, but generally as to the locality and then Mr. Wentz as to these particular tracts.

MR. SANFORD: Did you testify to these particular tracts?

MR. WENTZ: Yes.

THE COURT: Each one of them.

MR. SANFORD: Of course, with that view there would be no use opening because there is evidence to sustain the findings. Now, as to the acreage it might be all right to have Mr. Stewart make a resurvey or have someone go with him.

THE COURT: Whatever you care to do with reference to that, and I will reopen the case as to the result of such a survey.

MR. RAY: I will suggest this, if Mr. Stewart will survey it and file a statement with the clerk of the acreage found, my clients will stipulate the correctness of it.

MR. SANFORD: I will talk to my parties.

THE COURT: Let me suggest this, if you determine on someone else let the other parties know, then if they are not satisfied with them as they are with Mr. Stewart they can have someone go with him.

MR. RAY: There is a matter I desire to present

briefly at this time, or notice at the next hearing. Your Honor will remember from the pleading of the Provo Bench people, we set forth we built a canal in '62, or commenced the construction of it with a capacity of 140 second feet for the irrigation of six thousand acres of land, and about 1884 we filed with the county commissioner our declaration of intention to use that quantity of water from the river. At the time of the trial of the case the evidence showed, I think, we had under cultivation at that time 4,332 and a fraction acres of land. It was not our contention in our pleading or at the trial we had perfected our appropriation as to the amount, and there was no allowance as to the secondary appropriation as to the balance of the land lying under the canal, and, as the evidence showed, susceptible of irrigation, and which had only wanted irrigation because of the lack of water, and our contention is that that should be at least accorded a secondary right from Provo river. I cannot give you the exact figures. They are set out in two documents in the evidence, Our declaration of intention to the county commissioners, and our pleadings as to our area.

The other matter is the matter of the Blue Cliff right, it being ~~supposed~~ placed as a primary right for 46 second feet of water, our contention is, and as I have understood it this hearing was not to be a reargument but a correction of the decree as to technical matters-- that the Blue Cliff had never perfected its right to 46 second feet of water, began in '95 to construct its canal, and never put to ~~an~~ a beneficial use any such quantity of water. That it transferred to the plaintiff in this case about 1910 and subsequent to that the plaintiff had used in July a large part of the water to which it would have been entitled and whatever right the Blue Cliff Company had is a secondary right and not a right primary with the right of the Provo Bench Canal

Company in this case, or the Timpanogas Irrigation Company.

THE COURT: You may at the next session, you have given notice--

MR. RAY: Yes, I have given notice of my contention on that.

MR. SANFORD: There is one matter I overlooked and that is this, two of the parties have always used water for domestic purposes from this ditch. I do not know they had any right to anticipate there will be such change made--

THE COURT: There is no change made in the decree, I do not know what you have reference to.

MR. SANFORD: Mr. Wentz, I understand has given notice they will have to change their system of irrigation so as to take water in turns, and that would mean interchange the ditches, and instead of a constant flow through this ditch, which supplies them, there will be a flow only thirty hours a week, so that the water which they have taken for culinary and domestic purposes will no longer be there, and they will have to go a distance of five hundred feet. I think there should be some adjustment some way, possibly give them the right to put a pipe line in that Western Union ditch, something that way, have a right some way to get our culinary water.

MR. A. C. HATCH: Your pleading claimed domestic use?

MR. SANFORD: No, I don't know any of the pleadings claim. They have always used it. Did not have a house stream, simply took it out of the irrigation ditch which passed by there and the change in the system deprives them of that water for domestic purposes.

MR. A. C. HATCH: The evidence in the case shows the ground water level there to be only a few feet below the surface. For five or six dollars I understand they can have a well right up in all the houses and be a great deal more

sanitary than the use of the water from Provo River. The only purpose for which this stream could be used would be to increase their supply and have this little pipe line, little garden stream or house stream to use for irrigation purposes.

MR. SANFORD: My suggestion was might ask to insert a pipe line in the Western Union ditch, something that way.

MR. JOHN E. BOOTH: As to the well part, Mr. Park dug down a hundred feet there and did not find water, so that it would be rather expensive operation to undertake to get water from a well there in that ground. Your Honor please, I have a little matter to present.

THE COURT: What is the situation, Mr. Wentz, is it necessary to change the location on that ditch?

MR. WENTZ: Yes, I have combined the two streams Park & Nuttall and Barton & Young ditch according to their acreage, and allow one running and the other have part of each week, and their rotation period is seven days and eight hours, and they are drawing so much time according to the decision given. I might say that is provided for in the decree.

THE COURT: I do not know whether the court could give any relief unless water is allowed to run in that stream.

MR. SANFORD: We will have to ask for that. It is a valuable right, of course. Your Honor will make the order at the next hearing?

THE COURT: I do not know that I can. You would have to make an allegation; there is no claim of any right.

MR. SANFORD: No, I don't know of any.

MR. RAY: Judge Booth, has the West Union any objection to those people putting in a pipe line and piping it for a couple hundred feet?

MR. JOHN E. BOOTH: I don't know, of their own water.

THE COURT: Probably you can agree.

MR. JOHN E. BOOTH: Some of the people do not seem to understand my position, and I very briefly state I started out with this theory that the parties to the Morse decree, not being modified or appealed from, they were bound by that decree as being the law of the case. I took that as a basis. Now, when the plaintiff in this case and the Faucett Field and East River Bottoms Water Company made an agreement that the Morse decree should apply to them, then I took it that all the parties were bound by that decree, so I went on that theory all the way through, did not change it, though when we answered we pled that agreement, and offered testimony on it, and there was no objection either by pleading or testimony to that, and so I relied upon that all the way through, and I felt I was safe in doing so. Now, I say it appeared very near right, but not quite, and behalf of those two companies, because the situation I think is at least as similar as it could be got, as similar at least as those who are in the same class, and ask they be made the same as the Carter people. It is on page 4, and all that list down there. They are just only-- the river separates them.

THE COURT: Who are these people you are referring to?

MR. JOHN E. BOOTH: I refer to the Faucett Field and East River Bottoms Company, that is on the bottom of page 2, their duty starts with 52, and so does the Faucett Field, and we have had some meetings of the parties interested, and desire to say this, that as far as litigation goes they have had enough, they do not want any more if they can help it. Our expenses have run up a thousand percent since this case started, with a very great prospect of its never being less than five hundred per cent more than it was before the suit started, and we would rather get through with this as soon as we can, but we really believe that the

conditions are so similar with ours and this whole list that you have awarded 50 second feet, or fifty acres to the second foot, that we ought to be put in that class. It is not very much, and yet it is quite important to us. I think perhaps we are unnecessarily alarmed, our people were very much worked up over it when they first saw it, but on explanations and some experiments, I believe that they will consent and be willing to accept of the fifty acres and so we do not want to open the case or anything of that kind, but call attention to the fact they are so similar to these; in fact, we are worse off than many of that whole list on the third page, on account of more seepage down there than we have up where we are.

THE COURT: If the court should put you in the same class with the others, it will be necessary to reopen the case to the extent of putting some witness on and testifying to that duty, because I do not think there is any evidence in the case that would give you just that duty. and if there is no objection by the time the next meeting, I would be glad to do that. If there is objection I do not know about reopening the case.

MR. JOHN E. BOOTH: Probably we would not want to do that.

THE COURT: Are there any objections to the suggestion?

MR. RAY: I do not know the justice of it at all. It merely means lee-way that is all, and with that reopened it means reopening every other case.

THE COURT: I am not going to reopen the matter generally, but if the parties join that there was justice in Judge Booth's suggestion, in regard to this small quantity of land, why, I would submit only one witness, just enough to make a basis upon which that might be done, at the next meeting, but if there is a general objection, and it

involves the opening of the case and going into--

MR. JOHN E. BOOTH: We do not ask that.

MR. RAY: I shall formally object, after having conferred with Mr. Wentz, and he says the testimony is based upon the understanding and familiarity with the land there, and the duties given by him are in his opinion right.

MR. JACOB EVANS: There is a difference in the ground, and we object to it.

THE COURT: With that suggestion, I would hardly feel justified in opening the matters, because that would reopen the entire case for somebody else, and I have refused to open for the city.

MR. JOHN E. BOOTH: Yes sir, I realize that.

MR. TUCKER: I have a motion here, your Honor, on behalf of First Ward Pasture Company to reopen the case on two grounds. I take it that one is to show that the duty is not proper, and I take it you won't entertain such a motion.

THE COURT: I will entertain it, of course.

MR. TUCKER: The other ground is that the First Ward Pasture Company, the testimony showed their soil was practically similar to other lands about here, and their duty was given as slightly larger, they are given slightly less water than the other lands. Now, we take it that the court must not have considered the purposes for which this land is used. It has been used for pasturage purposes since '50, and probably always will be used for pasturage purposes, and the duty for pasture purposes is higher. We have affidavits that we will show it requires much more water than for ordinary purposes, and for that purpose we ask the case be opened, simply that we may show to the court that the duty for purposes of pasture only need be different than for general purposes, and I take it that

no definite information, no definite testimony regarding that went into the record, and for that purpose only we ask therefore to open the case. I have prepared a formal motion here and affidavits supporting it. I take it it won't be necessary to read it this time.

MR. RAY: Do you recall in the matter of the First Ward Pasture we had a long discussion about the seepage, the east drain condition of the land as to seep water and waters running off the bench and springs on one end of it, and the character of the land there was quite thoroughly gone into before the court.

MR. TUCKER: Yes, and we accede to that. We realize we cannot put in testimony regarding the character of the land, but we would like to put testimony on showing this has been used for pasturage purposes since '50, and probably always will be, and pasturage requires much more water than other uses.

MR. JACOB EVANS: That is all in the record now.

THE COURT: The motion will be denied, I do not think I ought to open the case at all.

MR. TUCKER: Note our exception.

THE COURT: The motion made by Mr. Soule on behalf of the Washington Irrigation Company, and submitted, I understand the plaintiff does not care to file--

MR. JACOB EVANS: No, don't care to file any brief.

THE COURT: I have examined the pleadings on behalf of the Washington Irrigation Company and I find the Washington Irrigation Company asked for just the quantity of water that was awarded to them in the decree, or in the decision, and with the exception that some surplus water they apparently did not ask for was included in the decree, but the water that Mr. Soule asked for in his motion be decreed to him now, there is no pleading in which he claims any such water."

The only storage water he claims is 500 acre feet, and 500 acre feet was awarded to him, so his motion will be denied. The court will not award additional water. Now, are there any other matters we can dispose of at this time. If not, the court, so far as this case is concerned, will take recess until the third day of September, 1918.

IN THE DISTRICT COURT OF UTAH COUNTY, UTAH.

PROVO RESERVOIR COMPANY,

Plaintiff,

v.

PROVO CUTY, ET AL.,

Defendants.

July 16, 1918.

MR. STORY: These have not been filed, but I will have them filed. The motion which I desire to present on behalf of the Utah Power & Light Company this morning is as follows: Comes now the defendant Utah Power & Light Company By John F. MacLane Esq., and Story and Steigmeyer, and moves the court to modify the order heretofore entered in the above entitled cause with respect to the distribution of the waters of Provo River pending the entry of final decree herein in so far as the same directs the distribution of the same to the plaintiff. (Reading)

The affidavit of D. L. Brundige is as follows: (Reading)

Now, your Honor, the notice which was given of this hearing is as follows: To the plaintiff above named and its attorneys of record: You are hereby notified that on Tuesday, the 16th day of July (Reading).

MR. WEDGWOOD: Before you proceed may I ask if that is all the foundation you intend to proceed upon today?

MR. STORY: I don't know.

MR. WEDGWOOD: I mean in a formal way is that your pleading?

MR. STORY: That is my pleading, yes.

MR. WEDGWOOD: Then, your Honor please, of course we have not had a chance to read it and we may wish to make some record, and I ask we have ten minutes to discuss it.

MR. C. C. RICHARDS: In behalf of the defendant Provo City I ask leave to join the defendant Power Company

in making this motion that has been made this morning.

THE COURT: You adopt the motion as made?

MR. RICHARDS: I mean by that we adopt it and desire to join in the presentation of it as though we had made the motion separately ourselves.

MR. A. C. HATCH: Shall we proceed, your Honor?

THE COURT: No, I think Mr. Story should proceed, it is his motion. I understand he was presenting it and interrupted by the suggestion of Colonel Wedgwood.

MR. A. C. HATCH: We were going to object at this time.

THE COURT: You may proceed, if you have some objection.

MR. A. C. HATCH: To any proceedings being had by reason of this motion at this time, that there is no cause set up in the motion at this time for any hearing before this court at this stage of the proceeding in this case, for the reason first the court made its finding several months ago, and by those findings temporarily at least fixed the rights of the respective parties and awarded or found that the defendant Utah Power & Light Company was entitled to 229 second feet approximately, of the waters of Provo river to be diverted at its dam, and under the findings the commissioner was directed, as I understand the situation, to distribute the waters until further ordered according to the distribution, as the rights were found to the respective parties in the findings made by the court. To those findings Utah Power & Light Company objected, and asked a modification. They came into court claiming 345 second feet of water from the river, they attempted to show 300 second feet was the capacity of their flume and the court found they were entitled to the 229 second feet, which added to certain other waters which were awarded to it, or found to belong to it, made approximately 247 feet. Upon their motion to modify, which was presented to the court sometime ago, we also moved to

modify ~~ax~~ to them, objected to the findings and claimed that it was excessive, and we claim that 144 second feet is all the water that they are entitled to as of right, that it is all they have ever appropriated and applied to a necessary beneficial use with such economy as is required of the users of water under the laws and under the public policy of the State of Utah. Now, that matter was argued at length to the court, and brief submitted. The most that we concede they are entitled to from the last hearing before this court under the most favorable circumstances is 163 second feet and they are here by their affidavit showing that they are obtaining 183 second feet at the time they made their complaint.

MR. WEDGWOOD: Affidavit and motion.

MR. A. C. HATCH: Affidavit and motion, their complaint upon which they propose to base this decision, their complaint as to the distribution of the water. That is what the motion is, complaint that the commissioner is not distributing the water as it should be distributed to them, and it is in effect another motion to modify the findings of the court. We have had that once before this before the court, and it is before the court now for its decision, and until it is decided as to whether or not it will be modified I take it they can make no complaint, but that matter has been argued at length to the court, presented by brief, and until the court determines that they are entitled to a less or a greater quantity of water, or makes its finding as originally, confirms the original finding, they have no right to come in with a second motion to modify that finding. That is all that this is in substance.

MR. JACOB EVANS: Have you filed a brief in that matter?

MR. STORY: I have not filed my brief, I have it practically completed, but did not get it in for two reasons,

one, I was called away and my stenographer was absent, and inasmuch as the court put this over to September third, there wasn't as much hurry as it otherwise would have been.

MR. A. C. HATCH: Now, this appears to me to be simply a supplemental motion to modify the findings heretofore made by the court that has been argued, presented, argued and submitted for a decision of the court, and until that decision is made by the court, there is nothing before the court upon which to base this motion. It is in effect and in substance only an additional motion to modify that former finding of the court. That is the view ~~of~~ I take of it, and I think my associates agree with me. Now, he comes in with the Chidester decree and bases his motion in part upon that decree, and says it is binding as between us and them. It may be. The court in its findings has not so held as yet. We come in pleading the Chidester decree, that we were entitled under the Chidester decree, beginning with Section 29-A of our complaint-- we claim as successors of the Blue Cliff Canal Company, and we set out just such rights as are awarded to us by the Chidester decree. Section 29-A of our complaint, "That plaintiff has acquired by purchase and is the owner and entitled to the use of the following primary water rights in Provo river."

MR. STORY: May I ask whether this is an objection to my motion, or is it an argument on my motion?

MR. A. C. HATCH: It is an objection to the motion, and I think we may be heard on our objection.

MR. STORY: Yes, but I have not finished my presentation of my motion at all.

MR. A. C. HATCH: I will wait until you finish.

MR. STORY: No, so far as the argument is concerned if you are objecting to the motion.

MR. A. C. HATCH: That is all and the only purpose of raising it. "The Blue Cliff Canal right consisting of

certain waters setting forth the award, although we don't claim it as such, consisting of 2 second feet of water from six o'clock P. M. to six A. M. every night (Reading).

Now they deny the whole of that paragraph in their answer. That is, they deny our right to the two second feet of water as decreed in the Chidester decree to the Blue Cliff Canal Company, and the same time they set up the Chidester decree as a bar, or as an adjudication rather, pleading all the rights as between the Blue Cliff Canal Company and themselves, so that we are before the court in this position as to that particular matter. We claim it as a successor of the Blue Cliff Canal Company which was awarded it by the Chidester decree. They deny our right to it as successors or otherwise, deny our ownership or any right to it. Then at the same time they plead that the Chidester decree is binding as to us, binding so far as their interests are concerned, but inasmuch as we are interested it shall have no force or effect. That is the position they have placed themselves in before this court. Now, when their interests are to be subserved by claiming something for the Chidester decree they claim it. When our interest is claiming by virtue of the Chidester decree in effect and substance, they deny we have any right, but if the motion that ~~is~~ has been argued and submitted to the court is decided as we claim it should be decided, they are now, according to the motion presented this morning receiving thirty or forty second feet more water-- 39 second feet of water more than we insist they have ever appropriated by applying it economically to a beneficial use. As to the Chidester decree which is referred to in the motion that has been presented in evidence to the court and is before the court and the court has made its findings with the Chidester decree in evidence before it showing all of the awards made by the decree, and the court has once passed upon that matter in the findings

already made and in the motion to modify, now before the court already submitted and undetermined. The same question comes before the court again as to the Chidester decree, and the motion that is now-- it is now attempting to present and to introduce further proof on is nothing more, cannot be anything, as I view it, except a supplemental motion to modify the findings of the court heretofore made. We say that it should not be heard, that they should not be allowed to be heard at this time on this motion.

MR. WEDGWOOD: Will the court pardon me just a moment. I want to add to Judge Hatch's statement this. The motion in so far as it makes statement of right is a duplication or reaffirmance of the Power Company's pleading in this case. That is a reaffirmance. The question has been tried out and determined. In my judgement, as far as I understand the case, the motion goes much further than a re-statement of the allegations of the pleading. If it does go further then it is an attempt to amend the pleadings in a manner not allowed by any rule of practise with which I am familiar. If counsel is attempting to gain the same result that he would by an amendment to the pleadings he should not be allowed, and we object to his proceeding in that way. He should state how he intends to amend the pleadings and what he asked the court to pass upon so that we may make a proper objection to that and at this time he could only amend his pleadings to conform to the proof, so that it is absolutely necessary that we have a concise statement of what he intends to amend, so that we can find it and know just what is asked for and intent. Again, the decree upon its face referred to is void, I think, under the general denials that we have that phase would be properly plead. If at this stage of the game counsel is to proceed upon a different theory, different allegations from what he has, as I said before we should have them so that we may

show what the actual condition is as between the Telluride Power Company or its predecessor in interest and the Blue Cliff Canal Company and its successors in interest. The so-called Chidester decree is upon its face absolutely void, and under the record is absolutely void, and if this matter is proceeded with we want to place that question squarely in issue before the court.

MR. A. C. HATCH: There was one matter further, their denial of our right under the Blue Cliff Canal is not the only denial that they make of the Chidester decree, but under 29-B, which they deny, saying they do it for lack of information and belief, they are predecessors in interest to the parties in the Chidester decree.

MR. WEDGWOOD: They were parties also under supplemental complaint.

MR. STORY: Not this company.

MR. WEDGWOOD: The predecessors.

MR. A. C. HATCH: I was not in that case and did not have in mind just at the time Colonel Wedgwood spoke of the date. The Chidester decree is in 1907, hearing had in January, 1906. We say the plaintiff has acquired by purchase and is the owner and entitled to the use of all the following primary water rights in Provo river. (Reading)

Now, it may be said that their denial is in force or effect for the reason that it was a matter of record, and they might have had information and belief upon which to base a positive denial or affirm it, under the right rules of pleading, but they have seen fit, nevertheless, to deny it, deny our rights and that places those rights squarely in issue before this court, regardless, so far as these people are concerned, of what may be contained in the Chidester decree, because they have denied the Chidester decree as to us, and they cannot deny it as to us and claim anything under it as to themselves. That is our position, and they having

assumed that position, the matter having been fully heard and tried before the court, and the findings made based upon the evidence had at the trial of those issues and they having further moved this court to modify those findings, and that having had a second hearing on the purpose of modifying them, this whole matter has been twice heretofore threshed out before the court, and the court should not be trifled with or allow any of the litigants in this case to proceed in such a manner as would make it appear that they were trifling with the court. And then further they propose under this motion-- they have already introduced proof by affidavit to a certain extent by the filing of the motion, that is heard there is some proof already offered. We have the right to rebut that and the whole thing will be reopened, necessarily, as I view it, be reopened and all of the rights as between the plaintiff and this company reheard before the court. I ~~sh~~ say it should not be done, we do not understand any rule that would permit of its being done.

THE COURT: Let me see before you reply to this objection, see if I understand the scope of your motion. As I understand, this motion, as I look over it is, as Mr. Story read it, the gist of it is that the court was in error in placing the Blue Cliff right which was awarded to the plaintiff as successor to the Blue Cliff Company in Class A instead of placing it in Class B. Now, if I get the motion, that is all there was in the motion.

MR. STORY: I think so.

THE COURT: I do not think, Judge Hatch, that the consideration of this motion would lead to the opening up of this matter, I am not disposed to open up the matter. I took it from the motion that it was to be really upon what was in. I will hear from Mr. Story, however, upon that proposition. If he expects to introduce evidence I will hear from him, if the motion goes farther than that.

MR. A. C. HATCH: If the court will permit me just a moment on that. It is a matter that may be decided without argument, I take it. One part of his motion contained in paragraph 6 of the Chidester decree beginning with paragraph 4 of the Chidester decree. Assuming that the Chidester decree is valid and binding, by his motion he says that all of the Class B rights including ours, were made subject to the rights of the defendant Utah Power & Light Company, or its predecessor in interest. The ~~pa~~ decree in paragraph 4 makes all of the Class A water rights as determined by that decree subject to the rights of the Telluride Power Company hereinafter decreed and determined. That is the very last two lines of paragraph 4, so that under that decree all of the rights of the Telluride Power Company, ~~and~~ all of the Class A rights, are made subject to the Telluride Power Company rights. All of those Class A rights except the Blue Cliff pass through the flume of the Telluride Power Company as we understand it, and return to the Provo river before they were diverted by the irrigators or the Class A users. Then follows paragraph 5, which fixes the right of Joseph R. Murdock as administrator of the estate of William Wright, deceased, and defines the rights. For the court's information I will state here that the rights defined, awarded in 5 was ~~xx~~ by virtue of a stipulation at the second day or third day of the trial signed by the attorneys of all the parties in interest awarding to Joseph R. Murdock the right here awarded. Then follows paragraph 6, which is as follows: "Subject to the rights of the Telluride Power Company as hereinafter decreed George I Taylor is the owner and entitled to the use of 8 minute feet of the waters of Class B, Charles S. Conrad is the owner and entitled to the use of 24 minute feet thereof (Reading).

Subject to the rights of the Telluride Power Company, and then follows, and the rest and residue of the waters of

said river designated as Class B is owned by and the following parties are entitled to its use, to-wit:-- not subject to the Telluride Power Company or subject to anybody.

Now, if the court please, the South Fork Cattle Company, Conrad and Taylor, it is shown by the evidence in this case are all users of water of the South Fork branch of the Provo river at the point where said branch-- above where said branch enters the river and above the dam of the defendant Utah Power & Light Company, and this dam is at the same site-- the dam has existed at the same site where it was originally built by the Telluride Company, there was and is a reason for making the water of Class B in the South Fork subject to others use because it came to them above the dam, and they were later and prior appropriators, or later appropriators, but to say that all of the waters of Class B was subject to the rights of the Telluride Power Company and further along in the decree it tells how those rights were decreed and awarded. The court I presume already passed upon them in making its original findings in this case. If it means anything it awards the Telluride Power Company under paragraph 7, the latter part of that paragraph-- the subdivisions of the paragraph are not numbered or lettered, but it is on the second page of the copy I have and at the bottom the Telluride Power Company has appropriated and has the right to divert all waters flowing (Reading).

All they are here claiming by their complaint is 345 second feet and under the decree all Class B as shown by the record in this case 3400 second feet is included, or over three thousand feet of water is included in those Class B rights awarded by the Chidester decree.

MR. STORY: Aren't you talking about minute feet instead of second feet?

MR. A. C. HATCH: No, second feet, three thousand

second feet is the record in this case. We say their pleading denies it but they here allege it.

THE COURT: I did not understand this motion to be in substance they were entitled to a Class B water right. I understand the motion to be in substance they should be supplied with their rights before any of the Class B rights are supplied.

MR. A. C. HATCH: If the court please, I may be in error, but my theory of this case has been that Class A and Class B in the Chidester decree were wholly ignored by this court, and this court is awarding the normal flow of water. In awarding the normal flow of water has found that the prior appropriators prior to the Provo Bench Canal Company had beneficially used only a certain quantity of water, that the present normal flow of the Provo river exceeded that quantity of water which would be Class A to the extent that that class and water would apply. After providing for all the prior appropriators including the power uses of the defendant Utah Power & Light Company, the court has made Class A, that is on an equality, certain rights, for instance the Provo Bench Canal Company is by the finding put in Class A. I do not know the number of second feet, but a considerable number of second feet over and above the Chidester decree. They are not objecting to that part of it, because it would not affect them, Provo Bench Canal Company's diverting gates being below the tail race of their plant. The Timpanogas is awarded some of this excess of normal flow, and the finding in this case has not taken Class A as found in the Chidester decree in any sense, but has found Class A to embrace what is shown by the record in this case the quantity of water which is the normal flow of the river now, and has awarded to those in their order, for instance, the Provo Bench Canal Company is put in Class A to the extent of its necessities for beneficial

use. The Timpanogas Company later in point of time is given to the extent of its necessities in Class A, the balance to the extent of the proved appropriation of the Blue Cliff Canal Company 50 second feet or 46 second feet, whatever it is, is placed in Class A, and if there were any other claimants here of appropriation of Class A water there is still, as I understand the proof, an excess which they will be awarded, that is prior to our claim for 150 second feet. If there had been an intervening appropriator between the Timpanogas Canal Company and us it would have been awarded ahead of us, and our rights probably-- that is intervening between the Timpanogas and Blue Cliff, they would have been provided first, and we would have been given the balance of Class A water and then placed in Class B to the capacity, to the extent of our appropriation, whatever it was. Now, there is the theory upon which I have counted that the decision in this case was made, and it was not based upon the Chidester decree, and that the court by all of the pleadings in this case, they have all treated the Chidester decree as this defendant has treated it, valid and binding so far as their interests were concerned, but of no force or effect so far as the plaintiff and other parties were concerned, because they all, your Honor will read all the answers or practically all of them, they all commence by admitting all of the allegations of the complaint down to and including 1 to 27, both inclusive, and paragraph numbered 36 and then deny the numbers up to 39. Now, in the allegations of this counter claim there are several allegations, three, four, five and six of our complaint are admitted by not being denied at all by this plaintiff. He admits 1 to 27 and 37, then denies 28 and up to 33. 34, 5 and 6 are not denied. He denies 38 and 39. Now, 34, 35 and 36 of the complaint is the rights-- first 34 is our claim of right to store flood waters of Provo river in its several

reservoirs. By not denying that they admit it, and our right to recapture it, and that they are here now denying in effect by this motion what they fail to deny in their answer-- our right to store and recapture the water.

Now 35, "Defendants severally deny plaintiff's right to the use above set forth" (Reading)

We claim the right, they admit it.

Then 36 they admit by failing to deny, "Plaintiff further alleges that many of the defendants have not a right prior in point of time of appropriation to the plaintiff's right to the use of the waters of said river, have been year after year continuously during the irrigation season claiming to have the right to do so, using the waters diverted both wastefully and in quantities largely in excess of that necessary or beneficial for the irrigation of their lands, and that such wasteful and unnecessary use is depriving the plaintiff and all who receive water through plaintiff's irrigation system" (Reading)

Now, when these defendants answered they did not deny that many of the defendants were wastefully using the water and we claim that they were among those who were wasteful in using it. That is, their allegations were taken and deemed denied by stipulation made in open court. Then we went into the proof of that, spent days in producing the proof, and then we spent some other time in motion to modify, on the motion to modify. It has all been threshed out, and the Chidester decree it seems to me is so plain that the Blue Cliff Class B right was not made subject to any right that they had. Then again if their rights as claimed under the motion is based upon the Chidester decree, the Chidester decree itself says that our predecessor in interest, Blue Cliff Canal Company was not a party to it, is not bound by it, because it is based not upon evidence taken in court, not upon a hearing had at which we were given an opportunity to

deny and rebut, but upon a stipulation that was entered into by three parties, Telluride Power Company, Provo City and the Timpanogas Canal Company. They are the only parties that are bound by that Chidester decree as to the award made to the Telluride Power Company, because they were the only parties to the stipulation. The decree itself so states. The plaintiff and the Telluride Power Company and Provo City and the Timpanogas Canal Company, and the Telluride Power Company-- now the plaintiff, Provo City et al-- it does not give-- the decree only shows Provo City and the Timpanogas Canal Company and the Telluride Power Company. Now the findings-- I do not know when the original decree was filed, I have not seen it, but the Blue Cliff Canal Company was not a party to that stipulation, as I understand the matter, and therefore is not bound by it and the whole of the findings or awards under this decree made to the Telluride Power Company are made by virtue of that stipulation. Therefore the decree would be binding as shown on its face only upon those who were parties to the stipulation, and again I say that whole matter having been gone over by the court and tried out in the original action and again in effect fully and ~~an~~ ably presented by the defendant on its motion to modify the court should not again at this time go into it nor permit them to in effect amend their decree-- amend their counterclaim in this manner at this time.

First, he says it appears from the complaint in said action (Reading).

The decree was before the court, as I say, and passed upon in all of its parts. It was part of the evidence in this case, I do not know by whom introduced, but it was introduced for whatever effect it might have on all of the issues before the court. We were here claiming a wasteful use and we insisted on the motion to modify that

the award made by the court was far in excess of any appropriation ever made by these parties, and we insist now upon the showing already had before the court that that is true.

THE COURT: I do not think I care to hear from you upon the objection, the objection will be overruled.

MR. A. C. HATCH: Note our objection.

THE COURT: You may proceed with your motion .

MR. STORY: The motion, your Honor, is one to modify the order which your Honor has made with reference to the distribution of water pending the entry of your decree herein. As I understand your Honor's actions in the case, that which has been done in the case is that you have rendered a tentative opinion^{on} which findings of fact and conclusions of law will be framed. and that you have asked, you did ask the respective parties to submit their objections to that, your tentative conclusion, in advance of the formal findings of fact, in order that if any mistakes had been made they might be corrected before the preparation of the findings rather than afterwards. We are not here at this particular time objecting to the decree, proposed decree. We did file an objection to that, to the proposed decree, and I will say frankly to your Honor that in due course, very few days, as soon as I can prepare it, I am going to prepare another objection to the decree along those lines, which I take it will be argued in due course. This matter is for a modification of the order of distribution and comes up because of the fact in the trial of the case we had relied absolutely upon the Chidester decree insofar as the determination of the rights of the parties to that suit were ~~at~~ determined, upon the pleadings of the plaintiff, and again upon their admissions in court, and upon the evidence of the decree itself, and we had not introduced any evidence contesting their right, their claim to a Class B right in whatever amount they desired, 46 feet or otherwise, because

it was wholly immaterial to us if their right was secondary to us as adjudicated by that decree, and I say to your Honor further that we say explicitly relying on their contention in this case, that in looking over the proposed findings which your Honor submitted, we did not recognize, did not discover the fact, it escaped our attention, that this right, old Blue Cliff right they were claiming as successor in interest to the Blue Cliff canal, had been elevated to a Class A right, which in times of scarcity established priority with our right; and furthermore this court did not determine what the normal flow of the river is at the present time covering Class A rights. We did not think that was material to us, because of the fact if the old decree which they had introduced in evidence controlled the rights of the parties it did not make any difference to us, because whatever water came down there, we would be entitled to use it in preference to them except as to a very small amount which was included in the Class A rights.

THE COURT: Let me understand your position. I understand you are not speaking in any way at this time to affect the decision of the court which you refer to as a tentative decree, but merely asking the court to modify the order--

MR. STORY: Of distribution, yes, in effect, if your Honor--

THE COURT: Why should I enter this order making any change in this order of distribution if the decision as rendered, placing the Blue Cliff canal right in Class A still stands?

MR. STORY: Your Honor, I do not want to be misunderstood in regard to that. In a way, of course, this does act upon that decree, but what I want to get at, your Honor has asked for objections to the decree--

THE COURT: No, you are mistaken in that.

MR. STORY: I so understood it.

THE COURT: It doesn't make any difference, but the only thing the court asked for was suggestions as to inadvertence and omissions and any objections to any of the findings, it was then asked of the court the permission to present in advance of the decree so that the matter might be completely gone over before the decree was entered, and it was with great reluctance that I did that. It was not my suggestion at all.

MR. STORY: That may be entirely so, your Honor.

THE COURT: I will suggest this is in my mind. I do not think the court cares to waste this time we are wasting if I understand your position. I understand you to say you expected within a few days, or soon, to present a motion that would be broad enough in its scope to attack the finding the court has made that placed the Blue Cliff right in the A Class, insisting it should have been in the B Class. Is that correct? If that is correct I think we had better wait until that is presented for the court to take any action at all.

MR. STORY: I will ask this be regarded to that effect, this motion.

THE COURT: I had so regarded it.

MR. STORY: I merely, in my understanding of the court's attitude in the matter had tried to conform to that and had suggested in pursuance of what I thought was the court's desire in that respect, I would present a formal objection to the proposed findings. As a matter of fact, this is in effect an objection to your Honor's decision at the present time, and if there is any doubt on the subject I will ask it be so regarded.

THE COURT: I took it to be so until you suggested it was not.

MR. STORY: I hope your Honor will not misunderstand me, and understand I merely suggested I would file a further objection in line with your Honor's suggestion to handle the

matters.

THE COURT: I suggested in the start I would indicate my views on your motion before you commenced to argue it.

MR. STORY: At the present time your Honor has made an order the water will be distributed in advance of any decision.

MR. WEDGWOOD: Mr. Story, will you let the court indicate what his view is so that it will be known.

MR. STORY: If I have interrupted the court, I beg the court's pardon. Had I cut you off?

THE COURT: You may go on, I have lost the connection of what I was going to say.

MR. STORY: I beg pardon for interrupting.

THE COURT: I think I was about to suggest my view of the matter was when I read this motion before you presented it, in effect it was an application to the court to declare the tentative decision was not correct in that particular.

MR. STORY: I think that was exactly my intention.

THE COURT: Then you suggested afterwards that was not the case, it was merely a motion to correct or change the the order that had been made, and you later expected to file a motion asking the modification of the decision, so that if that is the view you take of it, the court thought better not have two days of argument. Unless the decision is wrong, the court would not modify this order. The only thing is the question whether the court placed this Blue Cliff right in the wrong class, that is all there is to it.

MR. STORY: I think so, but your Honor had made the order directing the distribution of the waters of the river in advance of the entry of the decree herein in accordance with the tentative decision, and so my motion ran specifically to that particular order, but, in effect, of course, it does attack the decree.

THE COURT: Let me ask you, do you expect to file another motion?

MR. STORY: Now that I have understood the court's order, or the court's desires in the matter, that is with reference to the suggestions as to the decree, certainly not. This will conclude the whole thing.

THE COURT: The court has no desire in the matter at all.

MR. STORY: I should not have used the word desire, but I mean we are proceeding in an informal way of making suggestions, and I thought best to follow the informal way which had already been inaugurated, but this motion does attack the decree as well as the order, because the order is based on the decree, and want it so understood, but do not propose to file anything further.

THE COURT: Then you wish to proceed with this motion.

MR. STORY: I wish to proceed with this motion.

MR. A. C. HATCH: Our objection was based upon that it was in effect a motion to permit the introduction of testimony and proof to show the court that the decision was erroneous, and it is based upon the affidavit of Brundige and oral testimony that he intends to introduce at this hearing. We object to going into the trial of this case again.

THE COURT: If that was your objection, Judge Hatch, the court would overrule your objection because prematurely made. When he offers evidence you can object to the introduction at that time, but he has not offered any except he read an affidavit which was part of the motion, and if you object to the affidavit I will pass upon that objection, but your objection now is to hearing the motion.

MR. A. C. HATCH: We have an exception to the ruling of the court on the overruling of our objection.

THE COURT: Your objection to proceeding with the

motion, that is all I am passing on.

MR. WEDGWOOD: Which is the motion to modify the decree.

THE COURT: Yes, modify it in that respect.

MR. STORY: So that there may be no misunderstanding about my position, I will ask to amend the motion by interlineation by adding the word after the reference to the orders of distribution, and the tentative decree heretofore entered herein, so that there can be no question.

MR. A. C. HATCH: What page of your motion?

MR. STORY: In the sixth line after the first word "in", interline and the tentative decision.

MR. WEDGWOOD: And the record may show we make our objection same as we did before, and same ruling and exception as if repeated.

THE COURT: Certainly, and this may be interlined.

MR. STORY: We have not asked to open up the decree for the purpose of introducing further testimony, or anything of that kind, but the reason we filed the affidavit was to show the necessity for meeting again in this particular matter, and any other evidence introduced will be for the same purpose rather than to let the matter run during the summer, and until the final decision would be rendered in this case.

THE COURT: It would not be necessary to introduce any further evidence on that subject, because the court has sustained your application to have it heard.

MR. STORY: Certainly, and I wish to clear up the fact now before us. Now, your Honor, Judge Hatch has argued the merits of my motion to such an extent I hardly know whether I am presenting it or replying to his argument and they have changed their position with such agility in this case that the proverbial Irishman's plea is out of the running. We have first of all the allegations of the com-

plaint to consider in this case.

(ARGUMENT)

MR. WEDGWOOD: Let me ask, do you claim in reference to the rights of the Blue Cliff Canal Company there was any adjudication whatever in the Chidester decree?

MR. STORY: I most certainly, emphatically and positively do, and always have from the beginning of this case.

MR. WEDGWOOD: Do you rely upon the validity of the Chidester decree entirely?

MR. STORY: Yes, and the complaint and admissions of counsel.

MR. WEDGWOOD: I just thought I could shorten it because you will have to reply to that if we assume the burden of that argument.

THE COURT: Let the court ask why you care to proceed with the argument. I understand General Wedgwood concedes the correctness of your position providing this decree is valid.

MR. STORY: Then I have nothing further to say.

THE COURT: In other words, I understand you assume the burden of establishing that situation and let you reply to it.

MR. WEDGWOOD: No, I think I may have gone too far, but when that decree is properly explained from our standpoint there is nothing to this matter. Now, he will have to answer us on that matter. The decree speaks for itself. It is true in that decree the way it is worded unless it is analyzed, there appears certain things. Now, if the court is going to take those things on the face value of the decree, of course what the court says is true. There is one other suggestion that there was and is now, and we all

know it, I think fifty second feet of water more in the river for distribution than there was at that time.

THE COURT: I think the evidence shows a hundred.

12:10 P. M., RECESS TO 1:30 P.M.

MR. STORY: Your Honor, in view of the position taken by Colonel Wedgwood, as I understood it, just before the noon recess that he asked me if we relied on this decree, I stated that we had most positively, and have all through this case relied on the decree and allegations of the complaint, the admissions of counsel and statement of their case, and the construction placed upon the decree for years, and of course we placed this motion, and it is so stated in the motion, absolutely upon those grounds, and in view of the fact as I understood Colonel Wedgwood that they would concede, if the decree were binding, that the motion was proper, or words to that effect, and if their contest of the motion is based upon the fact they claim it was not a valid decree, I merely wish to add two or three words to what I have already said, as I think they should take the burden of showing that the decree is invalid and not binding upon them. I merely wish to add that this is the first time anything of the kind has been suggested in the trial of this case. They not only affirm it in their complaint, but throughout the entire trial they have affirmed it in aid of the decision which they, as plaintiffs, expected to obtain in this case, the construction of its being valid and binding upon all parties has been placed upon it both throughout the entire case and it is utterly inconceivable to me that this court would at this time permit them now to claim the invalidity of the decree in order to support the decision of the case.

(ARGUMENT)

MR. WEDGWOOD: I offer in connection with this argument as an exhibit the testimony taken in the case resulting in the so-called Chidester decree, duly certified to by the stenographer, to show the negative fact that there was no controversy between the Blue Cliff Canal Company or any of the defendants in this case or the plaintiffs, other than those referred to in the stipulation between the Telluride Power Company, Provo City, and others which I will hereafter mention.

MR. STORY: Of course, I would object to the introduction of any such testimony as that offered by the plaintiff, on the ground it is incompetent, irrelevant and immaterial, and attempting to vary a decree of this court by oral testimony wholly without the issues pleaded in the case and inconsistent with the pleadings, particularly the complaint filed by the plaintiff in this action and wholly inconsistent with the entire position taken by the plaintiffs during the progress of the trial.

MR. RICHARDS: I join in the objection.

THE COURT: The court is inclined to your view of that matter, but in order that the record may be complete the objection is overruled pro forma, and it may or not be considered upon the final consideration of this application.

MR. STORY: I will save an exception.

THE COURT: I am inclined at the present time, present status of this argument, I am inclined to the view your position is correct, Mr. Story.

MR. STORY: Save an exception to the pro forma ruling.

MR. RICHARDS: Note an exception to us.

MR. WEDGWOOD: All I care to add is to correct what impression might be given by Mr. Story's objection. I am not offering this testimony to-- contradiction, was it?

THE COURT: Vary was his term. I did not give any

consideration to that part of his objection.

MR. WEDGWOOD: It is to uphold the decree.

THE COURT: The material question is under the state of your pleadings whether you are in position to attack the validity of a decree which you have made the basis of your claim of right to the use of this water. That is the serious question in the mind of the court.

MR. WEDGWOOD: As I said to Mr. McLain, I will try and come to that in a very few minutes.

(ARGUMENT)

MR. WEDGWOOD: I offer in evidence, if the court please, the records and files of this court in case No. 957, comprising the complaint in the case, the answer and counterclaim of the Telluride Power Company, the petition for removal to the Federal Court of the Telluride Power Company and the findings of fact and conclusions of law in that case.

MR. STORY: I desire, your Honor, to make the same objection which I made to the introduction of the evidence previously offered by the plaintiff in this action.

MR. RICHARDS: We desire to join in the objection.

MR. WEDGWOOD: Now, if your Honor please, according to my suggestion made at noon, I have outlined now the ground, so far as this decree is concerned which seems to me to be sound. Now, I simply ask that the Power Company the right of reply, that if we desire we may have just a few minutes to reply to what they say.

MR. STORY: Did your Honor rule on that offer?

THE COURT: No, I did not. Colonel Wedgwood was making an explanation. I have serious doubts whether the papers offered aside from the pleading, have any materiality in this case. The findings and conclusions might support

an attack made upon this decree upon the ground the evidence did not support it, but I do not think the decree is subject to that attack. Now, I think the decree is absolutely void if there is no issue upon which it can rest, and these papers that I have suggested may possibly be admissible merely for the purpose of throwing some light upon the pleadings in corroboration of the absence of any issue in the pleadings. For no other purpose are they admissible at all. I will overrule the objection, and they may become a part of the record, so that either part may have the benefit of them upon review.

MR. STORY: Save an exception.

MR. RICHARDS: Save an exception.

THE COURT: Now, General Wedgwood, your position is that you may by purported evidence in the case establish a right to the use of water by appropriation, or by purchase from an appropriator under an allegation in your complaint that you have the water by virtue of a decree. In other words, where your-- substance of your allegation is that you derive your right by virtue of a decree originally of your predecessor in interest, or that you may establish that right by proof of the appropriation by your predecessor in interest.

MR. WEDGWOOD: No, I have not contended that. Of course I will ask possibly Mr. Evans or Mr. Hatch may supplement anything I say because I do not know some of those matters, but I have stated here that in so far as this decree was based upon pleadings and evidence--

THE COURT: I think, Colonel Wedgwood, you did not understand my question. I am not asking now with reference to the validity of the decree at all nor, I take it the validity of the decree was involved in my question. My question was the pleadings in this case, not the want of pleadings in the old case in the Chidester decree, ~~an~~ but the question was, and the question in the mind of the court

was of some importance too, whether when you plead as I understand you have plead in this action we are now trying, that you have the right to the use of water acquired by virtue of a decree which was awarded to you in an action pending by the District Court of this district, can you without any amendment of your pleading establish your right to it by proof of an appropriation aside from the decree?

MR. WEDGWOOD: I would say not of course.

THE COURT: Isn't that the situation here. My attention had not been called to the situation.

MR. WEDGWOOD: I will just add a word and let my friends take it up, but I would say this that if parties come into litigation of this kind which of course is education to every person who takes any part in it, no question about that, and proof is introduced there without objection or over the objection, if then a question arose as it well may arise, whether or not there is sufficient pleading, and I would assert absolutely there must be a sufficient pleading in order to sustain the judgment, then I would say as a matter of course the pleading should be made to conform to the evidence.

THE COURT: I will say, gentlemen, it is apparent from the decision the court rendered, the court did not award this 46 feet of water to the plaintiff by virtue of the fact it was decreed to the plaintiff, but by virtue of the fact of the evidence introduced of the appropriation. Evidence was introduced of the appropriation, so that I did not take into consideration the decree, but the question now confronts the court whether the court has any right to consider the evidence of the alleged appropriation when you have plead as distinctly as it seems you have from the reading of the papers by the various parties participating in the argument with reference to the decree and basing the rights upon the decree. I merely make these remarks, so that any further

discussion you might have in mind would enlighten the court upon that particular question.

(ARGUMENT)

MR. WEDGWOOD: Your Honor please, I offer the testimony to show a negative. I ask the reporter mark the transcript of the testimony in such way as to show there are two volumes, and connect them up, and unless there is some objection, so that they will be in, save copying, I ask to withdraw them.

MR. STORY: Do I understand it is your intention to offer the transcript, entire record in the former case as part of the record in this case?

MR. WEDGWOOD: To show the negative.

MR. STORY: After the trial is over are we offering evidence at the present time as part of the trial of this case.

MR. WEDGWOOD: I think it is understood this was offered solely on the question of how far this decree was a competent decree against you and against the Blue Cliff Canal Company successor or in favor of you, either way. That is as far as it goes and all it goes.

MR. RICHARDS: General, for the purpose of the record, when you say you refer to the--

MR. WEDGWOOD: To the power company, and I do not see, Mr. Richards, you and I have any contention in here, because I have admitted here so far as Provo City was concerned and its adjudication as to priority of use that decree was valid.

MR. RICHARDS: I think we were harmonious, General, and I was only trying to see it was not impaired at all by the statement.

MR. STORY: Of course, I renew my objection if there

is a renewal of the offer.

MR. WEDGWOOD: It is not reoffered, simply identified.

MR. RICHARDS: Join in the objection.

(Papers marked Exhibits 300 and 301.)

THE COURT: We are getting into this difficulty. If the court should agree with you, as the court is inclined to, General Wedgwood, that the decree was void so far as any determination of any of the questions between the successor in interest of the Telluride Power Company or Telluride Power & Transmission Company and the Blue Cliff, or the successors in interest of the Blue Cliff, it would appeal much more strongly to the court, that application on the part of the Utah Power & Light Company for permission to introduce evidence on the question of your appropriation and extent of it and priority as between your appropriation and theirs, then it does appeal to the court to receive such evidence as you are offering because they could well say to the court we have relied and had a right to rely upon the issue that you presented here. Your claim was you were entitled to 50 second feet of water as a secondary or Class B right by virtue of the fact it had been awarded to your predecessor in the case, the trial being had in a court having jurisdiction of it and we were misled by that to believe that you were going to rely upon what you had plead you were entitled to. Now, I will regret very much if this gets into a position where the court must reopen and take considerable evidence, and yet it seems to me if the court takes the view you do of it there would be no suggestion that could be made against that position of the defendant, if the court opens the case for the admission of any evidence whatever.

MR. JACOB EVANS: We might determine this question whether or not the case should be reopened if it became

necessary to do so after the court had determined what quantity of water the Utah Power & Light Company was entitled to. That matter is still before the court, and I take it you will not determine that until the brief of Mr. Story is in your hands, and you have an opportunity to read it. Now, if our view is entertained by the court why this controversy would simply go by the board and your decision in that matter might determine the necessity of whether or not --

THE COURT: If the court should take the view, ~~ex~~ adopt the view presented by Mr. Story and give to the defendant Utah Power & Light Company the entire amount claimed would this not still be a question they would be interested in. Would that relieve them entirely?

MR. JACOB EVANS: I am inclined to think so. I am inclined to think Mr. Story would be perfectly willing to pack his grip and go home if he could get three hundred second feet of water.

THE COURT: It is not a question what he is willing to do, but as a practical question would he still not be interested in it?

MR. JACOB EVANS: It seems to me it would do away with it, would it not?

MR. STORY: I can answer that very brief. Perhaps I was misunderstood in the last remark I made to the court, because I attempted to show where the leaving of this right to a Class A right, in times of shortage, to priority, very seriously affected our right. I was merely trying to explain that. Now, in my opinion it is utterly immaterial whether your Honor decrees us a hundred second feet or three hundred second feet, the principle involved is identically the same. In other words, when the flow of the river gets below the point that your Honor may decide where-- the amount of our appropriation, then whatever that may be we will be required to pro rate with the plaintiff under the

Blue Cliff right. Now, in this particular case, of course, I have assumed in this matter, I have assumed that your Honor's decision standing as it is originally made, namely 241 total-- the other is a practical question--

THE COURT: I think, I will have Mr. Evans' explanation in what way that would eliminate it. Judge Hatch also suggested until that was determined the quantity of water that should be finally awarded to the defendant Power Company, that this question was somewhat immaterial. I did not just get upon what theory, and I do not upon your suggestion, because it does not seem to the court it makes any difference what amount is awarded to the Power Company.

MR. JACOB EVANS: If our amount is prior to theirs.

THE COURT: Yes, if your amount is equal to theirs in priority, and they would have to prorate with you when the water fell below both awards.

MR. A. C. HATCH: Yes, but if the court should hold, as we contend, the history of the trial of all these cases is, it never has gone below the 163 second feet, as we claim all they are entitled to for distribution to those that are awarded decreed water below their tail race.

THE COURT: I understand the situation. Your contention that not as a matter of law or technical question that it is immaterial, but as a practical question.

MR. A. C. HATCH: As a matter of fact, it never could affect their rights.

THE COURT: I see.

MR. A. C. HATCH: That was the contention we made.

THE COURT: In other words the amount the court awarded to them, 143 .

MR. A. C. HATCH: 144.

THE COURT: 144, and the 46 that has been awarded here would make 190, and the river has never gone below 190.

MR. A. C. HATCH: That is my understanding of it,

never has in the history of the litigation here. Now, with regard to their contention and suggestion of the court, it would probably be proper to allow them to introduce further testimony. During the trial of the case we contended that the Blue Cliff Canal Company was entitled to more than we claimed by virtue of this decree, and we put on witness after witness to establish that right during the trial of this case, and the evidence was admitted without objection on the part of this defendant at any time. Now, under the ordinary rule of pleading when we put on that proof he had notice when we made the statement to the witnesses, made the statement as to the appropriation, he had notice, he had opportunity to meet at the time of the trial this question. Therefore, if they denied it they had notice that we were claiming and proving it, and under the ordinary rule we would be permitted to amend at this time our pleading to conform to that proof. That is as I understand the practise and as suggested by Mr. Richards, it would be unnecessary, the proof so far as the Supreme Court is concerned, but we had contemplated--

MR. WEDGWOOD: I do not acquiesce in any such law as that.

MR. A. C. HATCH: I say we had contemplated, and I think we will yet ask the court to permit us to amend our complaint to conform to the proof in that regard.

THE COURT: Let me see that I understand Judge Hatch, the extent of your position with reference to the obligation resting upon the other parties to the suit to be present, and take notice of what proof you would produce. We will assume now that under your pleadings as advanced an objection to it would have been sustained upon the ground that it was not within the scope of your allegations; in other words, you were seeking to prove something that you did not allege at all. Must the party at his peril be present to see whether parties are going to offer proof that is not within their allegations,

or at their peril take the consequences, or isn't the law such that a party may rely upon the presumption that the pleader will offer no evidence except such as is in support of his allegation.

MR. A. C. HATCH: If they did rely on it and it is not, yes.

THE COURT: Are not they in that situation now, have they not relied upon it and defaulted, as far as that question is concerned?

MR. A. C. HATCH: No, I take it not. They have denied the decree, they have denied that we were successors, they have denied that we have any right under the Blue Cliff Canal Company, and presumed to come here in support of their denial. That is my position. They were not taken by surprise. They were here to prove that it hadn't any right and that is what they were supposed to be prepared to prove. Then if we prove a greater right than we have claimed we have, as I contend, the right to amend, and have decreed to us that greater right if the proof shows we are entitled to it. We are successors in interest, and we probably do not know all of the facts until they develop at the trial of the case. They are successors in interest--

THE COURT: These questions the court will be compelled to determine when you move to amend your pleading, and if that should be sustained when they make application to introduce further evidence. These matters are merely incidental to what we are trying today.

MR. WEDGWOOD: I do not see we will get very far today. I think we are right up to that question at the present time.

THE COURT: It seems to me those are the crucial questions in these matters.

MR. WEDGWOOD: I think you will agree with me we cannot introduce proof that will stand unless you have an

allegation to rest on.

MR. A. C. HATCH: Oh yes.

MR. WEDGWOOD: So we certainly, in order to sustain the decree, everybody must make some amendment to those pleadings because it is a growing proposition, everybody gets wise as they go along.

THE COURT: Now, is that the end of your argument?

MR. RICHARDS: It will take a few minutes to finish up on our part.

THE COURT: I want some suggestion from Mr. Story or Mr. Richards if we should assume that the tentative decision the court has rendered was to stand, is it your contention that Mr. Wentz is not properly adjusting the division of water at this time.

MR. STORY: I did not want to confuse that question, your Honor, with the primary question whether or not the decree itself--

THE COURT: I want an answer to that.

MR. STORY: I do mean to say in my opinion, and don't mean to say what I did in an insidious way at all, in the way of an attack upon Mr. Wentz. I think he is wrong in his method of distribution.

THE COURT: I wish to ask that because evidently this matter has to go over for determination as to what the final situation is, either some application made or something else, some further presentation of it, and if so, if Mr. Wentz has in your judgment taken the wrong view of it, I want your views about it, so that I may make an order what shall be done pending the time the court shall determine your motion to modify. That is the reason I suggested it.

MR. STORY: As soon as I have the floor I will go ahead and close up as far as I am concerned. In the meantime of course if your Honor should let the-- withhold your judgment on this particular motion, the plaintiff, or rather

this defendant would be affected as long as the river stays at its present height.

MR. A. C. HATCH: Pardon me there, the water in the river has materially increased.

MR. STORY: On account of the very recent rain. If it drops back to where it was a few days ago before the rain, we will be losing about forty feet.

MR. WEDGWOOD: On the other hand, some of the crops will be out of the way, so we won't be losing it.

MR. STORY: On the other hand, so it may be understood, we have donated water to you so you may raise your crops, but do not want to have it go on ad infinitum. Now, there are just a few questions I wish to suggest in reply.

(ARGUMENT)

T. F. WENTZ, called by the defendant, Utah Power & Light Company, testifies as follows:

DIRECT EXAMINATION by Mr. Story:

Q Mr. Wentz, why do you determine the what you call the total river by adding together all of the irrigation rights when they do not participate at all in the prorating?

A Well, I get the total of the river, that is, the total of all the water in the river, and I have to add all the diversions to get that.

Q But Mr. Wentz, all of the water that is actually in the river instead of theoretically in the river is the way which you prorate between the defendant and plaintiff and other people who should come within the prorating, is the water which is actually flowing by the headgate of the power company plus the water actually flowing, or inflow to the river above the head gate of the Provo Reservoir Company, is it not?

A Yes, and the Timpanogas.

Q Now, that amount of water is very much less than what you term and figure, rather, your total river, isn't it, by adding together all of the irrigation rights?

A Well, I have a total river for the Utah Valley and then a total river in Provo Canyon. Those are shown on the sheet separate.

Q Let me get an answer to that particular question that I asked. The total river, as you figure it, consists of the irrigation rights below the headgate of the defendant power company, isn't it/

MR. A. C. HATCH: Mr. Story--

A Plus the water in the canal of the Provo Reservoir Company and Timpanogas Company, it includes all the water in the Provo Valley.

MR. RAY: Wait a second, are you speaking about storage water or natural flow?

A Everything.

Q I am now omitting the storage water in each case, the river is merely used as a carrier.

A Yes.

Q And I take it you are prorating only the natural flow of the river?

A Yes, that is true.

Q Now, referring only to the natural flow of the river, you make up what you term a total natural flow by adding together all of the irrigation rights below the Power Company's dam, don't you?

A. Yes.

Q And the total which you thus obtain is ^a as matter of fact, very much greater than the actual amount of water flowing in the river at the headgate of the Power Company's canals plus the water actually flowing into the river between that point and the headgate of either the Reservoir Company or the Timpanogas Canal Company, isn't it?

A That is adding the inflow below the mouth of the canyon as I

recall the statement of last week, about 13 second feet.

Q For your last prorating what did you determine to be the total river as you have explained it below the Power Company's dam?

A Well, the total river yesterday was 386.96 second feet, that included everything, storage and rights, transferred.

Q All right now, deducting the storage from the figure that you have just given as the total river, what is the difference; now, I ask you to deduct the storate or reservoir water?

A 355.

Q Now, deduct the Ontario drain, Ontario tunnel water?

A That is 13.70 second feet.

Q Yes.

A That leaves a balance of 341.58.

Q That includes the water designated as Class A under the court's tentative decision awarded to the plaintiff under the Wright, old Wright appropriation?

A Yes.

Q The point of diversion of that has slightly been changed from the up river down to the Provo Reservoir Company?

A Yes.

Q That also includes the--

A Dixon right.

Q What?

A Dixon right.

Q I call it the Harris right, I refer to the Dixon right, that is merely a Class A right, the point of divession of which has been changed down the river, is it not?

A Yes.

Q So whatever rights you have included in that figure of 341.58 constitute the sum total of the Class A irrigation rights?

A That includes all the rights, the 341.58.

Q Does that include the power company's right?

A Yes.

Q Of how much?

A Of 241 second feet.

Q Of 241 second feet, do you mean by that there is just 100.58 second feet total of all the other Class A rights, Class A irrigation rights?

A No, I mean to say that 241 of the Utah Power & Light is thereafter used for irrigation.

Q You mean by that that it is used for irrigation, but your 341.58 was made up of the total irrigation rights, wasn't it?

A Yes.

Q And it was made up of the total of those rights without reference to the 241 second feet of the Utah Power & Light Company proportion, wasn't it?

A The 341.58 is the water actually present taken out from the river by the several diversions.

Q Just a moment, just answer my question. The 341.58 is the total of the irrigation rights, isn't it?

MR. A. L. BOOTH: That is of the natural flow.

Q I just asked my question, and want an answer to my question.

A Yes.

Q So that the court will understand it, just read that question.

THE COURT: I think I understand it.

Q If you are going to add all of the Class A rights including the Power Company's right, you would add the 241 to that and make 582.58, wouldn't you?

A No.

Q If you were going to have all Class A rights?

A No, because this Class A water is used both for power and irrigation.

Q I am not talking about whether the water is used a second time, or whether there is any water going back into the stream from any irrigation right and thus making it available for the satisfaction of the other priorities; what I am trying to get at is what is the total Class A right that you have figured or used in computing what you term your total river; if you add the power company's right of 241, would it not be

THE COURT: That is palpable if you add those two figures together that is what it would be.

MR. STORY: I am trying to bring out this 341.58 is merely the sum total of irrigation rights.

THE COURT: Sum total of all the water.

THE WITNESS: The irrigation rights do not amount to 341.

Q Do you mean to tell me there was 341 feet of water actually flowing in the river at the head gate of the Utah Power & Light Company's flume plus the inflow between-- strike that out, I will ask it again. Do you mean to tell me the water flowing in the river at the Power Company's dam plus the inflow into the river between the dam and the headgate of the Provo Reservoir Company and the Timpanogas Canal Company amounted to 341.58 second feet?

A No.

THE COURT: I understood Mr. Wentz to make that very plain that it was not.

Q Then how much water was actually flowing in the river?

THE COURT: I understand Mr. Wentz to have testified 341.58 actually flowing in the river.

MR. STORY: That is the point I want to get, but, your Honor, that is not the amount actually flowing in the river at these points.

THE COURT: Not those points but the actual amount flowing in the river goes to the other diversions to find the total amount.

THE WITNESS: I believe I can answer his question.

Q I want to know how much there was altogether.

A In the Provo Reservoir Company there was 130.44 second feet.

Q That was flowing at the dam?

A That is in the Provo Reservoir Company canal. Now in the Timpanogas Canal Company there was 10.75 second feet. There

was leaking through the Timpanogas dam 3 second feet, and there was in the Utah Power & Light Company flume at the Nunn station that is below Lost Creek and Bridal Veil Falls, 203.52 second feet, making a total of 347.71 second feet of water in the Provo River in Provo Canyon.

Q Now, I wish you would please answer the question and tell me what the amount of water was actually flowing in the river at the power Company's dam?

MR. WEDGWOOD: Independent of storage water?

MR. STORY: Yes, independent of storage water.

A I can't answer that question because I don't know the inflow in the canyon. The only way I know the inflow in the canyon is by the leaking through the dam, and the inflow, that amounts to about 40 second feet. That is the leakage through the dam and inflow in the canyon.

Q Assuming that was 48 second feet, how much water was flowing in the river above the dam, immediately above the dam?

A I don't know, I don't know what the inflow is in the canyon at this time.

Q I say to assume it as you stated, 48 second feet leaking through the dam and flowing into the river between the dam and headgate of Provo Reservoir and Timpanogas canals?

A There was evidently some water going over the dam yesterday.

Q Whatever it is I want to know what the amount of water flowing in the river was.

MR. A. C. HATCH: How could he tell, how could anybody tell?

MR. STORY: If he is only going to distribute and prorate the water between these two intervals, I take it he would distribute the water available for these two rights rather than bring in some other right that does not participate in the ~~xxx~~ right.

THE COURT: Might I suggest this; I do not think the court is particularly concerned as to the flow on any

particular day. The court is more concerned in the question whether Mr. Wentz has adopted the correct method of determining the apportionment of this deficiency.

MR. STORY: Certainly, your Honor, and I was merely bringing out this particular example to show that the method which he has adopted is entirely erroneous.

THE COURT: Now, we are approaching the time we must close. I think it would be more-- what I started to say, I think it would be more advantageous to the court if you would indicate to the court some method that you think would be fair for this apportionment. Mr. Wentz has indicated what his method of apportionment was, and I do not know I just understand exactly what you claim.

MR. STORY: I will be glad to do it.

THE COURT: If you will indicate to the court what your suggestion would be for a proper apportionment.

MR. STORY: I shall be glad to do it, and do it in just as few words as I can. First of all, I take it if there is going to be any prorating it should be among all the appropriators, but assuming that was impossible then it certainly should be applied to all who were in substantially the same situation, namely, Provo Reservoir, Timpanogas, and all other appropriators whose points of diversion are between our headgate and our tail race, if there are any. In the third place, I take it that when you are going to prorate the water between those particular appropriators, which, because of physical conditions make it impossible to include others, that the prorating will be on the basis of the water available, actually available in the river for the satisfaction of those appropriations, without respect to the mere theoretical flow of the river based upon an addition of rights which might be ~~xx~~ satisfied in some other way.

THE COURT: The court agrees with all you have said so far.

MR. STORY: That is the point I am trying to get at.

He does not attempt to distribute this on what is actually flowing at the headgate of the power company plus the water or make of the river, the flow between that point and the headgate of the Reservoir Company and the Timpanogas Canal Company, and thus prorating the actual water flowing in the river, but he makes a theoretical river based upon the addition of all of the irrigation rights, all of which with the exception of those two, are not included at all in his prorating scheme, and attempts to divide on that theoretical basis rather than on the actual basis. Then again you asked for another criticism.

THE COURT: No, I didn't ask for any criticism at all.

MR. STORY: Yes.

THE COURT: I beg your pardon.

MR. STORY: I think you are right.

THE COURT: I didn't ask for any criticism of this method, I asked what you would do.

MR. STORY: Then, of necessity, if I am going to make a constructive suggestion rather than a negative suggestion, it would be in effect a criticism of his methods, and I will state it in the affirmative and constructive manner. I would eliminate his deduction in the first instance of ten second feet which the Reservoir Company has in determining the flow of the river for prorating purposes, ten second feet which they take through the Provo Bench Canal Company because they are in exactly the same situation.

THE COURT: Eliminate that ten second feet?

MR. STORY: So far as any prorating here is concerned, because in figuring the amount which in the first instance shall be divided certainly, because that is taken and supplied by our tail race, same as the other Provo Bench rights.

THE COURT: Why should they be relieved from prorating?

MR. STORY: I say they should not be relieved from prorating, and what I am objecting^{to}/is the fact they are relieved from prorating, deducting it in the first instance in determining the total flow of the river same as that in the Ontario drain water and Provo Reservoir Water in taking it out, saying they are not entitled to prorate. Instead of making it prorate by their elimination they prevent it from prorating. The same is true of the Wright appropriation. Why is that of any higher dignity than anything else?

THE COURT: The court cannot find any reason why they are, and the court has asked you if you would indicate what you think ought to be done.

MR. STORY: In the first place I should ~~xxxx~~ take this actual water flowing in the river, I should then deduct the storage water which is flowing down. I should deduct the Ontario drain water. I should then divide that difference or the remainder of the water actually flowing in the river between the three, or whoever may be called upon to join in the prorating in proportion to the sum total of their respective rights.

THE COURT: That sounds all right to the court. Is that any different from what Mr. Wentz has been doing.

MR. STORY: I think it is very different from what he has been doing.

THE WITNESS: Have you the sheets there?

MR. STORY: Yes.

THE WITNESS: You are mistaken. I have made the total of the Provo Reservoir rights which totals up in this particular instance of July 8, 1918, 101.18 second feet, and I have stated at the bottom of the page 10 second feet of the above amount goes through Provo Reservoir canal, Provo Bench canal, so that it leaves a total of 91.18.

MR. STORY: The sum total of the water diverted into the power company's flume, I am speaking, of course

only of the natural flow of the river, the sum total of the natural flow turned into the power company's flume and into the reservoir company's canal is very much less than the total flow of the river. they are talking about.

THE COURT: I can see it must be, and I think it should be, because it actually is there, isn't it?

MR. STORY: Yes, I know, but they are asking us to prorate on the theoretical instead of the actual basis. That is what I am getting at. If those other people are supplied by the return waters from our tail race and those are in a position where they should not pro rate or required to to prorate same as other Class A rights on the stream, why then should their proportion be included in figuring this theoretical river? That is what I am trying to get at.

THE COURT: The court is not aware any prior appropriator in Class A right does not stand his share.

MR. STORY: They don't.

THE COURT: Why don't they, that is what they should do..

MR. STORY: And they are not attempting and Mr. Wentz takes the position where they are satisfied by the return waters from our flume, they do not have to prorate and there is no cut made on their rights at all, but in figuring out the prorating between the Reservoir Company and Power Company, he, nevertheless injects their rights into the computation, and builds up a theoretical river. That is what I am trying to get at. Instead of prorating on the actual condition, he prorates on the theoretical condition, and he may be right so far as asking them to prorate if the law be a prorating can be had between one, two or three Class A rights and not all of them.

THE COURT: The law I do not think is as you have suggested, and I cannot yet understand from your suggestion how they are not all prorated.

MR. STORY: As a matter of fact, there is enough ^{we} water even when are cut down say forty feet below the total amount which your Honor at the present time has awarded us to satisfy the rights which are diverted below our headgate, to satisfy them in full, and hence they are not asked to prorate.

THE COURT: I see, I get the suggestion.

MR. STORY: And, nevertheless, however, there is no cut in those rights, their rights are used in the computation, included in the computation building up this theoretical river this way beyond the actual amount of water flowing in the river.

THE COURT: I don't so understand it. I think from your suggestion now, as I understand it, I think the prorating is being made correctly, if I understand it rightly.

MR. STORY: In other words he could build up a river of a great many second feet, when, as a matter of fact, there is only about half that amount.

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

MR. STORY: And should the prorating be based and building up all of the appropriations below our tail race with our tail race and eliminate them from the question, should we prorate the water actually flowing in the river, or prorate the river which is entirely different thing from the actual conditions? That is the point I am trying to make.

THE COURT: The court's view of it is you should pro rate the actual river, and the actual river is determined by adding together the quantity of water flowing into the several diversions.

MR. STORY: Would your Honor maintain if those others are eliminated from prorating that the river should be added, should be computed by adding in their diversions. That is what he is doing.

MR. A. C. HATCH: May I ask Mr. Wentz to state how he has made this prorating, the manner in which he had prorated it, I don't understand it, I can get nothing from Mr. Story's statement of it, and I cannot understand him and I don't yet know how the prorating has been made.

MR. WEDGWOOD: I think, your Honor please, if Mr. Wentz and Mr. Story got together and found out just where the difference between them was, and then each one of them state it, then we could arrive at something which is right. I do not think we will arrive at it in this way.

MR. A. C. HATCH: Never.

THE COURT: The court is anxious it be arrived at in some way. Whatever prorating is made among the parties of the deficiency in the river of course ought to be made equitably and fairly between the several users of water.

MR. WEDGWOOD: Sure.

THE COURT: If it has gone below the normal river so that the primary users cannot have all their rights supplied it ought to be ratably apportioned among you, but I have not yet got anywhere in my understanding of the difference between Mr. Story and Mr. Wentz. As I understand Mr. Story those lower users ought to prorate in the deficiency, and I understand--

MR. STORY: I say under the law, I don't know any distinction in the statute.

THE COURT: Certainly not, and I understand from your statement the physical conditions are such if they did prorate you would not have any water going through your flume, because if no water was permitted to run down there, and it was all taken, that is enough reduction made so that they did not get the quantity that was going to them I doubt whether you would have very much running through your canal, from your statement.

MR. STORY: I am sorry that I gave that idea,

because that would be the situation when all the deficit is charged to us as between the defendant-- we stand about nine-tenths of the entire cut when it is divided between the Reservoir Company and ourselves, because our right is so much larger than theirs that the deficit is very much larger. On the other hand there was a very much larger amount of-- number of appropriations included in the compilation, our proportion of the whole would be very much less, and hence our proportionate cut would be very much less. Now then to get down to the question of our situation here. Here is the dam. The Utah Power & Light Company's flume. Here is the tail race, Here is the Provo Reservoir Company diversion between our point of intake and point of return. Here is the Timpanogas between also the point of diversion. Here is the city below, here is the Provo Bench and other appropriators whoever they may be. There is a certain amount of water flowing in the river at this point, we will designate for the sake of the argument as a hundred. There is a certain amount of inflow into the river between these two points, principally ^{the} upere, available for the satisfaction of these two priorities, say plus forty, making this up here two hundred, two hundred plus forty, that is the amount of water actually coming into the river available for the satisfaction of the appropriations. Now, these down here are satisfied with the water is sufficiently high in the river and under the division made between these appropriations and this appropriation to satisfy these in full. Say their right is 40, this one is 90, the total amount of water going down through here would be more than sufficient to satisfy their rights in full, so that as a matter of fact, as Mr. Wentz says, because of the physical conditions it is impossible to prorate between all of these Class A rights, and make each one stand that cut, because by the very nature of things there is enough water going through your flume and

getting into the river to satisfy their rights in full.

THE COURT: That is what I said a while ago, if you prevented it going down there you would have to cut it off from your flume.

MR. STORY: Yes, but you wouldn't have the right to cut it off from us. The mere fact there is a physical condition in the river which would give these people their rights in full, would not prevent us from taking our prorata share of the whole. In other words, these people would get the benefit of the position, and if there was other water available below this point I suppose the other parties could pump it back if they saw fit to do so, but what I am trying to get at is here; he makes up his river by adding this and this and this and these other rights down below here without reference to the actual amount of water flowing in the river, and says instead of their being 240 actual second feet of water for distribution between these three, he says will join in the prorating, he figures in some five hundred theoretical feet to be divided, and thus makes us stand actually a very much greater cut than we would otherwise.

MR. A. L. BOOTH: Mr. Story, may I ask a question on those figures?

MR. STORY: Yes.

MR. A. K. BOOTH: If you add the 200 plus 40 that you say flowing at your dam, and into the river below your dam and you should be prorated on that amount, you would have to stand 200/240, wouldn't you?

MR. STORY: Yes, if your figures assume--

MR. A. L. BOOTH: I am just assuming these figures. Now then, if I understand you right, instead of doing that way Mr. Wentz adds to that 240 the 90 and the other 40, which makes 370, is that right?

MR. STORY: Of course, those figures are entirely--

MR. A. L. BOOTH: I am talking about the figures

you have given, if I understood you right Mr. Wentz did it that way.

MR. STORY: That plus 40, you want to remember is merely the river between those two points, that is not the Provo Reservoir Company or Timpanogas Canal Company.

MR. A. L. BOOTH: I thought you said you put that 240 and then Mr. Wentz adds this 90 and this other 40 to that, which, as I figure, would make 370 altogether. Now then, as I understood you Mr. Wentz now asks you to stand two hundred out of that 370 instead of 200 out of the 240. Am I right in the way you have been trying to explain it?

MR. STORY: No, I don't understand it.

MR. A. C. HATCH: In other words, Wentz is doing better by them than he would be if he distributed it as Story suggested.

MR. A. L. BOOTH: That is as I have understood his explanation.

MR. A. C. HATCH: Make him supply 200/240 instead of only 200/370.

THE COURT: It seems this matter between Mr. Wentz and Mr. Stoner, they ought to figure it out and arrive at some conclusion they could recommend to the court as fair. The only thing if this is so dry a year and we are going ~~xxx~~ so far below the normal river a deficiency must be divided, it ought to be divided prorata among the parties entitled to the water. Now, I am free to say from this presentation here that the court is a little at a loss to know just how it ought to be done, but it seems to me the engineers ought to be able to figure this out and come to a correct conclusion.

MR. STORY: Should be very glad to have Mr. Stoner and Mr. Wentz take the matter up and submit it to me and be glad to present it to your Honor with any of the attorneys, if they have any objection to it.

THE COURT: I can see what your difficulty is there.

It is a difficulty, but just how to correct it I don't know.

(ARGUMENT RESUMED.)

MR. JACOB EVANS: We now ask leave of the court to amend our complaint so as to conform to the proof as it has been introduced, and we will prepare the amendment in due time.

MR. RICHARDS: We will suggest, your Honor please, if our brothers want to amend they will submit their proposed amendment then we may have no objection to it.

MR. JACOB EVANS: We want to prepare it and submit it.

MR. STORY: Your Honor will not rule on the question whether they will be permitted to. We will reserve the right to make such objections as we care to at the time, also to make such further suggestion in reference to our own rights-

THE COURT: . You do not need to reserve the right, whenever anything is presented you have the right to object to it. When do you want to present that?

MR. JACOB EVANS: We would prefer of course not ~~in~~ presenting that until after the court has determined the matter that is now submitted to the court as to the quantity of water that is to be awarded to the Utah Light & Power Company. If we knew what that decision was going to be it might influence us somewhat.

THE COURT: The court has not entered upon a consideration of that for the reason Mr. Story's brief is not in the hands of the court yet. I did not want to take it up until I had all the briefs. I take it your application is not to submit this motion that has been presented today, for the court to delay the submission on that to determine whether you wish to move to amend your pleadings. That might leave this matter in an entirely different shape.

MR. JACOB EVANS: Yes, it may be we will not feel disposed to amend our complaint, dependant entirely upon the decision of the court, if we could know what that was.

THE COURT: You mean on the other matter?

MR. JACOB EVANS: Yes, as to the quantity of water the Telluride Power Company was to be awarded, then we would know whether or not we wanted to amend our complaint.

MR. STORY: I think the question of the amount is entirely immaterial as far as this question is concerned.

THE COURT: It may be to you and to the court immaterial, yet, in the view of the counsel they might regard it as material in determining their position.

MR. STORY: Certainly, and I cannot say they should move to amend now, tomorrow, or any other time, I probably shall object to their amending any time.

MR. A. C. HATCH: Another matter, Mr. Story has not filed his brief. It was his motion. They should have furnished us a brief before we were required to reply, and if he shall now file a brief, we would ask if there is any new matter in it we be permitted to reply.

THE COURT: Very well, Judge Hatch, when the brief is served upon you if you desire sometime, have General Wedgwood who is right there across the street from me call my attention to the fact you desire a certain length of time to reply and the court will give it to you.

MR. WEDGWOOD: There is just one suggestion in connection with the brief we have already filed. There is one other item might take half a page, we want to add to it.

MR. STORY: I have no objection. Of course, they had their brief all prepared with the exception of a few pages, and it was easy for them to get it in, while I had to do a great deal to get it up. You make that suggestion you have in addition before I finish my brief I will take it all up.

MR. WEDGWOOD: We will have it in within a few days.

THE COURT: The court will take a recess until the third day of September, unless something comes up in the meantime which makes it necessary to come back.

IN THE DISTRICT COURT OF UTAH COUNTY, UTAH.

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PROVO RESERVOIR COMPANY,)
) Plaintiff,)
) v.)
PROVO CITY, ET AL,)
) Defendants)

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September 3, 4, 5, and 10, 1918.

MR. JOHN E. BOOTH: If the court please, this is the first opportunity I have had since the order of the court about permitting people to put in testimony as to the character of the land. On behalf of the East River Bottoms Water Company, I ask to file this petition. I am not particular about it being heard now, because our people are all here, and it may be discussed later.

THE COURT: It may be filed.

MR. A. C. HATCH: What is it you are offering now?

MR. JOHN E. BOOTH: It is the petition to be allowed to add testimony as to the correct acreage in the East River Bottoms.

MR. RAY: May I make an inquiry as to that. I understand the acreage as found by the court was predicated upon a stipulation, was it not, as to the computation or the testimony of Mr. Stewart in open court.

MR. JOHN E. BOOTH: It was on the testimony of Scott Stewart.

MR. RAY: Does your Honor contemplate we shall file written answers to a petition of this sort?

THE COURT: I don't know.

MR. RAY: I have not seen it, but we do resist the opening of the case.

THE COURT: It has not been reopened for testimony,

MR. JOHN E. BOOTH: Only as to the acreage, as I understand.

THE COURT: Nothing but the city of Provo. I made an order at the time I was here, there seemed to be such a great discrepancy between the suggestions made as to survey of this acreage in Provo City by Mr. Bostaph, which put it at six hundred acres, if I remember right, when the highest estimate made by any of the witnesses for the City was three hundred.

MR. JOHN E. BOOTH: We are ready to discuss it at the proper time.

THE COURT: You may file the petition.

MR. JOHN E. BOOTH: Your Honor made an order in regard to the Barton and Young ditch.

THE COURT: Yes, two matters seemed to be so far out.

MR. SANFORD: If the court please, I made a motion before in behalf of Mr. Brice, who is now in the military service in France as successor to Rudolph Riard, be dismissed as to him. I asked it be deferred. I at this time ask the case be dismissed as to Rudolph Riard interest.

MR. A. C. HATCH: I think that is the only thing we can do, he being away.

MR. SANFORD: The fact was this, Rudolph Riard was a party during the pendency of the action. He died. His administrator was not made a party, nor was his successor in interest made a party. Mr. Brice now owns an interest. He was not a party to the suit, and I made the motion on that ground.

MR. A. C. HATCH: What is the interest claimed?

MR. SANFORD: 29.6 acres.

MR. A. C. HATCH: What is found by the court in its decree?

MR. SANFORD: It was twenty-six and a fraction.

MR. A. C. HATCH: Three acres difference.

MR. SANFORD: Yes, but there are other reasons, one

question was the duty of water.

MR. A. C. HATCH: I think that was fully gone into. If it is only a question of three acres, we would rather settle it.

MR. SANFORD: No, it was more than that. He desires not to have a decree finding as to him, and, of course, I think clearly could not.

THE COURT: You are authorized to appear for him. If you will state the demand, probably the other parties will concede it.

MR. A. C. HATCH: The party being dead, we would have to substitute someone, but if you will state your claim, and it is within reason, we would rather concede it than dismiss.

MR. SANFORD: The claim would be two-fold; one is about acreage, there is about three acres difference, and the other is about the duty of water.

MR. A. C. HATCH: We would not concede any different duty of water than that found by the court. We would concede the three acres rather than to dismiss, but, I think that the duty of water being found, and decree being entered as to that even though the court had not jurisdiction of the party to enter a decree at this stage, it would not be worth while to try this whole law suit over again just as to that duty of water, might necessitate trying the whole thing over just for that one party.

MR. SANFORD: I don't know as to that. I take it it is a question only as to the rights there.

MR. JACOB EVANS: Where is the land located?

MR. SANFORD: At the mouth of the canyon. I understand his contention is the duty of water is 35 acres. It would not amount to very much.

MR. JACOB EVANS: Were his rights ever adjudicated in the other cases?

MR. SANFORD: Yes, rights were adjudicated in the former case, I understand.

MR. WEDGWOOD: Your Honor please, it don't seem to make much difference if the court makes the order that it has made in several cases of this character, the court will retain jurisdiction to appoint a Commissioner, and the waters go under the control of the Commissioner, and whatever further order is made will be made in this case. That was the rule in the Jordan River.

MR. A. C. HATCH: I think the duty of water would prevail in any event.

MR. WEDGWOOD: It would be in this case.

MR. SANFORD: There is this situation, in this court there is already a decree.

MR. WEDGWOOD: I understand that, I have been familiar with it from its inception.

MR. SANFORD: Awarding him a certain amount of water, and he would be entitled to it until there is something different.

MR. WEDGWOOD: I will say this, for your information, that now, and hereafter, I shall claim, and I take it that the Provo Reservoir will claim that when the court makes this final decree it will retain jurisdiction of the subject matter of this action, and appoint a Commissioner, and will hold that that Commissioner divide the waters of the river, and that he cannot be interfered with without contempt of court, and you will have to come into court with your party and get a proper order. I don't see how we can prevent you dismissing your case.

MR. A. C. HATCH: Unless we would bring in a proper pleading and substitute.

MR. WEDGWOOD: That is too late as this stage.

MR. A. C. HATCH: It is too late to do that, we never would get to the end of the case.

THE COURT: I think all involved in your suggestion are questions that cannot come before the court now.

MR. WEIGWOOD: No, I was just saying to him if he desired to take the same duty of water and same acreage for his client, we would settle the matter now. If he don't, he is up against the other proposition.

MR. SANFORD: He does not desire to do it. Of course, the acreage, there is a slight discrepancy in that regard, but he does not desire to abide by the decision in regard to the duty of water, so we will ask for dismissal.

MR. A. C. HATCH: I think we are willing to concede the discrepancy in the acreage if it is only the three acres.

THE COURT: I understand Mr. Sanford does not care to take any concessions unless you concede all, is that the idea?

MR. SANFORD: No, we would not stay in the case.

THE COURT: You wouldn't be in the decree at all.

MR. SANFORD: No.

THE COURT: I understand then the case is dismissed as to the deceased person, Rudolph Riard.

MR. SANFORD: Now, your Honor please, the case was opened to put on proof as to acreage as to several others in the same vicinity taking through the same ditch. Mr. Stewart is here, I think it will only take a minute. There are several corrections to be made in the acreage.

JOHN R. STEWART, being called and sworn, testified as follows:

DIRECT EXAMINATION by Mr. Sanford.

Q You may state your name?

A John R. Stewart.

Q What is your profession?

A Engineer, civil engineer.

Q Mr. Stewart, did you make a survey of the land belonging to D. B. McBride and Moroni B. Cutler, described in the proceedings here as successors to Nuttal and R. D. Young and others?

A Yes sir.

Q Refer to the D. B. McBride land, how many acres are there?

MR. JACOB EVANS: If the court please, I did not understand the case was opened for the purpose of taking testimony respecting other lands except the lands of Provo City.

THE COURT: I didn't remember it was, but it is stated by several it was.

MR. JACOB EVANS: Have we any way of ascertaining that fact in the record made at this time?

MR. SANFORD: Yes, you remember I asked for two reasons, one acreage, the other the duty of water. You said it might be open and we could check up the number of acres, and in so far as the duty of water was concerned, there was competent evidence showing the duty of water was fifty acres, and if we should show a less duty, that you would believe the witnesses who had already testified, and therefore would not change the findings in that regard even though we did offer witnesses that the duty was 35.

MR. JACOB EVANS: I remember that part of it very well.

MR. SANFORD: And opened it for the purpose of checking the number of acres.

MR. JACOB EVANS: I don't have any recollection of it at all.

MR. SANFORD: I am very clear in my recollection of it.

MR. JACOB EVANS: I am very clear about the other proposition, the duty of water.

MR. SANFORD: And it was opened in regard to the number of acres.

THE COURT: I will hear what this witness has to say,

and, if it is necessary to produce some evidence in rebuttal, the court will not cut you off. Now, read the question.

Q I will reframe the question. Referring to the land of Mr. D. B. McBride, I will ask you if you surveyed that land?

A Yes sir.

Q And I will ask you if the land which you surveyed was land which has been irrigated for some years and cultivated?

A Yes sir.

Q And how many acres did you survey of such land as has been irrigated and cultivated for some years?

A Do you mean McBride, 14.6.

THE COURT: Is that the land that is referred to in the decision as Rudolph Biard and D. B. McBride?

MR. SANFORD: I think so.

THE COURT: 12.50 acres?

MR. SANFORD: Yes.

Q 14.6 acres, you said?

A Yes sir.

Q Now, refer to the land of Moroni B. Cutler that was referred to in the decree as Nuttal land, Mr. Cutler as successor, you surveyed that land?

A Yes sir.

Q Was the land which you surveyed land which had been cultivated and irrigated for a number of years?

A Appeared to be.

Q How many acres did you make of that land?

A 21.6.

MR. RAY: How much was allowed there?

THE COURT: 19.11.

Q In regard to the Young land, there are several of the Youngs, as I recall, you surveyed that land?

A Yes sir. R. D. Young and others.

Q It was given in the decree, I believe?

A Permelia Young land, I believe it was originally, I am not sure, the county plats show it.

Q State whether or not this land which you surveyed was land which has been cultivated and irrigated for some years?

A Yes sir, appeared to be.

Q How many acres?

A 27.2.

THE COURT: What was the amount?

MR. SANFORD: It was awarded to several Youngs.

MR. JOHN E. BOOTH: Twenty-six and a fraction.

THE COURT: What do you have it, you say?

A 27.2.

MR. SANFORD: There was another question that was opened and to be settled, and that was this. The court and commissioner has ordered that they irrigate in rotation, and that means that certain of the ditches part of the time will not have water in them, whereas heretofore they have had water in all the time, and it has taken the water away from two homes, McBride and Nuttal, in the decree, and now Cutler, and it is a question of house use rights for those places. They have always taken their water out of those ditches, and now they are deprived of it, because they have ditch water only part of the time.

MR. RAY: Mr. Sanford, may I inquire whether you have a claim in your pleading for culinary water in addition to the irrigation water?

MR. JOHN E. BOOTH: We have not.

MR. RAY: I object to any testimony then as to culinary right.

MR. SANFORD: I think the parties in the case-- haven't they commonly used the water without pleading it, isn't it common to use the water for culinary and domestic purposes all through this system?

THE COURT: I don't know, I am not familiar with the system except in the evidence, and there is no evidence on that subject, or pleading.

MR. SANFORD: If there is any question about that,

we will ask leave to amend.

THE COURT: I don't think I will permit any amendment, but if it shown this discretion given to the commissioner will deprive anyone of any right, I will not make the order. Of course, if you can use the water to as good advantage under the old way, I will permit him to do it. It seems to the court a great advantage to have the commissioner have the authority to rotate this way, but if it is going to deprive anyone of the right to use the water for culinary purposes, I will consider it very seriously, but I don't think the court will permit an amendment at this time to open up the case for extended evidence.

MR. SANFORD: Of course, heretofore there was water flowing in those ditches, Young and Park and Nuttal ditches. Now, the amount has been cut down so that it makes only one good sized stream for irrigation, and that means they have to rotate through those ditches, and take the water out of the ditches part of the time, and thereby they are deprived of domestic water. Now, I take it they might not have anticipated the so cutting down of the water as to deprive them of that. I think the people generally throughout this stream have used their domestic water and may not have made proof of it. It is a small matter, it is not a house-use stream, but used water out of the ditch. This makes such a change that it deprives them of that right.

MR. RAY: Mr. Sanford, may I make a suggestion here. It seems to me under the tentative proposition of the court, the commissioner is given the discretion relative to the rotation of the water over those lands. It does not now appear that the commissioner is abusing that discretion, and it seems to me the question Mr. Sanford is now raising is one that would be properly brought before the court after the signing of the decree, appealing to the court to direct the commissioner to distribute water in a different manner than he was distributing it, and it is not a matter of final decree, it is

a matter of the discretion of the commissioner in the distribution of these waters.

MR. SANFORD: I think the discretion of the commissioner fails because of the reduction in the amount of water that goes to these ditches.

MR. WEDGWOOD: Tell us how far these ditches are apart?

MR. SANFORD: Let the engineer tell. You see I have just come into them.

CROSS EXAMINATION by Mr. Wedgwood.

Q How far are these ditches apart?

A One ditch is one side of the main canal and one on the other.

Q How far away?

A The ditches, small ditches run near the houses, but the main canal in which they have to get water when the ditches are dry are some distance.

Q What distance?

A In the Cutler district it is 430 feet from the house to the main canal; McBride it is 330.

MR. RAY: That is a hundred yards.

MR. JACOB EVANS: That is as close as a man has a well.

THE COURT: I don't understand the ditch is three hundred feet.

MR. SANFORD: One place, and four hundred feet.

THE COURT: Does the main ditch run through the land of these parties?

WITNESS: Runs between the two places, the main canal.

THE COURT: Does the land of the party that is three hundred feet away, Mr. McBride, does his land go to the ditch?

A Yes sir.

Q So that he can water stock from the ditch?

A Yes.

Q Without going on anyone else's land? A. Yes.

THE COURT: You want this change because he will have to take his stock three hundred feet for water?

MR. SANFORD: Not only stock, but it is for house watering purposes too.

THE COURT: And the other the same way?

THE WITNESS: Yes sir.

MR. RAY: We object to the introduction of any testimony on this on the ground there is no pleading to support any evidence. Whatever pleading there is, the evidence has been introduced upon it, and it appears from the statement of counsel it is not a matter of any serious import to justify the opening of this case.

THE COURT: I think the objection should be sustained.

MR. SANFORD: Give me an exception. Then I will offer to amend the pleading so as to cover the right for use for household and domestic purposes.

MR. RAY: Object to the application as not timely made.

THE COURT: Objection to the amendment is sustained.

MR. SANFORD: Save an exception to that. Now, your Honor please, I have the witnesses here, and I can put them on to show that the land which he has surveyed has been cultivated and irrigated for a number of years. If that point will not be disputed, I don't know as I care to put them on.

MR. A. C. HATCH: What is your award as to McBride and Cutler jointly in that ditch?

MR. SANFORD: It is McBride and Riard in the decree, twelve something.

MR. WEDGWOOD: I would like to ask one question on cross examination.

Q Mr. Stewart, in your answers to the question as to whether or not this land had been irrigated and cultivated for a number of years, it did not seem to be very strong affirmative answer to me. Now you know when you see land whether it has been cultivated last year, do you not?

A See whether it is being cultivated this year?

Q Yes, cultivated this year now, can you tell whether it has been cultivated for years back at all?

A Well no, not only in this way that ditches are made to the land and across the land, draw the conclusion it has been irrigated at least.

Q And certain other things would tell you whether or not there had been irrigation for a number of years?

A Yes sir.

Q This land that you surveyed was cultivated this year, all of it?

A No, it is not.

Q It is not, then did you--

A I think it is, all appears to be irrigated this year, but not raising crops other than pasture, some of it.

MR. SANFORD: Some of it is pasture land.

A It is either pasture land or cultivated, I will say.

Q Now, to your mind did it show evidence of being cultivated years before?

A Yes sir.

Q And has it been out of cultivation for many years?

A No, I don't remember, the greater part of it is now either in orchard or crops, but there are some pieces that probably rather too rocky for intensive cultivation, and water is used as pasture land.

Q In other words, in your judgment some of it has not been under practical cultivation at all?

A I think that is probably true, what is mean is plowing and raise crops.

Q That is what I mean by practical cultivation, you speak about it being pasture land. Is anything in the nature of meadow land?

A Grass land.

Q Answer my question? A. No.

Q It is high bench land there?

A No, it is river bottom land.

Q And it is the mouth of the canyon in the river bottoms?

A Yes sir.

Q How far from the river?

A Oh, from a hundred feet to two thousand feet, I would say.

Q None of it borders on the river?

A No, I think not.

Q Other land between it and the river?

A There are some lands yes, between this and the river.

Q What is its elevation above the river?

A Oh, I should judge five to fifteen feet.

Q Is it such land that would bear grasses without irrigation?

A No, not very extensively.

Q And has it been sowed to grasses, or is it too rocky to sow?

A All the land I measured showed evidences of being sowed to grass and producing grasses of different kinds, some alfalfa.

Q In between the rocks? A. Yes sir.

Q Scratched in, and growing to some extent?

A No doubt it has been plowed, but some of it quite rocky.

Q In figuring this acreage did you figure solid or figure out lands occupied by corrals and other buildings, out buildings and homes, everything that is not irrigated?

A I didn't figure out any corrals and out buildings.

Q Nor houses?

A Nor houses.

Q That is, you took the land solid, as it was?

A Except where there was some land that was in timber, cut that out.

Q You classed that as non-irrigated land. What I am asking you

is whether you took into consideration such portion of each of those pieces of land as is occupied in any use other than cultivation and irrigation?

A Except as to houses, I say I didn't exclude the house and corral areas.

Q Do you know how much area there is in house, corral and non cultivated land?

A I will correct that statement this far, I did exclude the corrals and barn areas in Mr. Cutler's land, because they were at the east side, and just excluded those in my survey.

Q But not in the other?

A And there are no corrals or houses on the Young land nor the-- I will say the Young land, no corrals or houses on that, and the McBride land. I did not exclude the house nor the corral.

Q You don't know how much area they take up?

A Oh, the house is--

Q Do you know? A. No.

Q You made a survey of it? Now, on the McBride ground, what was there there, do you know, in the shape of buildings, corrals?

A McBride, you say?

Q Yes. Spade occupied for any purpose except cultivation and irrigation?

A There is a small barn and corral and dwelling house.

Q Do you know how much area it is?

A The--

Q Do you know?

A Not definitely.

Q What is the acreage you give here?

A McBride, 14.6.

Q What was it before?

MR. A. C. HATCH: Twelve and a half.

Q That would be two acres and a tenth additional, that includes what you call pasture land?

A Yes, on the McBride place there isn't any pasture.

Q None at all?

A None at all.

Q Now, you give your estimate how much there is on the McBride place of land which is occupied by corrals, out-houses, stock-yards, sheds, barns, anything which occupies area to the exclusion of irrigation, give your best judgment if you have any?

A Yes, I judge about a quarter of an acre.

Q All one piece?

A No, the house is setting off by itself, and the corral and barn are together some distance away.

Q About a quarter of an acre all told, you think?

A Yes.

Q Quarter of an acre is pretty small space?

A Yes, but it takes good sized barn to take up a quarter of an acre.

Q Assume a rectangle a quarter of an acre would be four by ten rods, did you plat those things out, - you haven't platted them?

A Yes, I have a sketch.

Q Did you put the house on there?

A No, sir, I didnot.

Q You just put in the exterior boundaries of the land?

A Yes, sir.

Q Take on this McBride place between the house and barn and corral, is the land cultivated between them?

A Yes sir.

Q How far are they apart?

A I should judge about sixty or seventy yards.

Q Cultivated land between them?

A Yes sir.

Q So you say on the McBride place there would be only quarter of an acre that has not been cultivated?

Yes, it is cultivated right up to the house on all sides, just a small house.

Q Of the 14.6 acres, you say a quarter of an acre that has not

been cultivated, that is all?

A That is my judgment.

Q You went out there to survey it and observe it, did you not?

A Yes.

Q Now, take it on the Cutler place, how much of this land and the space is pasture, as you describe?

MR. SANFORD: May I ask the same rule has applied all, through of excluding the house and barn from the acres?

THE COURT: I don't know, I don't remember any examination.

MR. SANFORD: We are willing to abide by the same rule, but I am wondering all through if they excluded the house and barn from the number of acres.

MR. A. C. HATCH: We excluded every part of the land that was not cultivated and irrigated, and particularly in Provo City the streets.

MR. SANFORD: Provo City would be a little different.

MR. A. C. HATCH: Not a bid of difference.

Q On the Cutler place how many acres of this was called pasture?

A I didn't segregate it, but my judgment is be two or three acres.

Q Two or three acres, and is that a piece of ground that produces grasses in a substantial way?

A Well, some of it is pretty dry now, but this part that I refer to shows every evidence of cultivation.

Q I ask you if it was producing grasses at the time you were there? A. Yes.

Q In a substantial way, substantial pasture, worth while?

A Yes, I would say so.

Q Well, worth while, or just--

A It depends on the amount of water it gets. That country up there is of such a nature that if it doesn't get water about every watering, it looks pretty dry, in a week or ten days it looks awful dry, and pretty hard to tell unless you had seen it right after the irrigation, or after they put the water on some other part of the field.

Q Out of that two and a half acres what proportion of the surface is rocky?

MR. SANFORD: I object to that as immaterial.

MR. WEDGWOOD: He says it has been plowed.

THE COURT: Objection overruled, I think it is proper cross examination.

MR. SANFORD: Exception.

A Some of that, take that two acres, it is pretty rocky, I should judge about half is soil and half rock.

Q Large rocks or cobble?

A Small rocks.

Q You say you excluded the buildings on the Cutler place?

A All but the house was excluded on the Cutler place.

Q Does that occupy a yard?

A No, it is cultivated just to the house.

Q The amount of acreage given there was what area?

MR. RAY: 21.6, difference of 1.48.

Q You say about two acres of this was rocky ground, you call pasture? A. Yes sir.

Q Now, on the Young place there, you say that includes buildings?

A No.

Q That in pasture too?

A Yes, considerable of it. More of that in pasture than any other.

Q How much of it?

A Half of it.

Q Same character as the Cutler ground, that is the two acres?

A Rocky streaks, and much of it looked to be very good soil, rocky streaks and little ridges where they take the ditches along the ridges and water both ways.

Q Don't the West Union Canal run through there?

A It runs along the east side of the Young-- well, it runs through the Young, one small tract on the east side of the canal, largely it is on the west side of the canal.

Q Runs through the Cutler land?

A Runs between the Cutler land and McBride.

Q So that it runs through the Young land and between the Cutler land and McBride land? You count the canals as irrigable areas, do you?

A No sir, I excluded the canals and brush along the canal.

Q Do you know whether that land is within the irrigable area under that canal as part of the land irrigated by that canal?

A I didn't get the question.

Q Such lands are irrigated from the West Union Canal?

A Yes.

Q Is this land watered from that canal?

A The ditch is taken from that canal. I think the Park and Nuttal ditch is taken from that canal farther up.

Q These ditches are from that canal? A. Yes.

MR. SANFORD: Captain, do you claim anything for that. I don't know where it comes from.

MR. RAY: He says he has excluded the area.

THE COURT: Barton and Young ditch taken from that?

A I don't know, Judge, I just assumed it had.

MR. A. C. HATCH: Evidently it does not.

THE COURT: That was my impression.

MR. A. C. HATCH: These ditches both have independent heads, I understand.

MR. WEDGWOOD: I think that is all.

THE COURT: Part of them take through the Park and Nuttal ditch, and part through the Barton and Young Ditch.

MR. SANFORD: That is right.

MR. WEDGWOOD: As far as we are concerned, I will stipulate they would all testify to the same thing.

THE COURT: We will finish with this witness first.

REDIRECT EXAMINATION by Mr. Sanford.

Q Mr. Stewart, I understood you to say that the pasture land had been plowed and seeded and producing pasturage or hay,

what you call--

A It has every evidence of having been plowed. Of course, this is my first trip to the land and all I could judge from/^{was}what I could see. On some of it I could see evidence of things that had dried out for want of water, raspberry patch on the Cutler place.

Q I was referring to either hay or pasture land about which Mr. Wedgwood examined you; that all showed evidence of having been plowed and seeded?

A It appeared so to me.

Q And is producing either hay or pasturage?

A Yes sir.

MR. SANFORD: Now, I will expect to prove by the other witnesses not only it appears to, but has been plowed and seeded, all the land which has been surveyed except maybe the house which he testified to.

MR. WEDGWOOD: We will admit your witnesses would testify in substance the same as Mr. Stewart's testimony.

THE COURT: I understood Mr. Sanford says he expects to show some knowledge it was cultivated land.

MR. WEDGWOOD: That they would testify it had been?

MR. SANFORD: Yes, continuously.

MR. RAY: We will make the same objection. Subject to the objection the testimony is not material, because the issue is settled by the decree of the court, that is, there is no proper order of reopening.

THE COURT: Concede they will testify?

MR. RAY: Yes.

MR. SANFORD: I think that is all then. That is our case.

THE COURT: Mr. Sanford, could you search through the files and get me the pleading of these parties before you leave, so that I may have it.

MR. SANFORD: I have a copy of it.

THE COURT: You might hand me the copy so I can see

what they ask for.

MR. CLUFF: Mr. McDonald informed me there were three parties that he got an order for at the last hearing to offer some testimony as to the amount of acreage they had, and asked me if I would see that was done. Can I take that up now?

THE COURT: Yes.

MR. A. C. HATCH: What parties are they?

THE COURT: How much acreage do you claim different from what the court found. If it is not a material matter I don't feel like going into it. Take the Young matter. There is forty-three hundredths of an acre difference. I don't think these matters are substantial enough so that the court will want you to go into it.

MR. SANFORD: On one lot, yes.

THE COURT: Matters of that kind the court will not take the time to go into. Do you know what it is?

MR. CLUFF: I don't know about two of these parties. The names he gave me was Roy Brown, Mr. Sims and Isreal West. Mr. Sims came in and Mr. Swan has made a survey of his ground, and, I think, the evidence shows about four acres and something to Mr. Sims. As a matter of fact, there is 10.76 acres.

THE COURT: That is really substantial. Under what ditches, where will I find it.

MR. CLUFF: I can't tell you, I don't know.

THE COURT: Mr. Swan, what ditch is this under?

MR. SWAN: I don't know in regard to the ditch, it is under the Spring Creek.

MR. A. C. HATCH: McDonald's clients were in that neighborhood.

MR. RAY: Weren't those areas a matter of stipulation?

MR. JACOB EVANS: I think they were, I think they were all agreed to and stipulated.

MR. CLUFF: I don't know about it. Mr. McDonald had to go to Vernal and he said the court made an order permitting him to introduce evidence as to these parties. Just one of

them has come to see me about it.

MR. SANFORD: May I have M. B. Cutler substituted for Louis Nuttal as a party, L. W. Nuttal?

THE COURT: Any objection to the substitution?

MR. A. C. HATCH: He has succeeded to the interest?

MR. SANFORD: He has purchased the interest from Mr. Nuttal.

(ARGUMENT)

THE COURT: I don't think it makes any difference, I think it may remain. Now, I will hear your evidence, Mr. Cluff.

GEORGE C. SWAN recalled.

DIRECT EXAMINATION by Mr. Cluff.

Q You are Provo City civil engineer, are you?

A Yes sir.

Q Are you acquainted with the land owned by Leslie Sims?

A Yes sir.

Q Have you recently made any survey of that?

A I have.

Q For the purpose of ascertaining the amount of ground that is irrigated?

A Yes sir.

Q Will you state to the court just what your findings are?

MR. RAY: I object to that as irrelevant and immaterial as to what ground is now irrigated on the Sims place.

THE COURT: Objection is overruled. Probably that would not be enough, if it is contradicted.

MR. RAY: For the purpose of identification I don't object to it at all.

A I will state I have not been present during an irrigation, I have not seen them irrigating.

Q I will ask you to describe the land that belongs to Mr. Sims? The nature of it, and what condition you found it?

A I found a total of 11.72 acres in the piece, of which a recent change in the river bed has cut off ninety-six hundredths of an acre, leaving 10.76 acres of the land aside from this piece that the river has cut off, and which is now river bed.

Q How much of that 10.76 acres of land is now and has been under cultivation? Describe the condition of it?

A Well, I didn't make the measurement exactly as to the difference between the pasture land and the other land. There is a portion of it that is in pasture land, and some cottonwoods growing on it, but being used for pasture land with grass growing among the cottonwoods, and the balance of the 10.76 acres is under cultivation in farm crops.

Q How much of it would you say was in farm crops?

A I didn't make an accurate measurement of that, I didn't attempt to segregate the two. Mr. Sims came after me on Saturday, and I just had time to rush out there and go over the tract after five o'clock in the evening on Saturday and measure up the whole tract and get that piece that was cut off for river bed before dark, and I didn't have time to go over and measure out the whole tract, or segregate the different portions. There is over two-thirds of it that is in-- planted in farm crops. Balance is in pasture.

THE COURT: Two-thirds of the 10.76?

A Yes sir.

Q Now, what is growing on the pasture ground you speak of?

A There is part of it cottonwoods have been taken off, and it is growing in grass crops, the balance cottonwoods and willows to some extent, and the grass growing under it, it is practically of the same character of land, river bottom land there.

Q Do you know when these cottonwoods weretaken off?

A No sir.

Q Do you know that they were not taken off since the commencement of this action?

A I don't know when they were taken off.

Q Do you know whether or not this land, this ten acres was under cultivation at the time of the commencement of this action?

A I don't know what the conditions were.

Q Do you know whether this land, this ten acres was under cultivation at the time the survey was made by Scott Stewart?

A I don't, no.

Q Do you know whether or not part of the land you surveyed was decreed by the court to Szur Monson?

A I have an abstract that he gave me.

Q This is dated July 22nd, 1913; he purchased four acres of that ground you surveyed, didn't he?

A What?

Q Five acres of the ground you surveyed was purchased from Szur Monson?

A I don't know, I haven't been all through.

Q Was part of the land you surveyed on the west side of the lane?

A The lane runs through the land there, cuts across the piece.

THE COURT: As I understand it, the land is on both sides of the lane?

A On both sides of the lane.

Q Can't you compare that with the map Scott Stewart made, and hand to the court this afternoon?

A I can do so, yes sir.

Q Will you do it?

A Yes sir.

Q I wish you would.

MR. A. C. HATCH: We think, your Honor, that the

land is all awarded water under this decree, that is, ten acres of it, and the balance be since the commencement of this action.

MR. CLUFF: I have nothing further.

THE COURT: Now, are there any other matters before we take up the matter of Provo City?

MR. RAY: May it please your Honor, I don't know whether the matter I desire to present should follow Provo City or precede them, but while I was away the question of the Blue Cliff right was argued to the court. I had given notice at the last previous session I would call that up for hearing today. I merely desire at this time to join in the protest of Provo City and Telluride Power Company against the decree as now rendered as to the Blue Cliff right and as to the Wright estate. Your Honor will remember that the pleading as to the Blue Cliff right was that it was a secondary right. It made no difference to my client, it being admitted my client's rights were primary rights, what waters should be conceded to the Blue Cliff, and therefore I made no contest as to the amount of the right, whether the right had ever been perfected, or, if perfected, whether it had been abandoned, relying entirely upon the pleading it was a right secondary to the right of the Provo Bench Canal and Timpanogos Irrigation Company. As a matter of fact, I stated in open court we were not interested in the Blue Cliff right, pleaded as a secondary right. In the matter of the Wright estate we objected to the transfer of the water of the Wright ranch to any point where it would not return to the river. Upon that question my memory is there were but two or three witnesses interrogated. Mr. Stratton went upon the stand, and testified, as your Honor will remember, that in his trips from Provo City to the mining camp through Provo Canyon, he had observed the return water from the Wright ranch into the river, and Mr. Newell Knight had made the same observation. Then Mr. Wentz' attention was called to it, and I think he estimated the return water at something like 50 per cent. That, I think, is all the testimony as to the return water. As the decree is now drawn, if

I do not misunderstand it, there is given to the plaintiff as successor in interest to the Wright estate a given quantity of water without any diminution for going down the canyon to be transferred without any seasonal decrease as to the fall of the river, and without any allowance being made to plaintiffs for the transfer of the water from the place of use to a place where none of it will return to the water shed. Indeed, I think we could not protest the transfer of the water from the present-- from the old use, the Wright ranch, to the new use, except as to the amount of return water, and we do claim that that is a quantity of water which was and always has been used by us as return from the Wright water. That is true as to every user, the Wright estate water returned and was available for use below to the Provo Reservoir Company. That will make no difference as the decree works out, whenever the quantity of water allotted to the Provo Bench is sufficient, of course. But when it is not sufficient, with that classed as a secondary right, then the plaintiff would take nothing, but the minute it falls to the point of minimum then they take an undiminished right, they don't fall as we do with the season and take a lesser duty, but they stay up as the one primary right on the river. The Wright and Blue Cliff, the one primary right that suffers no diminution during the season as to the requirements of land. If those are primary rights, certainly they would be subject to that diminution. I do not want to repeat the argument as to the Blue Cliff.

THE COURT: I think I misunderstood you. I understood you to include in the last statement the Blue Cliff.

MR. RAY: Yes, that is as I understand it, that the Blue Cliff does not take the diminution during the season as to the duties as we do, they are turned a given quantity of water. Now certainly if the right had not been transferred from the Blue Cliff Company to the plaintiff in this case as it was, if it had been elevated in dignity from a

second class water right to a first class water right and used in this valley, it would be subject to the same diminution we are, and it seems to not be just to the earlier and primary appropriators, this right being transferred to the plaintiff should have any added privileges as to seasonal use. Of course, the Blue Cliff right would not be upon the same basis as the Wright estate as to the transfer of the point of use, because I think there is no contention any large quantity of the Blue Cliff right returns, but if there is any contention here that there was ever a right in the Blue Cliff perfected for the amount decreed we object to it, first, because there is no pleading to predicate it upon as a primary right, second, because there is no evidence to show a perfection of the right as against us as a primary right, and because we would have been denied under the pleading the privilege of meeting the assertion of a primary right there. It is pleaded as a secondary right, and under that pleading they are not entitled to claim as a primary right. We would want to introduce evidence upon it if they ever did make such a claim. We claim as to the Wright water there ought to be deducted first the quantity which returns to the system here, and second, a loss in transit of at least the loss in transit charged against other appropriators in this system for a similar distance of the water, and second, that it be accredited as a secondary right. I am not able to say how fully these questions were presented at the last hearing, I was not present, had no notice of the hearing, but desire to join in their objection to the allowance to the Blue Cliff and Wright estate.

MR. STORY: Your Honor, we did not include in the argument the question of the right of the plaintiff to use of the Wright water at the new point of diversion without any diminution, allowance for the return waters of which Mr. Ray has spoken. I wish to join, however, in that protest against that part of the decree because I think clearly while they

have the right to change their point of diversion it can only be done when, and under such terms as will not interfere with the right of others. If that water is taken down past our head gate, we, of course, lose the benefit of all the waters which return to the stream for use at its prior point of diversion, and I think it must be quite clear to your Honor, from the argument we have had concerning the volume of flow, that there are times during the low water season when that would very materially interfere with our rights, at least to the extent of the return waters, so I wish to add that objection to the decree. As far as the other matters are concerned, of course that has been fully argued, I don't know when your Honor is going to pass upon it.

MR. A. C. HATCH: As to those matters I think there is a misapprehension, misunderstanding of counsel as to what the findings are. Now, as to the Wright water, I have understood all the time that as to the loss, seepage and so on, that was a matter that was to be reserved and determined later.

MR. STORY: Pardon me a moment.

MR. A. C. HATCH: And we have been using the Wright water under stipulation and agreement heretofore a certain quantity for our Wright water right.

MR. STORY: May I ask a question, pardon an interruption. Do you now claim the right to use at the new point of diversion exactly the same quantity of water that you have been accustomed to divert at the upper point?

MR. A. C. HATCH: No.

MR. STORY: That is, less the loss in transit only.

MR. A. C. HATCH: Less the loss in transit, yes, and the seepage that was ~~that was~~ to be determined later. We went into that with one or two witnesses but the court has not determined -- that is a question that I understand the court has not at this time, and does not at this time intend

to determine, because of the lack of convincing or satisfying evidence as to what it is.

MR. STORY: I understood that only applied to the loss in transit, that that did not apply to particular instances such as this where the right is sought to change the point of diversion, and where there is of course the question, what is the loss of water to the river by diverting it at the two points. In one case it is half as much as it is in the other, according to Mr. Wentz' testimony.

MR. A. C. HATCH: That is a matter that is not determined by the findings. The findings are that they are entitled to a certain quantity of water and the place of diversion is not fixed.

MR. RAY: Your complaint, as I understand it, Judge, and I am speaking from --

MR. A. C. HATCH: We claim that advantage.

MR. RAY: You claim the right to use the quantity of water to which the Wright ranch is entitled at your new point of diversion?

MR. A. C. HATCH: Yes, we claim that, but the court does not award it to us.

MR. STORY: I take it the Court adjudicates the award which you plead in your complaint.

MR. A. C. HATCH: From the beginning of this case we have been using a very much less quantity of water under the stipulation with the parties here, and that is a matter, I understand was not determined. I may have overlooked the matter.

MR. RAY: Are you willing then, Judge, to put the reverse English on your proposition. Are you willing the decree now state --

MR. A. C. HATCH: I don't understand that term.

MR. RAY: Then we will transform it. Are you willing to have a decree stating that the court does not determine

your right to transfer the Wright water to your point of diversion or the circumstances under which you may transfer it.

MR. A. C. HATCH: No, I don't concede that; I would be willing to concede this, that the court determine the amount and tentatively determine that we may divert at our present intake.

MR. STORY: What do you mean by tentatively?

MR. A. C. HATCH: For the time being, and leave it to be determined when this seepage and evaporation question is determined.

MR. RAY: Right there you draw a distinction that takes us from the question. Seepage and evaporation is one thing, and the court has withheld that, but the evidence is clear here that the return water from irrigation upon the Wright ranch is 50 per cent. We do not want that water taken from the river system.

MR. A. C. HATCH: When it is 50 per cent? During the high water season we would admit fully 50 per cent of the water that runs out over all these bottoms-- yes, sometimes 90 per cent of it returns to the river, but there is no evidence here as to the time when that quantity of water returns to the river.

MR. RAY: Yes, there is.

MR. A. C. HATCH: Time of the year.

MR. RAY: Yes, there is.

MR. A. C. HATCH: Now, during the high water season I have seen running across the Wright ranch a river of water, and all returning to the river, the whole ranch flooded with water, and it found its way from the lands back into the river. Those who have ridden over the railroad during the high water season will see the lands on both sides, ~~as the~~ rivers of water running on both sides.

MR. RAY: That is not return irrigation water.

MR. A. C. HATCH: No, that is not return irrigation

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water, but it is the period of time when this 50 per cent returns to the river is not in evidence.

MR. STORY: May I interrupt just one second?

MR. A. C. HATCH: Sure.

MR. STORY: Is that material?

MR. A. C. HATCH: Yes.

MR. C. C. RICHARDS: Will you permit an interruption. I would like to accomodate the Judge with another interruption and that is to say Provo City desires to join in the community objection made this morning, as we were with the power company in the original protest as to this Blue Cliff matter.

MR. A. C. HATCH: Now, of course, we have no objection to anybody -- the more the merrier, of course. With regard to the Blue Cliff right I have understood all along in regard to that award that the court has found that there is 50 second feet of water which is really, truly primary water after all of those prior to the Blue Cliff Canal company have been supplied with the duty awarded to the particular lands, and that the Court has awarded the Blue Cliff Company that 50 second feet as a prior right by reason of there being in the river at its normal flow that quantity of water. The Blue Cliff is by its appropriation later in point of time than all these protestants and the court has found by this finding that there is that much water that should be awarded to the Blue Cliff Canal company. Of course, it is immaterial to us. So far as any of these protestants are concerned, there are 150 feet appropriations. Now, whether it be awarded to us as the Blue Cliff Canal Company, or whether it be awarded to us under our application to appropriate the 150 second feet, is wholly immaterial to us so far as the West Bench people are concerned or as Provo City is concerned; which way it goes, the water is there, you are not entitled to it because you are awarded ^{all} that you are entitled to, and there is surplus water after you get yours.

MR. C. C. RICHARDS: If you will assure us of that.

MR. A. C. HATCH: That is what the court finds by this finding. Then the only person here who can rightfully object to that 50 second feet of water under any logical claim of right is Brother Story, and he does not object to the awarding to us the 50 second feet of water. Your people are joining in his protest. He is not protesting we are not entitled to 50 second feet of water, but he is protesting he has a right to put that 50 second feet, or certain portion of it through his wheels, because he did it under the Chidester decree. That is his claim, that we are not entitled to all of that 50 second feet of water to be diverted at our intake, because heretofore they have diverted and taken it through their wheels and it is going on down here, and gone to Utah Lake to waste, so that, as to Provo City and as to the Provo Bench Canal Company, and West Bench Canal Company, and all those, it is not a matter, as I view it in which they are interested, as to whether it goes to the Blue Cliff or whether it goes to us under our appropriation, because 150 second foot appropriation fills the Blue Cliff appropriation, so that if it goes one notch farther the water is there and we will get it; and it is conclusively shown by the evidence in this case that the water is there, river water that has been running to waste through Provo City during all these years, and I think after due consideration that Provo City and the Provo Bench Canal Company will conclude that they have jumped in when they didn't know that the gun was loaded. Story has got something to gain by this business if he can win out on his claim, but where the others will gain anything, I cannot possibly understand. As it appears to me, they are helping Story get water through his wheels, not to add anything that will be awarded to them or their clients.

MR. RAY: May it please your Honor, just one word in reply to that. Of course, Judge Hatch misconceives a good

part of my argument if he is frank to the court, and that is the fact that the Blue Cliff right is awarded to the plaintiff here as a primary right, with no diminution during the season. Judge Hatch says the court has considered --

MR. A. C. HATCH: Pardon me, I don't understand that is intended by the court, it is a primary right, same as other primary rights.

MR. RAY: I am arguing not what your understanding is --

MR. A. C. HATCH: I havenot noticed such a distinction.

MR. STORY: There isn't anything in the decree as I have read it, and if there is I would be glad to have it pointed out to me that my interpretation is not correct, that is, they are to have set apart to them the right of 50 second feet of water throughout the season.

THE COURT: I don't so understand it.

MR. RAY: I want to withdraw the argument.

MR. A. C. HATCH: I have never so understood it. It is subject to diminution, same as other primary rights.

MR. RAY: I am quite sure we can agree on this matter if it is threshed out now, and am satisfied would not agree if they could get it into the decree the other way, so I want to get it out now and smoke it out, and get it so the question won't come up next year that that right is a right subject to diminution, same as other rights.

MR. JACON EVANS: What particular portion of these findings do you construe --

MR. RAY: I am not saying I am construing a particular thing language of the decree, I am construing the absence of language.

MR. A. C. HATCH: I will say now, Brother Ray, we don't claim, and won't claim it is any better primary right than your primary right. It is subject to diminution, same as all the other primary rights.

THE COURT: Then I will understand the decree whenever drawn upon that point if it remains a primary right will be drawn to conform to the suggestion of Judge Hatch. ~~⊗~~ =

MR. RAY: We then object to this being decreed as a primary right on two grounds. First, it is pleaded as a secondary right, and second, our right was vested prior to the adoption of the constitution, and there can be no taking in of the Blue Cliff right and treating it as a primary right, or any right except subsequent to the rights of Provo City, the Power Company, the Provo Bench Canal Company and Timpanogos Irrigation Company; that the statute there cannot be made applicable to this situation.

MR. A. C. HATCH: I think there is a certain condition when all the rights are determined to be primary rights. Our Supreme court has determined that.

THE COURT: The suggestion that you made, Mr. Ray, includes this feature, does it not; Provo Bench Canal & Irrigation Company is awarded 76.01 second feet, during another period 68, and during another 61, is that the feature in connection with your right that you suggest is not as favorable as the award to the Blue Cliff of 50 second feet?

MR. RAY: Yes.

THE COURT: I did not get it at first, I see what you have in mind.

MR. C. C. RICHARDS: May it please the court, I don't see how Brother Hatch reaches the conclusion Provo City has no interest in this matter, except it be upon the theory this increased quantity of water which he says is present in the river of late is always going to be there.

(ARGUMENT.)

MR. A. C. HATCH: If the court please, the plaintiff is before the court claiming under the decree, and then claiming

and then claiming the decree is void. Where it was to our interest it was all right, and where it did not, it is held that is is no good. That has been the argument as I have noticed it, and Brother Story has joined us in our contentions in every instanse. The Chidester decree is a good decree where it fits their interest and where it does not it is worthless.

MR. STORY: May I ask you to state wherein I made the aegument the Chidester decree was worthless?

MR. A. C. HATCH: The last argument you made here-- I made a memorandum of it, I didn't take it down in shorthand -- as I remember he took about every position is is possible for an attorney to get into in an argument, taking all the time what was to the interest of his client. Now, from the beginning I have thought both of these decrees were worthless. We claim under our pleading, under our complaint under the Chidester decree. I have felt they were valueless as they left so much of the subject matter of the actions absolutely undetermined. I haven't anything further to say now with regard to the award other than this. If the court shall adopt these suggestions of Brother Richards, it will mean in every water case that is tried in the State of Utah that the court will have to find who was the first appropriator, and award him in the first class, and make as many different classes as there are appropriators and class them in the order of the time of their appropriation, and the courts won't do that. Our court determined that in the Springville Fullmer case, and the courts are continually following the rule laid down in that case.

MR. C. C. RICHARDS: Isn't the object of litigation to ascertain who has the priority and when that has been ascertained, to say it is prior.

MR. A. C. HATCH: I used to think that, and thought if I was the first on the creek I should have all that I

could possibly use and all that my ditch would carry, and if I could not use it I could turn it down to water sage brush, and it was nobody's damn business, but the courts of this state, and all this intermountain arid region have viewed the matter differently, and although I am still of the opinion that the man who has his ditch and fills it full of water, it is his water, and he has the right to carry it, whether he uses it, or whether he does not. The courts say differently. The general trend of the human opinion now is no man may waste regardless of whether he is prior in point of time or later in point of time. He must use everything that he has economically and for the benefit of the whole of the human race.

MR. C. C. RICHARDS: That is not the question I put to you.

MR. A. C. HATCH: I thought it was, and Provo City from the beginning, if the court please, from the time the little committee came up to Heber City to demand the turning down of the water when just the river bottoms were being irrigated, Provo City has been in the position it is in today, protesting every possible improvement that could be made by the proper applications of the waters of this river, and I expect to see Provo City always doing that, regardless of whether it has rivers of water running to waste through its tail ditches into Utah Lake. It has gotten into the habit of it, and it is hard to break it of that habit, has to be forced in every instance.

MR. C. C. RICHARDS: I am surprised to hear you make such an argument.

MR. A. C. HATCH: I am surprised myself that I could have the hardihood to make it.

THE COURT: Is that all, gentlemen, with reference to Mr. Ray's objection?

MR. A. C. HATCH: I think Ray has withdrawn his

objection as to the award of the 50 second feet.

MR. RAY: I have not, and you have no reason for suggesting I have withdrawn the objection to the award of 50 second feet.

THE COURT: Gentlemen, I am ready to hear anything else.

MR. STORY: Your Honor, there is just one other matter, so far as the right which has been awarded to Mr. Donnan is concerned. Your Honor has decreed that Mr. Donnan's right, 20 second feet, to which he has made application in the State Engineer's office shall constitute a first class right. We have already discussed the question whether or not this would be a final adjudication of his rights in that matter, and I think we reached a conclusion before, but there is one other matter involved, and that is whether or not, if he is given a primary right, he might be entitled to pro rate with the Utah Power & Light Company in times of scarcity. That of course we would contest. We have agreed, I think, however, with Mr. Donnan and his attorney that their right, that the decree that may be entered in this case shall make their right subsequent and subservient to the Utah Power & Light Company, whatever your Honor may determine it to be, in other words, their right shall follow ours and be subject to the Utah Power & Light Company's right.

MR. SOULE: That is confined, however, only to the power.

MR. STORY: That is all.

MR. SOULE: Only to the 20 second feet referred to in his application to the State Engineer.

THE COURT: That is returned to the river at a point above your intake, isn't it?

MR. STORY: No, the point of diversion is at our dam, and returned to the river between our intake and return.

MR. RAY: Might I suggest a question of fact. Mr.

Richards has suggested the question of the insufficiency of the flow of Provo River to meet the demands of those claiming prior to the Blue Cliff. That is the present situation. At a time when there is a quantity of water less than sufficient to meet the duties prescribed by the court, the Blue Cliff is participating in the flow of the river, and that is the situation against which we make complaint.

MR. C. C. RICHARDS: That is a direct application of our protest.

MR. STORY: There is one other matter I wish to take up with the attorneys for the plaintiff, and I think whoever represents Colonel Wall is also interested. In our stipulation with reference to the Ontario water we used a certain specified amount as being that to which each party was entitled. There is a variation in the flow of the river -- I mean the flow of the water from the tunnel and therefore at times there is not as much perhaps as the stipulation would call for, and at other times there is more. For instance, this year there was a surplus of foot and a half, two feet of water, I think, going into the river from the Ontario tunnel which the stipulation and decree, if followed literally would have been distributed with the general waters of the stream, so that I think that perhaps it should be amended so as to provide for fractional parts rather than specific amounts. I think we can agree upon them if we can get together during the noon hour. I think, Mr. Murdock, you have a certain percentage.

of all
MR. MURDOCK: One half, above five and a half.

MR. A. J. EVANS: We could not stipulate for Colonel Wall.

THE COURT: Is Colonel Wall represented in this case?

MR. A. C. HATCH: The Ontario drain tunnel.

MR. STORY: My point is merely instead of stipulating definite amounts we should stipulate fractional parts in so

far as the Provo Reservoir and we are concerned.

THE COURT: I think the suggestion is a good one, but I don't understand the other interest is in the case at all.

MR. RAY: No. We represent Colonel Wall generally, but I don't understand he has any interest in this case.

MR. JACOB EVANS: Has nothing to do with the Provo River water.

MR. A. C. HATCH: The Ontario drain tunnel has not been treated by us as part of the Provo River water, and they can take out wherever they want to, except if they take it down below it is a matter of seepage.

MR. JACOB EVANS: It seems to me it is no part of this litigation.

MR. STORY: Except the court is giving the Commissioner instructions how to distribute the water, and the only reason for bringing it into the case at all was to have that instruction give, same as you might say your water impounded in the reservoir is no part of the natural stream, nevertheless you want the right adjudicated so that the water can be distributed.

MR. WEDGEWOOD: This is part of the water that you have used all the time?

MR. STORY: Oh no, not by any manner of means. We have used it, yes, but not as part of our original right. I think the court determined that matter last argument.

MR. WEDGEWOOD: So that it may be understood. The water they have used is the water they use, and the water they have used determines the quantity they have used.

MR. A. C. HATCH: I didn't understand that was determined. I understand it has always run down the river.

MR. WEDGEWOOD: That was thoroughly discussed the other day, and it was decided.

MR. STORY: The court said he did not even care to hear arguments on that. I say it was determined, but not the

way you say it was.

MR. WEDGEWOOD: Just a second. Then it was argued to a finish; then you come in here with more on the question. Why not let it rest on the argument we had the other day.

MR. STORY: I was not opening the argument. I simply said whatever our right was adjudicated under that decree should be a fractional amount.

MR. WEDGEWOOD: Yes, but you made the assertion it was part of the argument we had before, and I would not let it stand. I want it to rest on what we argued.

12:00 Noon, Recess to 2:00 P.M.

MR. STORY: May we make just a short statement. I think, if I understand Judge Hatch correctly, it will be conceded that the decree with reference to the Ontario right may award to the power company and to the prove Reservoir Company, or the owner of that interest, 50 per cent of whatever water may come from the tunnel in excess of 5.5 second feet, which is owned by the Midway Irrigation Company, less whatever this court may determine to be the seepage and evaporation losses if any.

MR. A. C. HATCH: That is, each 50 per cent of the excess over five and a half.

MR. STORY: As I understand your Honor does not intend to rule today on the other question.

MR. C. C. RICHARDS: If your Honor please, we will take up the matter of the water works system first. Mr. John Stewart may come forward.

JOHN STEWART, called by the defendant, Provo City, being first duly sworn, testifies as follows:

DIRECT EXAMINATION By Mr. C. C. Richards.

Q You have been sworn already as a witness?

A Yes sir.

MR. A. C. HATCH: Have you stated what you claim in the waterworks system?

MR. C. C. RICHARDS: Yes sir, we are claiming the water that is flowing in the water works system from the springs in Provo Canyon.

MR. A. C. HATCH: The quantity, I mean.

MR. C. C. RICHARDS: The entire flow there is of those springs.

MR. RAYF Up to the capacity of the system?

MR. C. C. RICHARDS: Yes.

MR. A. C. HATCH: If the court please, that has all been gone into at length as to what went in there prior to this time, and the whole subject has been gone into once, and the witnesses cross examined, expert testimony taken in regard to the necessities and all that. Are we going into all of that matter again?

THE COURT: This is the first time I had heard of it, I didn't know, that was not suggested at the last hearing.

MR. C. C. RICHARDS: I understood, your Honor please, for this hearing was, the purpose of proving we had been using the water of certain springs.

THE COURT: No, this hearing was for the purpose of proving the acreage on the irrigated land within Provo City, the lots.

MR. C. C. RICHARDS: That is one item.

MR. A. C. HATCH: And the farm lots.

MR. C. C. RICHARDS: That is one item your Honor allowed us to prove.

MR. RAY: I didn't understand it.

MR. A. C. HATCH: It would be the opening up of the entire case and trying it all over, as to Provo City, except as to the duty of water. I understood the court to rule definitely that the duty of water would not be again opened, and that is just what this goes to, the necessity of water for certain in-habitants and for certain amount of sprinkling. It is clearly opening up duty as to uses for one purpose and duty as to uses for another purpose. I thought the court ruled that would not be permitted.

MR. C. C. RICHARDS: The question that was raised the other day was the matter of duty of water for irrigation purposes. That was what was raised here, and your Honor suggested you did not care to go into it. Now, this is what-- I have a transcript of what occurred at our last hearing.

MR. A. C. HATCH: I will say this, if the court please. It was admitted that the water went into the pipe line just as Brother Richards claims, as I understand it. The question before the court was whether it was necessarily and beneficially used.

MR. C. C. RICHARDS: Let us see what the transcript shows, then we will get the idea.

MR. A. C. HATCH: If the court please, while Brother Richards is looking for that my recollection is of this we admitted it all went into the pipe line and the proof showed there was about 5 to 13½ second feet of water went into the pipe line; the last testimony was showing where there was an overflow and waste of about 8 second feet, but after they had shown the quantity of water going into the pipe line, the number of inhabitants, the quantity used for sprinkling, the number of irrigations that they had--for sprinkling lawns-- the number of wagons they had in use for sprinkling streets, and the water that was taken for sprinkling outside of the city was all gone into at length, and then with all of that ,

we called different experts as to the necessities and they called experts as to the necessities, and the last witness we had was an expert from Salt Lake, I have forgotten his name. He put it way below that which the other witnesses had given, and the court made its finding upon the highest estimate that was made by anyone who was competent to know, who had made a study of the necessity of the public use for which that pipe line was used. Mr. Wentz, as I remember, our witness, and the findings of the court is based upon the highest estimate from the testimony of any witness who testified, and Provo City for its pipe line was awarded that amount. Now, if we are going into all that again, it appears to me it is as much a question of the duty of water as is the question of the amount necessary to supply a certain area of land for irrigation.

MR. C. C. RICHARDS: Now, if my Brother's recollection isn't any better on what occurred prior to the hearing on June 27th than it is as to what occurred on that day, I agree with him we cannot depend on it. Now, I shall read from -- after passing fourteen pages, statement and argument back and forth, I have picked up the transcript here and will see where we are. After General Wedgewood says, "The point I make when I say each cubic foot pipe added weighs 62½ pounds" ---- (Reading).

Now, we understand as far as the duty of water is concerned, your Honor does not care to hear any further testimony as it is applied to the land, but as far as the other matters are concerned, we are prepared to present evidence and have it here and offer it.

THE COURT: You may proceed. I would like to have you indicate about what scope you intend to cover.

MR. C. C. RICHARDS: I will say briefly we expect to show that in about the year '91, Provo City began to take water, to use water from the City race, I believe it is called,

up above their settling basin, and run the water into the settling basin, and thereafter piped it to the city, and used it for city purposes, and about ten years after, to be brief in my statement, about ten years after they went into the Provo Canyon and began development work upon these springs, and in 1902 followed that up in 1903 and '4 began piping it, and have piped those springs down and have today those springs with the settling basin and have built a new line along the upper part of the system, and are using that spring water, and the entire water arising in those springs through the pipe system to the city.

MR. RAY: The testimony is in to that very effect, and uncontraverted, and as far as my client is concerned, we will admit that is a fact they did take those springs in and use them.

THE COURT: In 1901?

MR. A. L. BOOTH: In '91, Mr. Richards.

MR. C. C. RICHARDS: It goes back ten years beyond that, your Honor please. We will be very brief in our proof. As to the water taken out of the river originally in '91 and '92, and about 1901, we tunneled in there and used that water so that our water right will go back to '90 or '91.

THE COURT: I don't remember that evidence is in.

MR. A. C. HATCH: We think it is wholly immaterial. There is nobody in this case questions their right to the use of such water in their pipes from the source they are now taking it as they have used necessarily, economically and beneficially. The history of it is wholly immaterial, when they took it or how they took it, the right to take it is wholly undisputed. The only question before the court that is disputed is as to the quantity they have necessarily and beneficially used, and going into the history of how they acquired it and who did the work here and who did it there, and when it was done, is simply taking up the time of the court

to no purpose. Now, we admit they are entitled to all the water in their pipe line from these springs that they have beneficially and economically and necessarily used. Now what difference does it make when they put it there.

THE COURT: I didn't so understand it. The decision was not based on that understanding. I awarded them so much water from the river, as I remember it.

MR. A. C. HATCH: Of course, if the court please, these springs are part of the river, were a part of the river.

THE COURT: They are much more valuable for the purposes of domestic use.

MR. A. C. HATCH: The only question as to the spring was one called the Maple Spring, and we went into that question at considerable length. They never had it in their pipe line until 1915, and the court awarded that spring to the plaintiff. All the other springs were flowing in their pipe line. If the court will remember, the testimony went as to what they had done, and when they diverted the water from the springs into the pipe line and ceased to divert from the river channel proper, that the water that now runs in their pipe line at its head comes wholly from the springs, and is never commingled with the waters of the river at all. Now, that is my recollection of it.

MR. RAY: Judge Hatch, will you permit an interruption. The court suggests what seems to me an important consideration there, and that is the value of this particular potable water for culinary use. So far as my clients are concerned, they will admit that whatever the culinary requirements of Provo City are, they are entitled to supply them out of the water produced from these springs, but not, of course, to have the quantity duplicated again out of the river supply.

MR. A. C. HATCH: And the plaintiff also concedes they are entitled to their quantity in so far as the springs will supply it, and the testimony is the springs furnish from

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5 to 13 $\frac{1}{2}$ second feet owing to the fluctuation in the flow of the springs, as I remember it, and to the extent of their necessities, they are entitled to the water from those particular springs except the Maple Spring. We concede without any testimony.

MR. C. C. RICHARDS: I think I can almost put the proof in in the time my brother is objecting, if he will give me an opportunity and then we will have something to rest a decree upon. The memory of man does not seem to be the most reliable in this case, and is not in any case. We try to, and after we have tried our best, we cannot do it.

THE COURT: I find my recollection at fault very frequently.

MR. C. C. RICHARDS: I will make it brief.

THE COURT: You may do so.

Q You are a civil engineer ? A. Yes sir.

Q And have been for how many years?

A About fifteen years.

Q At Provo? A. Yes sir.

Q You have been city engineer in Provo?

A At one time.

Q And you have been working upon the water works system, so you are familiar with it? A. Yes.

Q Have you recently made a survey of the system and plat of it?

A Part of the system, yes.

Q From the head up at the head waters where the springs are taken in down to the northeast part of the city where the distributing system branches out?

A My recent survey goes from the head waters down to where the concrete aqueduct begins at the mouth of the canyon.

Q And have you a map there you have made of that?

A Yes sir.

Q I will ask you to produce it. This is the map, is it?

A Yes sir.

- Q Made by yourself? A. Yes sir.
- Q From actual survey? A. Yes sir.
- Q Survey of the premises? A. Yes sir.
- Q Are you prepared to say that the data upon the map is accurate?
- A Yes sir.
- Q A map made by yourself? A. Yes sir.

MR. C. C. RICHARDS: Any objection to it?

MR. JACOB EVANS: Let me look at it.

MR. C. C. RICHARDS: Now, may it please the court, we have been unable to get a blue print of this in the city, and I should like to introduce it with the understanding when Mr. Davis returns to Salt Lake we may borrow it and have it blue printed, and substitute a blue print, so that this may be returned to the office. Indeed, Mr. Davis might be charged with the responsibility and have the blue printing done so that there will be no changes made in it. I would like to substitute a blue print for it.

THE COURT: You may do so.

- Q I will ask you to examine this map which I will have the reporter mark as Exhibit No. 304, and say whether this is a map of the balance of the system from the mouth of the canyon down to the point that you have spoken of as the distributing point?

A Yes sir.

- Q You are familiar with it? A. Yes sir.

MR. C. C. RICHARDS: I now offer to introduce in evidence these two exhibits, 303 and 304.

THE COURT: They may be received.

JOHN E. BOOTH recalled by the defendant Prove City,
testifies as follows:

DIRECT EXAMINATION By C. C. Richards.

Q You were at one time mayor of this city?

A Yes sir.

Q About what year?

A From February, 1890, to February, 1892.

Q Do you know when the first water works system was established here for the city?

A It was during that session, I think commenced probably in the fall of 1890 and finished the next year.

Q '91, and tell the court briefly where the water was taken out at that time, will you.

A The source of the water?

Q Yes, what water was used for that purpose?

A It was endeavored to get the water as being a better quality from digging a trench a little ways from the edge of the river and parallel with it, and that the water by percolation would be sufficient to fill our pipe. We dug down clear below the bed of the river, we got no water and had to take it right from the river and built a settling basin.

Q Where from the present settling basin-- is the present settling basin on the same site as the settling basin that time?

A Yes sir.

Q Same basin, is it not?

A Same basin.

Q How far from that was the water diverted from the natural channel to run into the basin approximately?

A Well, I never measured it, but I judge about half a mile.

Q And that was river water taken flowing naturally from the river?

A Right from the flowing river.

Q Did it go down through the City race?

A I think it did.

Q Was it where the City race nearly approached the settling basin, present location of the settling basin, that the City race was cut, and flume put in and water carried to the settling basin?

A Carried from the settling basin or to.

Q From the City race; in other words, was the water carried in the natural channel, or in the City race, rather, down to the point where it was most nearly contiguous or located to the settling basin and then the City race tapped and carried over to it?

A My recollection is we tapped the City race and carried it into the settling basin.

Q I will ask you, Judge, to look at the map here, and see if you can locate it. This seems to be the map of the line and this to be the settling basin on the lower west end corner, near the lower west end corner of Exhibit 303; is that the approximate location of the settling basin near the line marked City race?

A Yes sir.

Q According to your recollection?

A Yes sir. Wait a moment, this is from the left to the right up the river, is it?

Q Yes sir.

A That is right.

Q The settling basin is near the lower left hand corner of Exhibit 303, little mark there marked settling basin, and that shows that it is in close proximity to the City race?

A Yes.

Q Is that the point where you remember it the City race was tapped? A. Yes sir.

Q And river water then was flowing from the river into the City race, down the City race to that point and then taken into the basin? A. Yes sir.

Q What is your best recollection, Judge, as to the year that was so taken first into the settling basin for city uses?

A 1891, my recollection.

MR. WEDGEWOOD: No question but what that is right.

MR. C. C. RICHARDS: I don't think there is, Judge Booth has got the date right. The record establishes it.

Q When was the pipe line, or was there a pipe line constructed from the settling basin down to the city here?

A Yes sir.

Q For distributive purposes?

A A wooden pipe line.

Q What year was that constructed?

A That was in 1891, finished that year.

Q Was the water then available for the citizens here?

A Yes sir.

Q And used by them for municipal purposes?

A Yes sir, that year it was.

Q And has it been ever since, that is to say, not necessarily through that pipe line, but has the water system in the pipe line been in use ever since? A. Yes sir.

Q Did you have occasion to measure the water that was flowing into the settling basin at that time, Judge?

A I don't recall that I did, just at that time?

Q About that time?

A But a number of times along about then.

Q How much water was there flowing from the river into the settling basin for city uses at that time?

A My recollection is that it was about 600 minute feet. We reckoned^{ed} everything in minute feet that time, as a constant flow, sometimes more, sometimes less, but it was the general understanding was 600 minute feet allowed for the city system.

Q And that was, if I understand your answer right, in a sense a continuous flow? A. Yes sir.

Q All through the season, some variations up and down?

A Yes sir.

Q Do you know, Judge, whether that quantity of water was beneficial-

ly used by the city during those years, 1891 and '2?

A Of course I could not say as to all its uses. I remember that was what we required for the pressure purposes. We made a test when it was, when the system was accepted as to what pressure we had, and I don't know the amount in pounds, but it was accepted on the test when it was shown that the water in the system would throw it over, through a pipe would throw it over the three story building known as the Liddard & Hohn Hotel down on the corner of Center and First West, southwest corner of Block 67, and on that test the water would reach the top of that building.

Q That was in the year '91?

A Yes sir.

Q As you remember it?

A Before they finally accepted the work.

Q Was the intake sufficient at that time to fill the pipe?

A The water?

Q Yes sir.

A Yes, I suppose.

Q Do you know or have a recollection, Judge, of the quantity of pipe laid this side of the settling basin?

A I didn't quite--

Q Coming from the settling basin this way, do you remember how many miles of pipe were laid?

MR. WEDGEWOOD: Don't the map show it?

MR. C. C. RICHARDS: Yes.

A That is of the main, you mean?

Q If you don't remember.

A It was nearly 5, if I remember.

CROSS EXAMINATION By Mr. A. C. Hatch.

Q Was there any outflow from the settling tank back into the City race? A. Yes sir.

Q And such water as your pipe did not carry flowed back into

the race, came on down into the city for irrigation or other purposes?

A Any purposes for which it could be used.

Q So that the whole 600 minute feet did not flow through the pipe line to the city ?

A That was the test we made what was actually in the pipe line. We did not include the water that was going from the city race into the settling basin.

Q I understood the question as to the amount diverted into the settling tank, and the answer was 600 minute feet?

A I did not mean it that way, I meant we were using in the system 600 minute feet.

Q Now, did you measure that?

A Why, I assisted to on one or two occasions.

Q Can you give us the date upon which it was determined there was 600 minute feet?

A The measurements were perhaps not as accurate as they are now. We had several ways, as I recall it being commissioner one year, I don't remember what year it was now, that we had a Leffel weir table, and the weir measurements take the width of the opening and the depth, and we put a stake back, as I remember, ten feet, measured the water on that stake and the table calculated, had a table, and that give us the amount, that was the most accurate measurement we had at that time.

Q Then you had to measure there the water flowing into the settling basin?

A Yes sir, one way, and measure what run out.

Q What kind of a basin was it?

A Basin.

Q Yes, what was it constructed of? concrete, or was it just a barrow pit?

A It seems to me it was boards, but I am not certain. It don't seem to me it was concrete, although it may have been.

Q What was the size of that pipe at the head, Judge?

A I could not be at all certain in my memory. I have an impression about three and a half feet, but I may be clear off on that. That is an impression, yet, when I think of the size of it, I don't think it was that large.

Q Do you know what height the water above the pipe was in your settling basin at any time when you measured it?

A I believe the water in the settling basin was about 6 feet, that would go the distance above the pipe.

Q You cannot say within a foot or two of that, can you?

A No, I never took particular measurements, I have been in there and seen it, and I couldn't say. It is there and can be measured yet.

Q Do you know how much of that water ran to waste, or whether the pipes at the time you made the test were open at the lower end?

A No, not from actual knowledge I don't. I know that was the order when we made the test, the thing should be closed so as to get the actual force of the water.

Q Had the system such an arrangement that the pipes might be closed at their outlet?

A I think it has.

Q Don't you know, Judge, whether they have?

A Well, no, I don't; I never went down there to see it.

Q How high above the highest building in town would the water under that pressure reach?

A Why, I don't know, I didn't get up on the building to measure that, but it threw it on top, and over the top.

Q It was largely owing to the size of the nozzle how high the water went, wasn't it?

A I think that would make some difference. I haven't any idea a ten foot nozzle would have reached up there.

Q At one time you had a pressure here that would throw the water a hundred feet high, hadn't you?

A I don't know, I never saw it.

Q Haven't you seen it? A. No.

Q Do you know how large a nozzle you had when you threw it over the three story building?

A Only it was an ordinary nozzle that is used for fire purposes.

Q You don't know what size that is?

A No, I don't, I never measured it.

Q But the larger the nozzle the less height it would be in any event, wouldn't it?

A Why, I should say that was a matter hydraulics, yes, without argument.

Q Do you know how large the distributing pipes were to which fire hydrants were attached?

A They were various sizes. I think the biggest, as I remember it, was six feet, or six inches, and some of the others four inches, then down to one inch running into the lots.

MR. WEDGEWOOD: I would like to ask Mr. Richards a question. Do you know whether or not this data as to size of pipe and other things are of record in the engineer's office or the recorder's office?

MR. C. C. RICHARDS: I don't.

MR. WEDGEWOOD: Move to strike out this testimony as not the best evidence. Well known fact all these things are city records put in by surveys, and field notes are kept.

MR. C. C. RICHARDS: I submit the Brother is experimenting to sit here and let evidence ⁱⁿ and then move to strike it out afterwards.

MR. A. C. HATCH: When the pipe line was established and all that--

MR. WEDGEWOOD: I don't mean that.

THE COURT: Objection overruled. It will go only to the weight of the evidence not as to the admissibility if the witness knows anything of it. There is much of it Judge Booth has said he doesn't remember, gives his impression, whatever weight may be attached to it is admissibility.

MR. C. C. RICHARDS: I have several engineers here to testify to their knowledge of the system.

MR. WEDGEWOOD: I thought you could tell me whether these things were a part of the city's records.

MR. C. C. RICHARDS: I don't know. I took the engineers that laid out the pipes.

Q I will ask Judge Booth, do you know whether at the time, any record was made of the size of these pipes?

A I understood that there was a record kept in the city engineer's office of the size of all of these pipes.

Q Who was at that time the city engineer?

A Let's see. It occurs to me it was either Demoisey or Searles.

CROSS EXAMINATION By Mr. Wedgewood.

Q Isn't it a fact, Judge, a certain company came here and contracted to put in the water works?

A Yes, the Rules Brothers, but it was supposed to be, and I think was right in connection with the city engineer.

Q Both Demoisey and Searles were here?

A Yes, both Demoisey and Searles were here, and I think they both worked on it.

Q There was no city engineer here, some one of those men was employed to aid the city.

A I think it was the city surveyor, as we called him then appointed, there was at one time.

MR. A. L. BOOTH: I was here at that time.

THE WITNESS: A. L. Booth was the city surveyor.

Q Do you know whether any record was made of any measurements of the water?

A No, I don't know whether any records were made or not.

REDIRECT EXAMINATION By Mr. C. C. Richards.

Q You were the mayor?

A I was mayor; I left those matters to the boys.

Q You were not keeping records or making surveys, you were only the mayor?

A That was all.

RECORDS EXAMINATION By Mr. Wedgewood.

Q This was built to carry water? A. Yes sir.

Q It carried bug juice during June and July most of the time?

A Let's see, Colonel, I think you hadn't got here then, had you? No, that wasn't the purpose of it, that was before you came here.

WILLIAM K. FARRER, called by the defendant Provo City, being first duly sworn, testifies as follows:

DIRECT EXAMINATION By Mr. C. C. Richards.

Q Your name is William K. Farrer? A. Yes sir.

Q Where do you reside?

A Provo City.

Q How long have you lived here?

A All my life.

Q Have you been the watermaster for Provo City?

A Yes sir.

Q What years?

A 1898 and '9.

Q I will ask you if you were at that time familiar with the water works system at the settling basin, and from there on down to the point where the water was taken out of the City race?

A I was more familiar with it at the mouth of the canyon at the settling basin than I was with the whole system.

Q Did you have occasion at different times to measure or assist in the measure or observe the measurement of the water that was let from the river or the City race, as it is called, into the settling basin? A. Yes sir.

Q Did you see that water measured once or several times?

A I saw it estimated, I never saw it measured from the river into the settling basin I know of.

Q Where was the estimate made?

A Just above the outside settling basin.

Q At the point where the flume connects with the City race-- is it where it was taken out of the City race?

A There is an outside settling basin, then there is one covered in we call the old settling basin, one was a filtering basin.

Q Well, the filtering basin, where was that water taken from that you admitted into this filtering basin, where did it come from?

A Immediately north, I should say, six or seven hundred feet, something in that neighborhood, I couldn't tell you, I never measured it.

Q What channel did it come out of?

A Out of the City race.

Q Was that the point where the measurement was made at the City race?

A Right at that point, between that and the settling basin.

Q By whom was it made?

A Measured?

Q Yes.

A Why, MR. A. L. Booth was the commissioner that acted as commissioner during my term of office.

Q And you were representing Provo City?

A Yes sir.

Q And were other watermasters along with you?

A Yes sir, used to be rutable for all the watermasters on the two sides of the river to attend while the water was being adjusted.

Q How much water was turned out for Provo City at that point to go into the basin, if you know?

MR. WEDGEWOOD: Wait a minute, he said expressly he didn't see the water measured, he saw it estimated, I object

to it as incompetent.

Q Have you seen water measured at different times?

A Yes sir.

Q So as to know what a given quantity of water is in size of streams?

A Practically so.

Q And from that are you able to judge with pretty close accuracy as to the quantity of water flowing?

A I think I can come within a few feet of a stream of water anywhere below 700 feet or above, that is, reasonably above.

Q Do you distinctly remember the water as you saw it flowing in the stream at that time?

A Yes sir.

A As estimated by Mr. Booth, the water commissioner?

A Yes sir.

Q What would you say was the quantity of water?

MR. RAY: I object to that as calling for hearsay what Mr. Booth estimated it at.

THE COURT: I understand he is asked to give his estimate of the water.

MR. C. C. RICHARDS: I mean just as the court says.

MR. RAY: May I have the question read.

MR. C. C. RICHARDS: Sure.

(Question read)

MR. C. C. RICHARDS: I only refer to that as the occasion. Now, I want his opinion what quantity of water.

MR. WEDGEWOOD: I object to it as incompetent.

THE COURT: Objection is overruled.

MR. WEDGEWOOD: Exception.

A I will state that water was somewhere between six and seven hundred minute feet.

Q Did you see that water turned out, estimated and measured, whatever it may be called, more than once?

A Yes sir, that water was measured a number of times during the

two seasons I was water master; that is, it was estimated. I wouldn't say I saw it measured, because I don't believe it was.

Q You saw the flow? A. Yes sir.

Q The water was turned out and regulated by the Commissioner so as to give you a given quantity, was it?

A Yes sir.

Q An estimated quantity, if not a given quantity. You had in mind the size of the stream as it appeared those different times?

A Yes sir.

Q And what would you say, ^{was} the quantity flowing into the city settling basin on those occasions?

A I would say between six and seven hundred minutfect.

Q And you may answer if you can, whether that was the normal flow that you had flowing into the basin?

A As far as I know it was.

Q And you visited it with considerable frequency, I understood you to say?

A Yes sir, in 1898, I was at the head of the canyon nearly every day, head of that settling basin nearly every day.

Q Saw the stream of water as you went by?

A Yes sir.

Q And how was it during the next year?

A Next year was practically the same, as far as I know.

Q Did you travel up and down the next year the same way?

A Yes sir.

Q For the two years? A. Yes sir.

Q That would be 1898 and 1899?

A Yes sir.

Q Did you have occasion to visit that locality after that so as to observe the quantity of water that was being used?

A Yes sir, I believe I visited a good many times in 1903--

MR. A. C. HATCH: Just a moment there, if the court please. The question was as to the quantity of water being used.

MR. RICHARDS: I will change the word used, being

introduced into the settling basin.

Q Did you see the quantity of water that was being let into the settling basin from the City race at other times?

A Yes sir.

Q What years, do you remember?

A 1893 and '4.

Q '93?

A 1893 and '4.

Q That was before the testimony you have just given, was it, or afterwards. I understood you to say these other two years when Mr. Booth turned the water down was '98 and '99, is that right?

A I have got a little confused on that; I was a member of the Council for two years, and I was a member of the committee on irrigation and that would be prior to the time I was water-master.

Q I want to get whether you meant 1893 and '4, or 1903 and '4?

A 1903 and '4.

Q That was the time, was it?

A Yes sir.

Q You were watermaster then before--

A Yes sir, that was later.

MR. A. C. HATCH: Just a moment, that I may get it straight. He testified before that he was City Watermaster in '98 and '99.

MR. C. C. RICHARDS: He was in the City Council in 1903 and '4.

THE WITNESS: Yes.

MR. A. C. HATCH: You were watermaster in '98 and '99?

A Yes sir.

MR. A. C. HATCH: And councilman in 1903 and '4?

A Yes sir, I believe that is right.

Q What do you say was the quantity of water that was being turned from the City race into the settling basin that time?

A That was my recollection of the time.

Q Same quantity? A. Yes sir.

Q Did you have to do with the management, operation or control of the water system during '98 and '99, into the city?

A The irrigation system I did.

Q But not the water system?

A Not the water.

Q How many times did you see, do you suppose, that flow of water there in 1903 and '43?

A I couldn't say.

Q A number?

A I have a number of times.

Q Was the stream practically the same?

A I never saw much difference?

CROSS EXAMINATION By MR. A. C. Hatch.

Q You have testified how much was running into the basin, settling basin; did you observe how much was running out?

A No sir.

Q Did you at any of these times?

A No sir.

Q So that you don't have any knowledge as to how much went into the city water pipes?

A No sir.

Q There was a spillway there all the time from the basin back into City Creek, wasn't there?

A Back into City Creek?

Q Yes.

MR. RAY: Overflow.

Q Do you know where the spillway was?

A Yes sir.

Q It was there at that time, was it not?

A Yes sir, I know of a spillway there.

Q You don't know whether the water was running out of it or not?

A It might have been.

REDIRECT EXAMINATION BY MR. C. C. Richards.

Q Do you know of any of it having run out of the spillway?

A I don't believe any of the 600 minute feet ever run out of the spillway.

Q You never seen it?

MR. WEDGEWOOD: You asked if he knew, and he says he don't believe it did.

A My recollection is Provo City use, all the time it was the understanding of all the watermasters I had connection with admitted --

MR. RAY: Move to strike out what the watermasters understood or admitted.

THE COURT: That may go out.

Q Do you know of any water having overflowed at the spillway and having gone out?

MR. WEDGEWOOD. I object to his competency, he has not shown he was there.

Q Have you been by the spillway?

A Yes sir.

Q Frequently or otherwise; were you up there quite often, or only occasionally?

A Well yes sir, saw the spillway every time you go up.

Q You may state whether it was a matter of observation on your part to see whether --

A Way I understand that spillway what it was built for was to get rid of the ice condition more than anything else; that was my understanding of that spillway.

Q Was it used for the purpose of--

A Outside settling basin.

Q For the purpose of turning water out there to overflow?

A Yes sir.

Q Was it used frequently or only occasionally?

A Set it at a certain level, when there was more water in than reached that level, it went over.

Q Was there much water overflowing there?

A How is that?

Q When you went up the river did you see the overflow there almost every time you went up, or only occasionally?

A You couldn't go by without seeing it.

Q Was there much overflowing?

A There was -- no, not as a rule.

Q What quantity would you say was overflowing as you remember it?

A I couldn't say, nothing I could judge of.

Q Was it a large stream or small stream?

A Practically a small stream.

Q Could you estimate it, give us some more definite idea of the quantity that was overflowing?

MR. A. C. HATCH: Brother Richards, he has said he didn't know anything about it, and has answered me and you twice that way.

MR. C. C. RICHARDS: I am calling his attention. If he says he cannot estimate it--

THE WITNESS: I don't think I could estimate any flow there.

THOMAS E. THURMAN, called by the defendant, Provo City, being first duly sworn, testifies as follows:

DIRECT EXAMINATION By Mr. C. C. Richards.

Q Your name is Thomas E. Thurman? A. Yes sir.

Q You reside in Provo? A. Yes sir.

Q How long have you lived here?

A Since '53.

Q Were you at one time the watermaster or superintendent--

MR. A. C. HATCH: Just a moment, I have what pur-
ports to be a record or minutes.

MR. C. C. RICHARDS: Judge, I am introducing evidence
now, and it will be your time later.

MR. RAY: That is in the record.

MR. A. C. HATCH: This is all in the record.

MR. RAY: Yes.

MR. A. C. HATCH: Of course twenty years ago, and
the record was introduced showing what the parties measured
it then, water works years ago, what went in and all that,
and this is just going over it, and testifying as to recol-
lection of men as against this record. It seems to me it
is a waste of the time of the court.

MR. WEDGEWOOD: That is the best evidence.

MR. A. C. HATCH: It is already in the record, this
testimony, so far as they could get it, and the best evidence,
and I cannot understand any purpose in going over it with the
kind of testimony at least as that given by Judge Booth and
by Mr. Farrer. They testified the best of their recollection
and all that, but here is the record of what they said it was
at that time.

MR. RAY: May I interrupt, I called attention to
that record, because I wanted to refresh the court's recol-
lection on it. Mr. A. L. Booth, the very man who made this
measurement during the main trial, was put upon the witness
stand and testified he had made written notes at the time,
and the measurements were 500 minute feet. Now, it seems
to me this testimony doesn't come within the purpose of re-
opening. That record was squarely in, the measurements made
by Mr. Booth. Now, we take Mr. Farrer, put him on the
stand and he says I watched it, and my estimate is so and so.
That cannot enlighten the court as to the quantity. When you
have the written record of the man who made the measurements,
it seems to me this is improper under the purpose of per-

mitting the city to introduce testimony.

MR. C. C. RICHARDS: If the court please, I can understand the extreme anxiety of my brethren to have no evidence in here, and the ease and grace with which they are claiming everything is in the case, and assuming what 3800 pages of transcript show. I read every line of it, and recently too, and I admit I cannot recall those things; and the purpose here is upon this hearing, which is aimed to be very brief, that we are to assume it is all in.

THE COURT: The objection is overruled, because I don't think that this evidence is incompetent, because, as suggested by General Wedgewood, it is not the best evidence. I don't think it comes within that rule because a person's recollection of what occurred is the best evidence on that subject, but I will say, however, I would not advise you to take much of the time of the court proving such estimates as Farrer's and Judge Booth's because they are so indefinite the court cannot give any weight whatever. Mr. Farrer says he never saw it measured, but merely looks back now at the stream of water twenty odd years ago and makes an estimate what the quantity was, and the court's general knowledge of such matters is that the court could not give much weight to that kind of evidence, especially in view of the fact there is evidence here of an actual measurement of that water at that time; but the objection is overruled.

MR. A. C. HATCH: Just a moment, we can probably save it all.

Q You may answer were you watermaster or superintendent, or what position did you occupy?

A I was watermaster in 1890 and '92, 1892, 3 and 4. I was City Commissioner in 1900.

Q Were you in office in 1891?

A No sir.

Q 1890?

A 1890.

Q '92?

A '92, 3 and 4.

Q Do you remember when the water works was first installed, the settling basin and pipe line connected with it?

A Yes sir.

MR. JACOB EVANS: Just a moment, may I ask a question here. Weren't you a witness in this trial on the former hearing?

A Yes sir.

MR. JACOB EVANS: And you testified about all these things in this case, didn't you?

A Not about this, not about being commissioner. I testified--

MR. JACOB EVANS: You were called to the witness stand several times and testified in this case?

A Yes.

MR. JACOB EVANS: And testified concerning all the matters that took place during your administration as water master?

A While I was water master, but not as commissioner.

MR. C. C. RICHARDS: The same question presented in another light.

Q Do you remember when the settling basin was built down there?

A Yes sir.

Q How long were you familiar with the flow of water into that basin, if you were, after its construction?

A Up until '94.

Q 1894? A. Yes sir.

Q Did you have occasion to turn the water in or make observation of the quantity of water flowing in the basin during 1892, 3 and 4? A. Yes sir.

Q And did you make a note or record of it in your note book?

A Well--

Q Have you a record of it in your book?

A I have a record of it when I was commissioner; Judge Booth and me measured it one time.

Q What year was that?

A That was July 16, 1900.

Q 1900? A. Yes sir.

Q Have you any measurements before this?

A No, I don't think I have only just --

Q In 1892 or '3 and '4, was the water turned-- how was the water turned, and by whom?

A It was turned in by me as city watermaster and superintendent of the water works, we went together.

Q Was the water measured by you at that time when it was turned in? A. No.

Q Was it measured by the superintendent? A. No.

Q Have you seen streams of water measured so as ^{to} know how many inches or feet there are in 500 or 600 minute feet?

A Yes sir.

Q It was your custom to measure, or practise to measure water by minute feet at that time, was it not?

A Yes sir.

Q And not by second feet? No sir.

Q Of miners inches? A. Yes.

Q And have you frequently seen streams that have been measured 500 or 600 minute feet? A. Yes sir.

Q Have you a recollection at the present time as to the size of the stream that you saw flowing into the settling basin in '92 and '3 and '4, as to the number of minute feet in it?

A Yes sir.

Q How many minute feet were there flowing in there at that time?

A I should say about 600 minute feet.

Q Sir?

A About 600 minute feet.

Q Do you think that is a pretty close estimate of it?

A Yes sir. I would like to explain the reason of this 500 feet is --

Q That is the measurement in 1900?

A Yes.

- Q I am coming to that. Now, after 1894 did you see the quantity of water that was being turned into the settling basin, and being used by the city for city purposes?
- A Yes sir.
- Q From 1894 up to 1900 did you?
- A Yes sir.
- Q With considerable frequency, or only occasionally?
- A Well, considerable frequency, I was there very often.
- Q What would you say the size of the stream was when you did see it, compared with the time you estimated five or six hundred inches?
- A There was more water when the 600 feet was there going in there, than there was at the time I measured it.
- Q When did you make the measurement yourself?
- A On July 16, 1900.
- Q 1900, where did you make that measurement?
- A Right above the intake into the settling basin.
- Q That is where the water came from the City race?
- A Yes sir.
- Q How many feet were there then?
- A 500 feet.
- Q 500 feet? A. Yes sir.
- Q What do you say of that stream in size, compared with the stream you had testified before, was that smaller or larger?
- A It was smaller. The reason I say that is because the settling basin-- all the water interests had met together, and demanded a division of the water, the measurement, and we went up there for that purpose.
- Q What position did you hold then?
- A I was commissioner appointed by --
- Q Commissioner on the river? A Yes sir.
- Q Appointed by whom?
- A By the different interests?
- Q Different canal interests? A. Yes sir.

- Q Canal companies? A. Yes sir.
- Q You went up and measured it out to the different companies?
- A Yes sir.
- Q Measured out to Provo City 500 inches, is that the idea?
- A That is what went into the water works.
- Q That is what I say, into the water works into the settling basin?
- A Yes.
- Q You say that was a smaller stream than the streams which you had estimated at 600 inches in '92, '93 and '94?
- A Yes sir, the settling basin is cement basin, and it is about seven feet deep when the water runs out of the over-flow, water would be about seven feet, but at this time when we measured it, the pressure was low, and there wasn't enough water to run out at all, out of the over-flow.
- Q Now, did you measure the water at any other time you have a record of?
- A Yes, measured it all that season.
- Q Do you remember whether you made any change in the amount by increasing or diminishing the amount from 500 feet that you measured there, you say in July of 1900?
- A We filled the basin so as to have a pressure-- the basin full.
- Q Did you find that 500 feet would do that?
- A We didn't measure it after that only we went all over the system and give-- divided it up as equally as we could.
- Q When you say over the system do you mean --
- A All the interests.
- Q You mean the irrigating canals, different canal systems?
- A Yes sir, Little Dry Creek and different canals.
- Q How many years were you commissioner, Mr. Thurman?
- A I only have the record here of that one year, but my recollection is I was commissioner two or three years.
- Q Now, are you able to say from recollection what quantity of water you distributed to Provo City outside of this particular time when you measured it, whether you had a uniform figured

quantity you distributed to them, or whether it varied-- I mean for the pipe line, I don't mean anything in this inquiry but the pipe line; if I don't say pipe line, I mean pipe line.

A Whenever the basin was full we figured it there was 600 feet going into the pipe. Of course, dropped down below so that there was no overflow like it was on July 16th, when we measured it, there would be about 500 feet.

Q Now, let me see if I understand you right; 600 if the basin was full so that the water was overflowing there would be 600 feet being taken out through the system?

A Yes sir.

Q That would give you enough head to take out 600 feet?

A Yes sir.

Q And if it was not overflowing--

MR. A. C. HATCH: Just a moment, we object to the question and move to strike out the answer, last question, if the reporter will read it.

MR. C. C. RICHARDS: I submit counsel has no right to sit here and hear questions and answers.

MR. A. C. HATCH: He answered before I had an opportunity to object.

MR. C. C. RICHARDS: You had every opportunity, witness was deliberate.

MR. A. C. HATCH: It is wrong to make a record like that, for that reason we object to it. It is misleading the witness clearly. He is testifying to things that he doesn't know he is testifying to, I take it.

THE COURT: Read the question.

(Question and answer read.)

THE COURT: What is the objection to that?

MR. A. C. HATCH: That the counsel is making the record. It is a leading question, putting words in the witness's mouth that I assume the witness doesn't know what

he is testifying to.

THE COURT: Possibly not. You may find out on cross examination whether he does. Motion to strike is denied.

MR. A. C. HATCH: Note our exception.

MR. C. C. RICHARDS: You may cross examine.

CROSS EXAMINATION By Mr. Jacob Evans.

Q The estimate that you have made of the water flowing into the settling basin was based upon the water that you saw going into the basin, was it?

A What do you mean?

Q The flow into the basin?

A Was measured before it went into the basin, yes.

Q And that run from five to six hundred minute feet?

A Yes sir.

Q Do you know whether or not there was any overflow running out of the basin at that time?

A Not when the 500 feet was measured.

Q When there was 600 feet how much would be running out?

A Well, just -- there is two overflows on the basin, and I measured it at one time there was-- I think the basin was about three feet in length, and inch and a quarter of water running over that there at one time.

Q How wide was this opening where the water was running through into the overflow?

A I say my recollection is it was about three feet.

Q About three feet wide?

A Yes sir.

Q How did you measure that, how did you determine?

A We just measured it on the Leffel system, what we used.

Q Did you have a Leffel weir to measure the water with before it went into the settling basin?

A We did have, yes.

Q All the time? A. No.

Q Did you make one there just for the purpose of measuring it from time to time?

A No, sir, there was a gate above there that we used.

Q What kind of a gate was it?

A I don't recollect now, that is quite a while ago.

Q Wasn't it merely a few boulders of rock that were thrown in there to turn sufficient quantity of water to run into the settling basin? A. No sir.

Q Can you tell me what kind of a gate it was then?

A The gate-- the opening where it went into the settling basin, was cement.

Q You say you made some measurements? A. Yes.

Q How did you do it?

A Depth and width of the gate.

Q Tell the court in detail how you made these measurements to determine there was 600 minute feet going into the settling basin?

A I don't know that I could do that right now.

Q You never could do it, could you, Mr. Thurman?

A Did do it.

Q Can't you tell now how you did it?

A I can tell the different measurements here that we made at that time, way we made them.

Q You can tell as to the figures you have in your book, that is the only way?

A Yes;

Q I am trying to arrive at how you got at those figures?

A By measurement with a rule.

Q What kind of a rule did you use; what was the measurement?

A Two foot rule.

Q What did your weir consist of, how did you measure it?

A Common gate, wooden gate, boards that backed the water up to a level, then measured back, had a peg set.

Q How far from the gate back?

A I think the peg was just about ten feet generally, sometimes not that far, depends how much breast there was.

Q Where was this, above the settling basin or below?

A My recollection is it was above; it is quite a while ago to go back.

Q You are not definite about whether it was above or below?

A It was above the basin.

Q Did you have any below the basin ?

A Not for that purpose. We had one below the basin we measured the Upper East Union ditch.

Q I am speaking of the water that went into the city pipe line, did you have any way of measuring the water that overflowed and went back into the City race?

A No sir.

Q Don't know how much that was?

A No sir.

Q Now, isn't it a fact, there was an overflow or an opening in that city pipe line down about Baum's place?

A You mean leakage?

Q An opening in the pipe?

A Oh yes, there was an opening down there.

Q How far was that below the settling basin?

A About a mile.

Q And whenever the water in the pipe line going into the city backed up to such a point as to back it up where this overflow was about a mile below the settling basin, the water would run out of there and run into the City race, wouldn't it?

A Yes, but as I understand it that was put in there for what was called the -- when the water went over that hill there, bust the pipe if we don't have some way of letting the pressure off.

Q Yes, but there was a hole there that let the water out of this the pipe line about a mile below the settling basin?

A Yes sir, I don't know the object of it though.

Q Water run out of it, didn't it?

A Yes sir, it run out.

Q And the same water that would run in from the settling basin, a portion of that water would run out of that hole down a mile below the settling basin, wouldn't it?

A I have seen it run out of there, but I don't know whether it did all the time or not.

Q It did every time you were there?

A Sometimes.

Q Nearly always when you were there there was a stream of water running out of that hole?

A Yes sir.

Q Did you measure that? A. No sir.

Q Don't know how many minute feet there was running out of that?

A No, we measured the Union ditch right below there a little ways.

Q Where did this water go that ran out of this hole?

A In Union Creek.

Q And was used in the city here for irrigating purposes?

A Either here or in the bottoms above.

Q Was used anyway? A. Yes.

Q By the irrigators? A. Yes sir.

Q So that so far as the city was concerned, it would not have made any difference if you had put 20 second feet of water there, that portion of the pipe line, if it would have carried it from the settling basin down to where this hole was below, it would have run out and been used for irrigating purposes?

A There would not be very much there. It was only a small opening of course. The pressure here in the town--

Q Whenever it backed up sufficient to reach that point where that opening was made, the water would run out through that opening, wouldn't it?

A Yes, and there is another one up here by Brinton's field, right in the lane.

Q That was open too, was it, all the time?

A I don't know as to that, I cannot-- I wasn't there.

Q Would you mind letting me see the little book you have?

A I don't believe you can read it.

Q Just point out to me the page.

A What?

Q That 500 minute feet.

Q This is a long time ago.

MR. A. C. HATCH: Where did he say that second opening in the pipe line was, how far below?

MR. JACOB EVANS: About a mile below the settling basin.

Q Will you point it out to me, I don't find it.

A The water works right there, that is the total in the river that day. Of course, when I come home figure it up and go back the next day and regulate it. That is the way all the commissioners done.

Q Now, when was this memorandum made?

A July, 1900.

Q July 16, 1900? A. Yes sir.

Q Some of these figures here seem to be quite freshly written, they have been written recently?

A No sir, that book never been used since it was put away in my drawer, happened to find it the other day when they called my attention.

Q The page upon which this distribution is made all totaled up, and then after it is totaled, the words water works and 500 is written below that, isn't it?

A Yes, there is the measurement that time.

Q Why didn't you put that measurement on your memorandum along in the order in which you put all the others in your memorandum book?

A I think it was the last place we met, been over the other canals.

Q That is the way you account for it?

A Yes sir.

Q Take that 733.44 opposite the Upper East Union, you say those figures have not been recently marked over and changed?

A No sir, they have not.

Q They are as they were originally made?

A That might have been changed at the time, but it has not been since.

Q Now, do you have a distinct recollection as to whether or not there was five hundred minute feet of water flowing into the settling basin at the time you made this memorandum, or do you refresh your recollection by reason of your memorandum?

A I refresh my recollection by that memorandum.

Q By the memorandum? A. Yes sir.

Q Now, did you measure it more than once?

A Every time I went around that season, we measured it.

Q Did you make any memorandum of it?

A I don't know that I did.

Q Is this the only memorandum you can find that you made of your measurements of water flowing in the settling basin?

A I think it is, my recollection. These are Thomas's figures. I generally got Hy Thomas to go over these measurements with me whenever I come home at night, and made a computation, and those are his figures..

Q You made a good many measurements going into the settling basin, haven't you? A. Yes sir.

Q And you have no independent recollection now as to what any of those measurements were, have you?

A No sir, not independent.

Q Only this one?

A Only this one.

Q And that you remember by reason of your memorandum?

A Yes sir.

Q Now, as I remember it, you testified that at that time there was no water running out of the spillway?

A Yes sir.

Q Do you have an independent recollection about that?

A I do; I know that the water was not running from the settling basin.

Q At the time you made this particular memorandum?

A Yes.

Q But yet you had no recollection of this particular memorandum at all until your memory was refreshed by your book?

A No, I don't think I ever thought of it since that year.

Q What makes you remember that on that 16th day of whatever date it was, 16th day of July, that there was no water running over the overflow when you made many other measurements there?

A My recollection is that Judge Booth was with me, President of the Western Union Canal, and other men that were interested in the other canals. and we had been guessing at the amount of water in the water works, and Judge and me went over and made that measurement.

Q You have measurements all through this book made on different days? A. Yes.

Q Was Judge Booth with you every time?

A No sir.

Q How then do you remember Judge Booth happened to be with you on this particular occasion?

A That is just my recollection, that is all.

Q But you are not certain about that, are you?

A I am not positive, no, but I think that is the fact.

REDIRECT EXAMINATION By Mr. C. C. Richards.

Q Mr. Thurman, I could only hear part of your cross examination. Did you say that you made or that you did not make other measurements than the one that you have the record of there?

A Yes sir, I did.

Q And do you know what your figures were at the other measurements?

A My recollection is they were about the same they were at this time.

Q Do you remember any test being made as to the pressure that

you had after the water system was put in, the force?

A Yes sir, I belong to the fire company here.

Q What pressure did you have?

A And we had pressure enough to throw it over the tabernacle tower here.

Q This building here on the block west of us?

A Yes sir.

Q Same tower that is there now?

A Yes sir.

Q During your service in 1900-- 1904, I think you said it was, do you know whether the quantity of water that was turned into the water system was about uniform, or whether it varied?

A Well, it would vary as the water varied in the river.

Q What was the least amount you remember having had?

A I don't remember. I guess we tried to keep the settling basin full as much as we could.

Q Do you remember whether you had less than 500 minute feet?

A I don't think we ever did.

Q And up as high as what?

A As high as 600, I would say. Of course, that is only a guess.

Q Well, you measured 500 feet, I understand you, different times?

A Yes sir.

Q So that you knew how large a stream that was?

MR. JACOB EVANS: I didn't understand him to say that.

Q What did you say?

A I said we measured it and there was 500 feet.

Q Do you want us to understand you only made one measurement of 500, or made other measurements of which you have no record?

A Yes, we measured several times, but we were governed by a peg, lots of times when the water was at a certain height we had our pegs marked so that we could tell just what there was after it was measured.

Q You have got one record there of measurements?

A Yes.

- Q Now, did you make other measurements that you have got no record of, or did you make no other measurements?
- A I made other measurements, but don't seem to have --
- Q Haven't them on your book?
- A Haven't the water works. Here is one city water works, 500 feet, here in another place.
- Q You have got another one there, have you got a date with it?
- A This is July 9th.
- Q July 9th, same year?
- A Same year.
- Q Was those two measurements then in July?
- A Yes sir.

RECROSS EXAMINATION BY Mr. Jacob Evans.

- Q Let me see that. On the dates when you would measure this water going into the settling basin, did you make any observation to determine whether or not there was water running out of the opening about a mile below the settling basin?
- A No, not every time.
- Q Would make no observations about that ?
- A No sir.
- Q The idea was to get the water into the settling basin?
- A Yes sir, in order to keep that full.
- Q Keep that full?
- A Yes.
- Q And you didn't pay much attention to where the water went after you got it in there, whether it went out of these openings, or come into the city?
- A When the water was low in the city we would get up there as quick as we could, see what was the matter.
- Q Any way that was not a part of the investigation there to determine whether the water was going out of any of those openings below the settling basin? A. No.
-

HEBER PHILLIPS, called by the defendant, Provo City, being first duly sworn, testifies as follows:

DIRECT EXAMINATION BY MR. C. C. Richards.

Q Your name is Heber Phillips? A. Yes sir.

Q Where do you reside?

A Sir?

Q Where do you reside?

A Provo.

Q How long have you lived here?

A About forty-six years.

Q Do you remember having done any work on the springs in Provo Canyon ? A. Yes sir.

Q For Provo City? A. Yes sir.

Q When was the first work done by you ?

MR. JACOB EVANS: What springs do you have reference to?

MR. C. C. RICHARDS: I will give you the springs in a moment.

Q What year was the first work done?

A It was 1901.

Q And upon what springs did you first work, where did you begin your work?

A The first spring we worked on, we called them the Spring Dell spring, I don't remember by their name there filed on, spring dell proper.

Q What work did you do there?

A We dug into the hill, developed the springs and trenched them together, made ditches and got the water together as much as we could.

Q Who was working with you?

A My brother.

Q What is his name?

A James Emery Phillips.

Q Do you remember how long you were engaged?

MR. JACOB EVANS: If the court please, object to this as incompetent.

A No, I don't remember just how long, six weeks or two months we were there altogether.

THE COURT: What was the objection?

MR. JACOB EVANS: I object to it as incompetent.

THE COURT: I will hear from you, why is it incompetent?

MR. JACOB EVANS: Because it is all gone into, and these springs have been awarded to the Spring Dell Resort Company, these very springs he is testifying about.

MR. C. C. RICHARDS: We expect to show, your Honor please, posting and recording of notices, doing of this work, other work, making surveys, piping the water, putting the water into our pipes, and using it from 1903 and 4 to the present time. I cannot imagine it could have been awarded to the Spring Dell Company when we have been using the water all this time. Certainly expect to prove we are using it and have been using it for twelve or fifteen years continuously.

THE COURT: The question whether you acquired any right in twelve or fifteen years by using water belonging to someone else. If it was piped water you might. If it is the springs evidence in relation to which was given by the Spring Dell Resort Company--

MR. C. C. RICHARDS: I can hardly imagine that would be the case.

THE COURT: I don't know anything about where the springs are located.

MR. JACOB EVANS: I will withdraw the objection for the present anyway. We will find out what it is.

Q Which side of the river were those springs?

A Why, generally on the north side; north and northwest.

Q You think you would be able to locate them on the map?

A I think so.

Q Just look at the map hanging on the board there above you. See if you can find them up here. Are those springs on the north--

A Right in here.

Q Just a minute, are those springs on the north or south side of the Denver & Rio Grande Railroad track?

A North side.

Q Northeast side?

A Yes, I call this north.

Q North or northeast?

A Depends on the point you take it from.

Q And can you mention about the locality where these springs are as being east of the Spring Dell lateral ?

MR. JACOB EVANS: If the court please, as I understand it, there is absolutely no contention about these springs.

MR. C. C. RICHARDS: I thought you said they were the springs somebody else had.

MR. JACOB EVANS: I thought they were on the south side of the creek.

MR. C. C. RICHARDS: This is the first intimation we have had you are in harmony with us. You are changing so often we would like to put the proof in so we would have something besides your temporary concession to stand on.

Q How long were you working on those springs?

A I don't know how long, we were up there about six weeks or two months.

Q On the whole work?

A Altogether.

Q What work did you do there?

A Find little seepage water coming out of the hill and dug in, get all the water we could.

Q Then where else did you do any other work that season in the canyon?

A After we left that place we went farther up the canyon and

found what we called the Phillips springs.

Q What side of the canyon were those springs?

A They are on the north side.

Q What did you do there?

A We did practically the same work, dug in the hills, found what water we could, trenched it out, got the water altogether in one ditch.

Q Did you do any other work that season?

A We worked on another spring, what we called the Guard Quarters.

Q Guard Quarters? A. Yes.

Q Which side of the canyon or river were those springs?

A That is on the same side, north side.

Q Farther up?

A Farther up, yes sir.

Q That is farther east? A. Yes sir.

Q What work did you do there?

A About the same work.

Q Did you develop considerable water those different points?

A Yes sir.

Q brought it altogether?

A No, we didn't get it al-together quite a distance. All we could get in those springs that was close.

Q All the water of the Dell Springs?

A All the water of Spring Dell.

Q You got them together?

A Yes sir.

Q And all the waters at the Phillips springs, you got them together? A. Yes sir.

Q And all the waters at the Guard Quarter, you got together?

A Yes sir.

Q But you didn't bring the Guard Quarter and Spring Dell and Phillips Springs together? A. No sir.

Q Now, had there been any work done upon any of those springs prior to the work you and your brother did as far as you

could see there? A. No sir.

Q Was it apparently the first work of development done by any one there?

A Looked that way to me. I never seen where they done any work before.

THE COURT: I think Mr. Story should be notified there is testimony being introduced in regard to the Guard Quarter springs, and all that water was awarded to them.

MR. C. C. RICHARDS: I wouldn't want to take advantage of him.

Q Is this the south or north Guard you were working on?

A Sir?

Q Was this South Guard spring, South Guard Quarter spring, or North Guard?

A I don't know it by south or north.

Q Is it on the north side of the river?

A North side of the river on the hill above the flume.

Q Is there another one up there, another guard spring that you know of?

A Not that I know of.

Q Higher up, you only know of the one.

MR. C. C. RICHARDS: Mr. Goddard thinks this spring does not interest Mr. Story, but we will see.

THE COURT: The guard quarter spring water was awarded to the Utah Light Company, and is also known as the Johnson spring. Possibly if you call the witness's attention to that fact he may be able to distinguish them.

Q Did you do any work on the Johnson spring?

A No sir.

Q Is this Guard spring that you speak of above or below the flume of the Telluride?

A Just above the flume, little hollow there.

Q Now, which was the higher up, the spring that you worked on, or the Johnson spring, the Guard spring or Johnson spring?

A I don't know anything much about the Johnson spring. The Johnson ditch was higher up on the hill.

THE COURT: Let me ask, do you know of a spring named Johnson spring, are you familiar with it?

A No sir, I am not acquainted with it.

THE COURT: Mr. Story, evidence is being introduced of the right of the city to the waters of the Guard Quarter spring. I thought you ought to know of that fact.

MR. STORY: Thank you very much.

MR. C. C. RICHARDS: I didn't know we were running into your territory, but the Judge is of the impression we are, and if we are you should know it.

MR. STORY: We own that by stipulation. The rights as between the two parties as been settled definitely by agreement, city and power company, as far as Guard Quarter springs are concerned.

THE COURT: I made the award, understanding that to be the case, but evidence is being introduced now of work done on the Guard Quarter springs.

MR. C. C. RICHARDS: We understand there is north and south Guard and the one we are after is not the one Brother Story is after at all.

THE COURT: They should be distinguished so that the record will be clear.

MR. C. C. RICHARDS: Mayor Dixon says that is the case, and it is also suggested the other Guard spring--

THE COURT: Guard Quarter spring.

MR. C. C. RICHARDS: Guard Quarter spring, one is the North Guard Quarter, and the other the South Guard Quarter, and the South Guard Quarter spring is also known as the Johnson spring. I have the point of the compass wrong. The North Guard Quarter spring is the one the power company owns, we are not making any claim to that at all, but it is the one called the South Guard Quarter our proof is directed to.

MR. RAY: Mr. Richards, may I interrupt here. I don't want to be offensive about it, but it seems we might preclude a good deal of this proof by an offer to admit that the city has done all things necessary and precedent to the right to use from those springs the quantity of water for which they have a beneficial use, and not from the river, and that they have used it, and that is exclusive of the Maple spring so far as the plaintiff is concerned, but so far as all the other springs are concerned they have developed them, and their right is a prior right, and they are entitled to have that water in preference to river water, and the only question is the question of the quantity, that they have the facilities through which to use them -- and any other admission that is necessary.

THE COURT: I think that ought to shorten it considerably.

MR. RAY: That includes all the waters they have heretofore diverted into their pipe line, all the springs except the Maple spring.

MR. A. C. HATCH: If the court please, the plaintiff also concedes, and I take it that all the parties to the action concede what was offered by Mr. Ray as a concession, that Provo City has done all of the things necessary to acquire such right to such water as is necessary for its use, and such as has been beneficially used by it.

THE COURT: That is from the spring.

MR. A. C. HATCH: From the spring.

THE COURT: Distinguished from water from the river?

MR. A. C. HATCH: That I take it puts it where it is simply a question of the quantity that is necessary for their use. Nobody objects to their having done the things and having the necessary pipe line to convey the water.

MR. C. C. RICHARDS: Is there a question as to the time at which our right originated in '90 or '91, question?

MR. RAY: No.

MR. A. C. HATCH: No.

MR. C. C. RICHARDS: And no question about the stage of this right in 1901?

MR. RAY: My admission, Mr. Richards, was all things were done necessary and precedent to making it a preferential right to the use of those springs as against the parties litigant in this case, to the extent of your necessity.

MR. C. C. RICHARDS: I understand that, but want to get a date. Your admission did not cover it. This witness fixed 1901.

MR. RAY: You have that date in, we don't propose to dispute it in any way.

MR. F. S. RICHARDS: I would like to hear the statement of Mr. Hatch read, as I could not hear it.

(Statement read)

MR. A. C. HATCH: This has nothing to do with the irrigation rights. It is simply the pipe line, water for lawn sprinkling, and municipal purposes, and in Mr. Ray's statement, the Maple spring was excluded.

MR. F. S. RICHARDS: You say the Maple spring was excluded?

MR. A. C. HATCH: Yes.

MR. RAY: That was the plaintiff. We make no exclusion of the Maple spring at all.

MR. F. S. RICHARDS: I did not hear the statement.

MR. RAY: We don't care what spring you take the water from, but I made the statement knowing the plaintiff contested your right to the Maple spring, but we make no contention as to any of the springs.

MR. F. S. RICHARDS: The position of prove City I understand is this. They claim the city has appropriated and used and had a beneficial use for all of the waters of all of these springs including the Maple spring, since 1901, and be-

fore that they had water from the river and this water has been used beneficially during that time. I don't except the Maple spring or any of those.

MR. A. C. HATCH: If the court please, as to the Maple spring, the testimony was gone into that at great length on both sides. The others were practically conceded from the beginning by all the parties to the extent of their necessities, and if the court is now going to open up the testimony as to the Maple spring, of course, we would have to bring other witnesses in rebuttal. We don't know when this will end. We haven't any objection to those other springs. The Maple spring was gone into at length by different witnesses both on behalf of the city and on behalf of the plaintiff, and the court found in favor of the plaintiff as to the Maple spring in the findings. The case, I understand, was not opened to hear that again.

MR. C. C. RICHARDS: We have threshed out what it was opened for.

MR. RAY: My understanding was that the case was not opened to retry the title to any of the springs, but as to their necessities.

THE COURT: If you will notice what the court said the other day at the other session there was an absence of evidence indicating or showing upon what was based the city's claim to the right to the use of the waters of these springs. No intimation was given, as I remember it, of any attempted filing upon them as the law then existed, or the initiation of any right to the water of these springs.

MR. RAY: That is the thing we want to cover by our admission.

THE COURT: You are covering that. The question Judge Hatch now suggests is in relation to the other spring, the Maple.

MR. A. C. HATCH: The court will remember that the

testimony was offered at length in regard to the Maple spring by both the city and plaintiff.

MR. WEDGEWOOD: Mr. Ray says he is conceding everything but the quantity.

THE COURT: Do I understand that would include the Maple spring?

MR. WEDGEWOOD: No, because that has been passed upon and threshed out.

MR. JACOB EVANS: Express finding in the record here.

THE COURT: I took it from what General Wedgewood said when he states your concession includes everything but quantity, if it required the Maple spring to make up the quantity.

MR. WEDGEWOOD: No, I consider that passed upon because that has been threshed out, diversion and use.

MR. JACOB EVANS: As I remember, we took a day or two on that particular spring.

THE COURT: I remember we went into that.

MR. C. C. RICHARDS: I think my brothers are confusing going into that spring with other litigants and the city officials recollection is as my recollection. I searched the record very carefully to find whether the city had gone into that question as to any spring, and my recollection is there isn't a thing. Maple spring was threshed out between the rest of them, but not as between the city, because the city did not go into the spring question at all.

THE COURT: I don't remember, but the question was gone into because the city was a party.

MR. C. C. RICHARDS: But the city did not offer any proof as to any of the springs in the canyon. I will be glad to have anybody refer to it.

MR. JACOB EVANS: I think if you will go into Mr. Swan's testimony, he went into that very carefully, and it

and it was made a bone of contention here, not between the plaintiff and anybody else, but Provo City. Nobody else was claiming this spring except these two people. We claimed it and they claimed it.

THE COURT: My recollection is the city introduced evidence what had been done with relation to taking the water of those springs and using it, but the suggestion I made was that the city introduced no evidence upon which they based a claim of right to either take the water or use it. They gave evidence what they had done in reference to the water.

MR. JACOB EVANS: That is true, they did not show any appropriation.

MR. A. C. HATCH: They confused the names of the spring, and called it different names. The spring was identified as the spring they now have flowing into their pipe line, carried into their pipe line in 1915 for the first time.

THE COURT: I remember the evidence in relation to the taking of some spring water into the pipe line in '14 or '15.

MR. C. C. RICHARDS: Our purpose now is to show as my brother has suggested we did file on the Maple spring, and proceeded to develop and do work upon it, and in due and reasonable time took possession of the water, and have been using it and are using it, and have been for years and years past, in our pipe line.

MR. JACOB EVANS: Of course, that statement cannot be borne out by the evidence I know.

MR. C. C. RICHARDS: I don't know, I am told it can be, I don't expect to testify myself.

MR. A. C. HATCH: Let me call the attention of the court to the testimony of the witness Goddard, who said they claim all the springs clear down to the mouth of Provo Canyon,

and no question about the matter having been gone fully into and threshed out. once as to that spring. The others were not gone into I take it for the reason no one was attacking the city's right to the use of those springs.

THE COURT: In your statement to the court, Mr. Richards, you stated that the flow from those springs was 8 or 10 second feet, did you?

MR. C. C. RICHARDS: I understand it runs as high as that, varying according to the season of the year.

MR. A. C. HATCH: They claim as high as $13\frac{1}{2}$ second feet at the former hearing.

THE COURT: What quantity of that is represented by the Maple spring?

MR. JACOB EVANS: Less than half a second foot.

MR. C. C. RICHARDS: I think we have some measurements of that spring, I am not certain.

THE COURT: Unless the court changed very materially, or there was a very material change in the evidence as to the necessities of Provo City, under Mr. Ray's concession you have more water conceded to you than the evidence shows you have a necessity for from the other springs, eliminating this half a second foot.

MR. F. S. RICHARDS: The maximum flow, your Honor please, we are advised only occurs for a very short period.

THE COURT: Of those springs?

MR. F. S. RICHARDS: Yes, the minimum flow is something like 5 second feet, or $5\frac{1}{2}$, as I understand, and it continues for a considerable time, and then goes up very gradually, and it is only for a very short time I think in July or August, perhaps, it reaches this maximum flow, and that only lasts a few days, that maximum flow does not indicate any considerable length of time, flow for any considerable length of time. The flow is much less than that ordinarily, but our contention is that the water of those springs has been taken into the system

and has been used and used beneficially, all of the water.

MR. WEDGEWOOD: what is your average flow?

MR. F. S. RICHARDS: I don,t know, we will show that later on. I am not familiar with all the testimony in this case. I have not examined the witnesses myself to know as to that. They have been interrogated, however.

MR. C. C. RICHARDS: With regard to the matter of the appropriation, your Honor please, I understand the point was this, as early as 1901, or thereabouts, notices of appropriation were posted.

THE COURT; This Maple spring?

MR. C. C. RICHARDS: Yes sir, this spring.

THE COURT: All the rest were conceded.

MR. C. C. RICHARDS: Yes sir, all the springs, but I want to refer to them all to show why this spring was not used earlier. They brought in different springs from time to time, and Maple spring happened to be the last spring that was brought in. That is the understanding I have of it, and that is what the proof shows.

MR. A. C. HATCH: Twenty-eight years after they first inaugurated their syste,.

THE COURT: I dislike to open the case so that we are going to have weeks of evidence here, and I will suggest this, if you have such a filing upon the Maple spring I will permit you to offer it now, so that we can go right to that part instead of going to the use and then later the notice of appropriation of this spring. You need not, of course, encumber the record with any matters with reference to the other springs, because all of the parties have conceded that you have taken all the steps necessary to establishing your right to the entire flow of those springs, provided your necessities require you to have them.

MR. F. S. RICHARDS: If your Honor will indulge us a moment.

THE COURT: Limit it to this particular spring.

MR. A. C. HATCH: I understand it is all such springs as they have heretofore taken into their pipe line.

THE COURT: yes, I took it to be that.

MR. JACOB EVANS: Does not in other words include any other springs which have ^{not} been taken into their pipe line and arise in Provo Canyon.

MR. F. A. RICHARDS: We are not making any claim for any.

MR. JACOB EVANS: That is different from what the city has usually been claiming, they have claimed them all and claimed a right to take them whenever they wanted it.

MR. A. C. HATCH: That is the reason we took the Maple spring.

MR. F. S. RICHARDS: I understand the Maple spring was the last of those springs that were filed upon taken into the system.

MR. A. C. HATCH: We don't understand the Maple spring was filed upon at any time or at all. This is the first intimation we have ever heard of it.

MR. WEDGEWOOD: Even if it was filed on in 1901 or 1908, eight years elapse, we don't admit that filing has any force at all..

MR. JACOB EVANS: It is not valid, it was our water to begin with, they had no right to file on it.

THE COURT: We will determine when the evidence is in what was done.

MR. C. C. RICHARDS: Little confusion as to the names here.

MR. RAY: Mr. Story and I are both very anxious to know the scope this proceeding may take. In view of my admission I am not interested in the litigation as to the springs. As to the quantity of water to which they are entitled for the municipal uses it seems to me that has been litigated

pretty thoroughly, and I don't know whether it is the purpose to again open up the quantity necessary for fire pressure and street sprinkling and for hydrants and lawns and all those things and go into them again or not. If it is it will take a good many days, and personally my engagements are such I cannot attend them. I have to be at Denver on the 11th, and I know we cannot hear them by the eleventh at the rate it took us to hear them before. I did not understand the case was to be opened for that purpose, and made no arrangements for attending upon the court that long, and would like to be advised as to the scope of this hearing.

MR. A. C. HATCH: If the court please, my understanding of the matter was that the court had heard them with regard to their necessities for culinary, domestic and irrigation purposes, and their pipe line uses, except as to pressure. The complaint was that the quantity of water permitted to flow into the pipe did not give them fire protection. That was the idea that I left the court with, that that was the only question that would be gone into, was whether or not the water that was awarded to them was sufficient to give them a fire protection, be pressure sufficient to give them pressure. Judge Wedgewood argued it at considerable length that it was their duty to put in a pressure box somewhere so that the water would not be wasted. I never understood that the question of all of their necessities and so on would be gone into again, because days were taken for that before.

MR. C. C. RICHARDS: When did you get the idea it was simply to be confined to fire protection?

MR. A. C. HATCH: At the last session, because, if the court please, the whole matter other than that had been gone into here for days.

MR. C. C. RICHARDS: Will you permit another question?

MR. A. C. HATCH: Yes.

MR. C. C. RICHARDS: I understood when we opened

this hearing today you insisted your understanding was the court was not to hear anything about the water works, nothing but the abreage of the city lots . When did you get this change of understanding?

MR. A. C. HATCH: I haven't had any change, Brother.

THE COURT: Let me ask a question. What was your expectation in regard to introducing proof along those lines, did you expect to go into those questions?

MR. F. S. RICHARDS: We expect and understood this case was open for the purpose of showing we had made the appropriation of these springs, and made beneficial use of that water, and that it was necessary to supply the necessities of Provo City. We understood we were permitted to make that proof, and come here prepared to do it.

MR. A. C. HATCH: There is where I raise the question.

MR. F. S. RICHARDS: Now, as to the time that would be required I told Mr. Ray myself the other day, on Friday or Saturday, it would be impossible for us to get through in one day, it would require several days, I didn't know how many days, and first half of this day was taken up in other matters.

THE COURT: I will say, gentlemen, the court will not permit you to duplicate the evidence that is in. I think we ought to understand that. Will not permit a duplication of the evidence in. With that understanding, I am a little at a loss to know what evidence you expect to introduce, and if you can indicate to the court what you expect to introduce in support of the fact you have put this to a beneficial use, it might answer Mr. Ray's question.

MR. RAY: Yes, that will be it.

THE COURT: What will be the line?

MR. F. S. RICHARDS: We expect to show the quantity of water in the system, and have used it all and have used it beneficially.

THE COURT: I think that will take a very short time.

I would not suppose you ought to take more than an hour to show that.

MR. C. C. RICHARDS: It cannot be done way we are going here, one question asked and half an hour argument.

THE COURT: Expect to show measurements of the water?

MR. C. C. RICHARDS: Expect to show measurements of the water.

MR. A. C. HATCH: If the court please, they attempted to do that before.

THE COURT: I don't remember they did it.

MR. A. C. HATCH: They were asked with regard to it many times as to the quantity flowing in their pipes, your Honor will remember that, and as to the amount necessary for irrigation, lots were gone into. You remember Judge Corfman questioning and the expert testimony as to the necessities and diverse witnesses as to the use of the water for sprinkling purposes and other purposes.

THE COURT: Pardon me, I understand Mr. Richards' answer that the question of their necessities is not going to be gone into at all, any expert testimony with reference to their needs and necessities because he did not include that in the statement to me as to the evidence. It is merely the water they had used. Is that correct?

MR. C. C. RICHARDS: I don't understand, we expect to offer nothing but a few measurements. I suppose we are here for the purpose, the case was opened for a purpose, and as I understood it, that purpose was to give us an opportunity to supply evidence that had been omitted upon this item. Now it is to be of no importance to prove City if we are going to open the case and not put the evidence in.

THE COURT: That is the reason I asked you to indicate the character of your evidence.

MR. C. C. RICHARDS: Yes, and we expect to show by actual measurements the amount of water put in, and we shall

offer -- I don't know whether the court will admit it or not , but offer evidence as to the needs of the city.

THE COURT: I doubt whether the court would want to take the time.

MR. C. C. RICHARDS: I presume the court will allow us to make the tender and make the record.

THE COURT: Certainly.

MR. C. C. RICHARDS: The court may rule on it when we get to it.

THE COURT: We spent so much time on that question, and experts were brought here and testified what the needs of the city were for those purposes, for fire purposes and sprinkling.

MR. C. C. RICHARDS: I appreciate that, your Honor please, and also appreciate the fact days and days of time were taken to agree upon the acreage, yet when it was found so far wide of the mark, the court has opened it that we may go to that.

MR. A. C. HATCH: When you come to it you will find that the final measurements there is very little difference from the proof originally given.

THE COURT: I will say this, gentlemen, the court's engagements are such I cannot permit you to retry the case to the extent you indicate you would want to retry it, to go into the necessities of the city and offer witnesses.

MR. C. C. RICHARDS: we do not expect to offer many witnesses on it, your Honor.

MR. A. C. HATCH: I don't think they should be permitted to offer any.

MR. C. C. RICHARDS: Ask the privilege of making the tender.

THE COURT: If you will indicate to the court any reason why the court ought to do it that appeals to the court, the court will do it even though we had to do it at great

inconvenience.

MR. C. C. RICHARDS: I would rather do it as we proceed with the case.

THE COURT: The only object the court had in asking this question, and I beg your pardon for doing it, the only object was I might accomodate Mr. Ray. I don't think we ought to take the time of the court discussing the questions we have been discussing last five minutes, except it will be an accomodation to a number of counsel if we could know something about the length of time, and that is the only excuse the court had for bringing it up at this time.

MR. C. C. RICHARDS: I think we could get by that question by probably tombrrow noon, if that would be satisfactory to counsel.

THE COURT: As I was suggesting, if you will indicate to the court as you did as to the acreage, some reason that will appeal to the court as that did, the court will probably permit you. There has not been anything indicated yet that would justify the court in permitting you to introduce any evidence.

MR. F. S. RICHARDS: Let me suggest we came here expecting to prove our appropriation of this water, and I think we started in in an orderly way to do it. I don't know whether the court will agree with me in regard to that or not, but I think so. Now, we proceed about to a certain point where certain admissions have been made that narrows the issue somewhat, as I understand it, does it not?

THE COURT: Very much; seems to me almost entirely.

MR. F. S. RICHARDS: Now, it changes the situation, and we have to rearrange our testimony and make it apply to the point now in issue, not those that are conceded, so we are not prepared at this particular instant to indicate just what we are going to do from now on, but we have indicated in a general way what we supposed we had a right -- ground we

we had a right to cover, and what we shall offer to cover, what we shall attempt to prove if the court accepts the proof, well and good, and if not-- when the time comes, if your Honor please, and we shall endeavor to be as brief as possible and cut out all these matters that are no longer essential to be proven, and as we reach these points, we will endeavor to show your Honor the reason why this should be done, of course. We want to present this case in a persuasive way to the court, we don't want to present it in a way to invite the court to refuse our testimony, want to offer it in such a way, if possible, that the court will accept the testimony because we believe we are right, we believe we are entitled to more than we have got, and we expect to get more than we have got, and expect this court to give it to us, and if the court don't give it to us, then we expect to have a record that we can raise the question elsewhere, but we don't propose to come before the court to present these matters without presenting them in the most persuasive way we can and present all the reasons we can. Do I make myself clear. We want to get at it as rapidly as we can, but we have to take a little time to determine exactly what we are going to offer.

MR. STORY: May I speak just a moment about a matter. I want, of course, to give all the time that is necessary to the case, but it seems to me it is unnecessary for me to remain here unless something is going to be taken up that affects my client. I understand from your Honor this morning it is not your intention to rule this session upon the matters discussed at the last two sessions.

THE COURT: No, I will determine all of the matter together.

MR. STORY: For instance, the question of amendment to pleadings, anything of that kind would not be taken up now. Now, I understood the plaintiff's position to be in so far as amending their pleadings to attack the Chidester decree

was dependent upon your ruling on these other questions, and that they would determine after that ruling was made whether or not they would make an application to amend. I, of course, wish to resist the amendment at any time, but did not want to have it taken up in my absence, that is all.

MR. JACOB EVANS: I understood at a former hearing the court had indicated he would permit this amendment to be made, and based upon that the evidence was introduced by General Wedgewood, showing the circumstances concerning the trial in the Chidester case, and after we had in effect gotten from the court a ruling permitting us to amend, to permit that evidence to be introduced, in view of the arguments that were made and matters presented, we then stated we did not know whether we would want to make the amendment.

MR. STORY: I have quite a different recollection.

MR. JACOB EVANS: That is my recollection of it.

MR. STORY: Your Honor turned and asked them if they wanted to amend, and they said no, they did not want to decide they wanted to amend, and they left that for a matter for them to determine whether they would make the application after your Honor had ruled on this other question. In other words, it was certainly not a proposition of "Now you see it and now you don't, we will do it if we want to and not if we don't". Certainly this court did not make any ruling unless I totally misunderstood the situation, that they would have the right to amend. If they were going to amend they would have to make a formal application for that privilege.

MR. WEDGEWOOD: Mr. Story, the record will show what took place.

MR. STORY: I would like to know now whether that is the case, did you make an application to amend?

MR. WEDGEWOOD: Whatever was done, the record will show.

MR. STORY: I think I have a right to get the court's recollection of it.

MR. JACOB EVANS: I haven't any objection to hearing what the court's recollection is.

MR. STORY: I am willing to stand on the record made at that particular time, but wanted to know if anything more was going to be taken up at this session in respect to the amendment?

MR. JACOB EVANS: We would like to have it understood now and here if we feel disposed to ask to amend, in view your Honor has stated you were going to decide all these matters at once, we will have an opportunity to ask that at any time we see fit to do it during this session.

THE COURT: I take it it will be asked at a time when Mr. Story will have an opportunity to resist your application.

MR. JACOB EVANS: Certainly I have no objection to that.

MR. A. C. HATCH: The statutes provides the court may of its own motion direct an amendment to conform to the proof, and the court may treat the amendment as made where the evidence is introduced without objection supporting the finding, the court may treat, considering the amendment as made without a formal making of the amendment.

MR. STORY: That is a very different proposition.

MR. A. C. HATCH: That is the general rule. Now, we are considering those matters.

MR. STORY: But the point is this--

MR. A. C. HATCH: Pardon me.

THE COURT: I understand there is nothing now, gentlemen, between you. Mr. Story is assured that when the application is heard by the court he will be notified in advance so that he can be here.

MR. STORY: That is all I want.

MR. JACOB EVANS: I might say now, in his presence, before he goes away, in all probability such an application may be made, so that, if it is going to delay the court to get

notice to him he ought to remain here until we determine what we are going to do in respect to that.

MR. STORY: That is hardly fair. You have had a good many weeks to determine that. I have a great many engagements, I have to go to Colorado. If you are going to make it, I think I ought to be entitled to the courtesy of a statement when it will be made. I don't think it is necessary for me to remain here waiting for it to come up without notice, and I don't think the court should require me to do it.

MR. JACOB EVANS: At the other hearing my recollection is certain matters were submitted, and briefs were to be filed by the power company and on our part. We thought at that time in all probability that question would be determined before this hearing, and at that time, and because of that thought in our mind, we said we would delay making our application until that decision was made.

THE COURT: That is just as Mr. Story stated it.

MR. JACOB EVANS: Now, your Honor says you will probably decide all of these matters together. That raises a new condition here, and that new condition having arisen, we want an opportunity to discuss this matter among ourselves as to the effect of the amendment.

THE COURT: Your position is reasonable

MR. STORY: I suppose then I could have the usual notice.

MR. A. C. HATCH: We don't want to amend so as to re-open and thresh over this case. That is the only proposition, it has been tried upon its merits, and every point we have raised has been contested to the end.

MR. STORY: My position is first I contest the right to amend at this time, and second, if they should be permitted to amend, then, for the reasons which we stated at the former argument we would ask of course permission to amend out plead-

ings and put your amended allegations in issue, and probably raise some very material question as to your right, Blue Cliff right. If they throw the whole case open I can't help it, but if they make the amendment we certainly must protect our interests by attacking a right which we did not attack, and stated in court we did not attack because it was a secondary right.

MR. JACOB EVANS: It is merely raising this question, when we get together if we determine we want to amend, and we are through with these other matters, will we have to remain here two or three days and send word to Mr. Story to come down here, we are about to make a motion to amend our pleadings. We think the court is in session, it is going to be in session until this matter is settled, and we think it is his place to stay here and find out what is going on, just as it is our place or anybody else's who is interested in this matter.

MR. STORY: I think that is hardly fair in a case of this kind. It might be true in an ordinary case, but not this one. I am willing to accommodate you in any way. It is not going to do you or me or anybody any good for me just to sit here and you wait three or four days when you decide to make an application.

MR. JACOB EVANS: This is the first moment we have had any notice of the fact this question which was submitted would not be decided until all the questions were decided together. Now, we want an opportunity to confer together.

MR. STORY: Can you do this, can you determine between now and day after tomorrow morning so that ^{you} I could get word to me tomorrow?

MR. JACOB EVANS: I don't know.

THE COURT I think, gentlemen, you can settle this between yourselves, probably, outside of court.

MR. STORY: I would like to get some permission

from the court to return home. I am going to Colorado on a very important matter, I will come back at the convenience of the court if I can get some indication when the thing is going to be taken up, if it is going to be taken up at all.

THE COURT: I am very sorry the information is so indefinite in relation to that matter. I think probably you and Mr. Evans talking it over after court adjourns can come to some conclusion. I have no idea how long it is going to take.

MR. A. C. HATCH: We will give Mr. Story notice at the earliest moment after we have determined.

MR. STORY: How much notice will you give me?

MR. A. C. HATCH: Time enough so as to give you an opportunity to get a stenographer to dictate anything you have by way of amendment.

MR. STORY: Can you let me know to indicate whether you are going to make an application to the court tomorrow?

MR. A. C. HATCH: No.

MR. STORY: When can you give me the information when you will make the application.

MR. A. C. HATCH: I can't say, I have not conferred with my associates.

MR. STORY: Can you confer tonight?

MR. A. C. HATCH: No, I am going to Heber City as soon as court adjourns. I am like you, I have to go home.

MR. STORY: Can you say whether you are going to make it this session?

MR. A. C. HATCH: No, I cannot say that. If I could, I could tell you exactly when we are going to do it and what we were going to do, and how we were going to do it.

MR. STORY: Can we agree if you make the application for the amendment you will make it before Judge Morse at Salt Lake?

MR. A. C. HATCH: No, I would not agree to go to

Salt Lake for anything except I had to, never go to Salt Lake unless I have to.

MR. STORY: Of course gentlemen, it does seem to me it is not courtesy to require me to sit here.

MR. A. C. HATCH: I am not asking you to stay here. I will say we will give you notice in time to get here if we ask for any amendment, that is all I can say to you.

THE COURT: I think that goes back to the first proposition that you have notice of the time.

1/11

5:00 P.M., Recess to 10:00 A.M., September 4, 1918.

10:00 A. M., Recess to 2:00 P. M.

MR. A. C. HATCH: If the court please at this time we wish to ask the court for an order permitting the plaintiff to amend its complaint to conform to the proof already submitted, and we present a formal written motion to that effect, and by reason of Mr. Ray representing some of the defendants and Mr. Story representing others of the defendants we ask that they be noticed by the clerk of the proposed amendment. We can mail them or give ~~them~~ to the clerk copies to mail to them before the court passes on it. We wish to submit the formal motion at this time. I will hand the original to the clerk.

THE COURT: When we adjourn this session I will fix a time when the court will be able to hear this, possibly tomorrow, I don't know.

MR. A. C. HATCH: For the benefit of all counsel present, I will say that the effect-- or probably had better read it, not having copies for all, and then state the effect of it. Under the title of the court and cause, now comes the plaintiff in the above entitled cause (Reading).

The effect of that will be to eliminate from our complaint the Chidester decree and leave the matter before this court subject to the proof, as though there was no Chidester decree.

MR. JOHN E. BOOTH: May I ask Judge Hatch if this interferes at all with what is called the Morse decree?

MR. A. C. HATCH: We were not parties to the Morse decree in any proceeding.

MR. JOHN E. BOOTH: I understand that.

MR. A. C. HATCH: And I don't know whether or not it does affect the Morse decree, but it will do to the extent that the Morse decree does award to the parties more than by the proof in this case is shown to be their necessary beneficial use.

MR. JOHN E. BOOTH: If I may just take a moment. The reason I asked, your Honor will probably remember at the time the Morse decree was decided in 1902, as I now recall it, your Honor there provided that when there was 250 second feet in the river, up to that time no division was necessary, that everybody was supplied. We agree with that, we have never questioned that. Now, we should probably oppose the amendment in case it comes and interferes with the waters below 250 second feet per minute.

MR. A. C. HATCH: Under this claim we claim 305 feet is the normal flow, and it might to this extent affect that decree; we claim of that 46 and 2.

MR. JOHN E. BOOTH: I recognize that.

MR. A. C. HATCH: 46 second feet, and that might, if it should fall below 250 feet, it might bring it within a pro rata distribution, that claim that we make; other than that it would not in anywise, as I understand the matter, in any way affect the Morse decree; and now as I also understand, for twelve years last past, except this year, it would not in any way affect the Morse decree. This year I am informed

that the river at one period was reduced to 220 second feet, and in that case the pro rata distribution would reduce.

MR. JOHN E. BOOTH: Everybody.

MR. A. C. HATCH: Yes, and if we were permitted our 46 second feet, claimed a pro rata distribution, there would be one year in twelve or twenty that everybody would be more or less reduced.

MR. JOHN E. BOOTH: Now, all the rights that I represent at the old ones, and all of them under the Morse decree, who receive their water under that. Now, if they get that why we would just as leave the Provo Reservoir would use every drop of it as not, that has been out contention all the way through, or somebody else; we would prefer the water be used instead of running to waste.

MR. A. C. HATCH: Our position is this. We were not parties to the Morse decree, the Blue Cliff and those who are made defendants in the Chidester case were not parties in the Morse decree, as I understand, and they were brought into court so as to adjudicate their rights, and the Chidester decree gave a lump sum to the plaintiffs covering all those whose rights had been determined by the Morse decree. They united in prosecuting the case to determine the rights of others, whose rights had not been adjudicated, and we were parties to that Chidester decree.

MR. JOHN E. BOOTH: So far as your predecessors are concerned?

MR. A. C. HATCH: Yes, so far as our predecessors are concerned, Blue Cliff was concerned, and our contention now would be that the Chidester decree being so uncertain and not determining really, not determining anything, that we are not bound even by our predecessors as to the Chidester decree.

MR. JOHN E. BOOTH: The reason I asked was if it does not go back farther than so as to interfere between the

parties themselves that were members of the -- or parties to the Morse decree, I don't think we have any objection to your amendment.

MR. A. C. HATCH: You can understand knowing Judge Booth, the testimony in this case that only one year in thirteen, as I understand it has the water been below that quantity, and when it is above that quantity, when it is up to 300 second feet, we become a party.

MR. JOHN E. BOOTH: That is satisfactory too.

MR. A. C. HATCH: Of course, going farther, I don't want to be unfair or mislead anybody in this proposition -- we understand that the waters are continually increasing.

MR. JOHN E. BOOTH: I agree with you.

MR. A. C. HATCH: By reason of their use on land above, and that the quantity of water at the mouth of Provo River -- Provo Canyon is greater from year to year than it was in years long past, and that so long as the flood waters are put upon new lands higher than the mouth of Provo Canyon that this condition will continue, that is, that there will be a continuing increase.

MR. JOHN E. BOOTH: I recognize that, that is true.

MR. A. C. HATCH: And the conditions prevailing now we assume will continue so long as the population that now exists above is there, and that the population and the increased use will continue of the surplus or high waters, and that would be primary water forty years ago was wholly consumed by Provo City, we admit that.

MR. JOHN E. BOOTH: I have a government record about it being down here less than 150 second feet one time.

MR. A. C. HATCH: Yes, but that was a condition none of us have a right to believe will ever exist again.

MR. JOHN E. BOOTH: I certainly agree with you on that. *Huc*

MR. A. C. HATCH: Therefore what was the maximum of

primary water forty years ago would not be a maximum of primary water today. Now that is our theory as I understand it, and we are claiming not as primary right that which years ago we would only have attempted to claim as a secondary, or even a third or fourth or fifth right.

MR. JOHN E. BOOTH: You don't need to take this down; I will make this side remark. As I understand his theory suppose that A and B settle on a stream and take all the water, that is a primary right.

MR. A. C. HATCH: Yes.

MR. JOHN E. BOOTH: Now, the water increases from natural sources, permanently increasing, C comes along and takes water. Now, that is a primary right so long as he gets a primary right as good as the others. When it is that way. That is my understanding of it.

MR. A. C. HATCH: Yes, but going further, the theory as I understand is this, that after a use of seven or eight or nine or ten years the water shall again be reduced down to where it is less than that originally used by A and B, C has spent a life time probably on his place, but he has been treated by all the courts when that condition, if it ever should exist and we haven't any record so far as I know of that condition ever having come about, but if it should come about he would be treated as in the same class, and A and B will be required to pro rate with him. That is my understanding of the right, otherwise no man would attempt to settle upon a stream after one or two had diverted water.

MR. F. S. RICHARDS: Did your Honor say time would be appointed for the hearing of this motion?

THE COURT: Under the arrangement that Mr. Story and Ray were to be notified of the hearing when we get through with this session, I will indicate when I will hear this. If I am to be here tomorrow, I will hear it tomorrow.

MR. F. S. RICHARDS: I was not certain of it.

THE COURT: I don't care for any discussion of it now because it all ought to be at the same time. Now, you may proceed, Judge Richards.

HENRY J. W. GODDARD recalled.

DIRECT EXAMINATION By Mr. C. C. Richards.

- Q Mr. Goddard, have you been sworn in the case?
- A Yes sir.
- Q You are one of the City Commissioners?
- A Yes sir.
- Q And in charge of the water works of the city?
- A Yes sir, I have been.
- Q How long have you been in charge of them?
- A Nearly six years, this will be the sixth year.
- Q This is your sixth year, and have you had to do with the direction of the distribution of the water?
- A Yes sir, general supervision of it.
- Q And have had under you what employes who have had immediate charge of the distribution?
- A I have had a superintendent of water works.

MR. JACOB EVANS: I would like to inquire whether this is directed to the irrigation water?

MR. C. C. RICHARDS: Water works system; I haven't said anything about irrigation was, and don't expect to.

MR. WEDGEWOOD: I object to it as immaterial, as the matter now stands, we have conceded everything except quantity. Now it seems as though the questions might go direct to quantity.

THE COURT: These are preliminary questions to show his familiarity with the situation.

MR. WEDGEWOOD: I know, but he can tell what he knows.

and then we can see.

MR. C. C. RICHARDS: If you will be patient we will get to it pretty rapidly. Answer the question, Mr. Goddard?

A I have a superintendent of water works, and from three to six and seven men.

MR. WEDGEWOOD: we will admit, your Honor please, that Provo City had water works, has people to care for these water works the same as any city of its character does, that the water goes into the houses, supplies culinary and domestic use in its broadest sense, bath tubs and toilets and all those things, uses of the water for sprinkling lawns, and I think it is in evidence the city is ten thousand people and everything is complied with in Provo City so far as the machinery for carrying on the water works is concerned. The question we don't admit is quantity.

MR. C. C. RICHARDS: what was the question asked.

(Question read)

Q What were those men engaged at doing?

MR. WEDGEWOOD: I object to it as immaterial under the admission.

THE COURT: Objection sustained. I sustain the objection because all of that was gone into very thoroughly if I remember.

MR. C. C. RICHARDS: It is not my recollection, your Honor, and is intended to be very brief. I state very frankly that the purpose of this offer and what I propose to show by this witness is the employment, and I propose to offer the employes themselves who are engaged in the service of distributing this water, and who knew of the leaks and wastes and use made of the water, and to show by this witness and by others that there were no leaks that were not promptly repaired, and that those repairs were given preference over all other service, and that there is no waste of water, that the water that was turned into the system was all used and

used beneficially; that he had a number of employees, as he stated, and they are here, and we propose and offer to prove by them that they were in constant touch with the system, in the constant service seeking and hunting any leaks, repairing them, watching the use of the water upon the lawns, and that the users of water for lawn purposes were restricted during the summer season to a limited number of hours, and that in fraction of the rules, violators of the law were prosecuted, and that every effort was made and service rendered to make as nearly impossible the loss of water as could be; and I will show in addition to that the actual measurement of the water. Now, I might have put the measurements on first. I have them here and will put the witnesses on unless the table is agreed to without them. The witnesses are here to show the number of feet that went in and the actual use of the water for a beneficial purpose. The witnesses will be very brief, unless they are held long on cross examination.

MR. F. S. RICHARDS: We desire an exception to the ruling of the court on this question.

MR. A. C. HATCH: If the court please, I understood they would not be allowed to supplement testimony already in. This witness was sworn, was examined at length with regard to all of these matters in the original case, and other diverse witnesses were, and proof was offered to rebut the testimony and to show waste from all parts of the city. Your Honor will remember the testimony of the men who testified to water running to waste at the outlet of the pipes. Mr. Wentz testified as to the water flowing out of the pipe between here and the intake at different places. All of those matters of breaks and leakages in the pipe were gone fully into and this is not supplementary evidence, as I understand it. It is the same witness practically rehashing the same testimony that he gave in the original hearing.

MR. C. C. RICHARDS: I don't understand, your Honor

please, this witness had given this testimony in this way.

MR. A. C. HATCH: Other witnesses did.

MR. C. C. RICHARDS: Now, that's it.

THE COURT: Let me understand what do you understand is before the court now?

MR. C. C. RICHARDS: The question of proving the necessity of the use and beneficial use of this water. Our purpose, two points we have here --

THE COURT: I don't understand there is any question before the court. The question was asked and the court sustained the objection to the witness testifying as to the number of people who were employed by the city. I don't understand any other question has been asked. I don't understand any other question is before the court.

MR. C. C. RICHARDS: All right, your Honor; we will proceed then.

Q You were familiar with the system, were you, Mr. Goddard?

A Yes sir.

Q Were you frequently up and down the different parts of it through the city?

A. Yes sir.

Q So as to make observation as to whether the water was being beneficially used or wastefully used?

A Yes sir.

Q Do you know whether it was being beneficially and economically or wastefully used?

MR. WEDGEWOOD: Object to it as immaterial.

THE COURT: Objection is sustained.

MR. F. S. RICHARDS: Exception.

Q Did you have persons employed to ride through the city and make observation of whether the water was being carefully and economically used, or wastefully used?

A Yes sir.

Q Do you know, Mr. Goddard, whether during the warm part of the year, the warmest part of the season, when the water was

the scarcest, whether the water users were limited as to hours for use for sprinkling purposes?

A Yes sir.

Q Do you remember what the hours were?

MR. A. C. HATCH: If the court please, we object to that at this time, for the reason that it has already been testified to, gone over by diverse witnesses at the original hearing, and it is simply burdening the record at this time with a repetition. We admit that they were limited as to hours and use.

MR. C. C. RICHARDS: That is all I am asking. We could have had it in less time than the objection. I don't want to re-try this case, your Honor please, but there is thirty-four hundred pages of testimony; I have read it carefully, I cannot pretend to recall it, my brother cannot. If it is in once I don't want to put it in again. If it is not in once I do want it in, and think my clients are entitled to have it in. I am trying to get it in as brief as we can, and simply to urge this one point that we claim to be trying to get at in good faith on both sides. My brother laughs at me, I think he well may. We are simply trying to prove a beneficial use and that is is the water economically used. That objection to every question we put.

MR. F. S. RICHARDS: Which brother are you referring to?

MR. C. C. RICHARDS: Not you.

MR. A. C. HATCH: The time and area upon which it was used and amount, and every use except the quantity that was used for fire purposes was wholly gone into at the former hearing. People were put on the stand here to testify how they irrigated their lawns, how long they sprinkled and the time was testified to, that they were put upon certain time, and that is why we object.

MR. WEDGEWOOD: Your Honor please, just one word.

Your Honor said last night you would permit them to prove the quantity. Now, I am frank to say I chafe to sit here and go over this thing which is absolutely unnecessary unless we raise it on cross examination. What I would like to get at, what they claim, what do they want, then when that is put in, then if this thing is necessary they can have it. We think it is not necessary.

MR. G(C. RICHARDS: I will show you, General Wedgewood in figures. I was going to follow it with this witness, if you are going to make those admissions save calling the witness, otherwise I will call them.

THE COURT: Now this objection being sustained, are you willing to take the concession offered by the plaintiff?

MR. C. C. RICHARDS: No sir, I take it as he makes his admission it is a voluntary statement, and let it go of record, but I don't think we should be bound by his--

MR. A. C. HATCH: If they don't accept it, we withdraw it.

MR. C. C. RICHARDS: You may withdraw it.

THE COURT: As the admission is withdrawn the objection is overruled. I would sustain the objection if the admission was left in the record because I think the admission covers all that you were asking.

MR. C. C. RICHARDS: I was interrupted twice while the admission was being made. It is possible on the stenographer reading it--

MR. A. C. HATCH: Our admission was they were limited to time of use or use for sprinkling purposes, not that they were limited at all as to any other uses.

MR. C. C. RICHARDS: That doesn't show whether it was a reasonable of unreasonable limit.

MR. WEDGEWOOD: Without the witnesses who made this it is not intelligent to me.

MR. C. C. RICHARDS: Of course not.

MR. WEDGEWOOD: This don't get at it.

MR. C. C. RICHARDS: Oh no, and the witness won't that we are interrogating.

MR. F. S. RICHARDS: Cannot prove the whole case by one witness.

(Question read)

A Yes sir.

Q What were they?

A In the morning between the hours of five and eight. In the evening between five and eight.

Q And were they the only hours that the water users were permitted to use the water upon their lawns?

A I think there was certain portion of Center Street was allowed to use it during the noon hour when the sprinkling carts were not on.

Q Now, what length of time were those hours enforced?

A You mean as to --

Q What time in the season did you put that regulation into force?

A All through the sprinkling season.

Q Now--

A That would be from -- it would vary in different years-- from April to October.

Q Whenever the consumers were using water and sprinkling their lawns?

A. Yes sir.

Q They were limited to those hours?

A. Yes sir.

Q And that has been so for each of the years you have been watermaster?

A Except in 1912.

Q How was it that year?

A We had no limit to them then.

Q Sir?

A In 1912 we didn't have them timed.

Q You didn't have any regulation?

A No.

Q Now, Mr. Goddard, while you were acting and have been acting

as the -- what has been your title-- water commissioner?

A That has been one of the departments that was allotted to me in the division of the city government.

JOHN R. STEWART, recalled.

DIRECT EXAMINATION By MR. C. C. Richards.

Q Now, Mr. Stewart, you are city engineer, I think you testified during the first six months of 1912?

A Yes sir.

Q During that time did you make measurements of the water flowing from the springs in the canal?

A Yes sir.

Q What springs did you measure the flow from, all of the springs?

A I measured the flow from all the springs that we had weirs on.

Q Well now, which of the springs that are now flowing into the system were not included in that measurement, if any?

A Spring known, I think spoken of here as the Maple spring.

Q That was not flowing in?

A Which is on this map noted as the Yellow Jacket spring. It was not then flowing into the system; and one other spring along the north side there, I don't remember now the name of it, but small, rather small stream.

Q Have you in mind approximately the quantity of water there was there so as to give us an idea of it?

A In the one--

Q In the one that you didn't get in, I don't mean the Maple spring or the Yellow jacket spring. In the other one you

say a small spring not included in the measurement?

A No, I have not measured, I have seen it but have not measured it.

Q Have you an idea sufficient that you could give an approximation

of it so that the court may get an idea of the quantity?

A It would only be a rough guess at two or three tenths of a second foot.

Q Perhaps a quarter of a foot, two and a half tenths would be a quarter, would it?

A Yes sir, might be that much; it wouldn't be larger than that.

Q With that exception this covers the rest of the water, with that exception and the Yellow Jacket or Maple?

A Yes sir, Spring Dell weir covers all the water in one measurement that came into the system at that time.

Q Now, you measured that--

A I measured that Spring Dell weir on a number of occasions.

Q What is your first measurement as you have it there?

A In 1912, first measurement was 44 hundredths --

Q No, what was the date?

A March 19th.

Q When?

A March 19th.

Q Go back and see if you didn't measure it earlier.

A Oh, let's see, oh, yes, have a measurement here January 23rd.

Q January 23, 1912? A. Yes sir.

Q This was at Spring Dell, the point you have described, was it, where this measurement --

A Yes sir, I took a number of them, but the Spring Dell weir takes them all.

Q I know, but that is the point you have just described at the weir at Spring Dell? A. Yes sir.

Q That you are now going to testify of?

A Yes sir.

Q How much water did you find there at that time?

A Shall I give the depth on the weir or total?

Q The quantity of water?

A 7.18.

Q When did you measure again?

MR. JACOB EVANS: That is second feet?

MR. C. C. RICHARDS: Yes.

A On February 7th.

Q Same year? A. Yes sir.

Q At the same point? A. Yes sir.

Q How much water did you find?

MR. A. C. HATCH: Were all of these in 1912?

A All in 1912.

Q How much water did you find flowing at that time from the springs?

A 6.70.

Q When was your next measurement made?

A February 21st.

Q What quantity did you find then?

A 6.60.

Q That was at the same point? A. Yes sir.

Q When was the next measurement made?

A March 19th.

Q And at the same point? A. Yes sir.

Q How much did you find then?

A 5.90.

Q When did you again measure at the same point?

A On April 2nd.

Q How much did you find then?

A 5.41.

Q When did you again measure?

THE COURT: Might I ask could not Mr. Stewart just give these without a question each time?

MR. WEDGEWOOD: we will be glad to.

MR. C. C. RICHARDS: Yes.

A April 23rd, 5.76.

Q Go right ahead.

A May 9th, 6.40. That is all I took.

Q Now, did all that water flow into the water system?

A Yes sir.

Q I mean down into the city for use here?

A Yes sir.

MR. A. C. HATCH: Pardon me.

MR. C. C. RICHARDS: You may cross examine.

CROSS EXAMINATION By Mr. Wedgwood.

Q You say all that flowed in the water system?

A Yes sir.

Q How do you know?

A Well, I was familiar with the --

Q How do you know?

A I was telling you.

Q On January 23, 1912, how do you know all the water went in the water system as to any of these hundredths?

A Because there was no outlet for it to go out of the system.

Q That is from the weirs, Spring Dell weir, it could go no where else except into the system?

A No sir.

Q Did you follow it down that day to see what became of it?

A No sir.

Q Now, there are two pipes used to equalize pressure and counter-act air pressure, are there not, in the course of that pipe line?

A I don't know.

Q What I mean is in the pipe there are two standards, that is pipes, which are open at the top, and of a height about equal to your head, so that when air gets into a pipe, or there is any condition which requires a vent, that vent is there; do you know of any such places?

A No, I don't.

Q You don't know whether such things as that exist on the pipe or not?

A I have not seen any on that pipe line.

Q You have not seen any? Have you been over it?

A Yes sir.

Q All over it? A. Yes sir.

Q Then you ought to know whether such a thing exists there?

A Yes sir.

Q You say they don't exist?

A I say I have not-- on that ^{main} pipe line I have not seen any such.

Q I don't care main pipe line, main part of the line?

A There are some vent pipes on some laterals coming in, that is the reason I speak that way.

Q Vent pipes on some laterals?

A Yes sir.

Q What do you mean by laterals?

A Laterals coming into the main line.

Q That is inflow laterals?

A That is inflow laterals above the Spring Dell weir.

Q Above the Spring Dell weir? A. Yes sir.

Q Well, a weir of course is open, that is not in the pipe, is it?

A It runs-- the water must be turned out of the pipe to be run through the Spring Dell weir, so it is turned from the pipe line into the weir box and measured, and then turned back into the system again.

Q That is, all the water?

A All the water that is running through the pipe line.

Q You shut the water off entirely from the system?

A I shut it off entirely while measuring it.

Q Then you turn it out to measure?

A Then I turn it out to measure.

Q And above that point there are two or three vents I speak of?

A Air vents, yes sir.

Q Below that there are none?

A None that I saw.

Q So then we get the understanding now that this water that you measured was in the pipe? A. Yes sir.

Q You took it out of the pipe to measure it?

A Yes sir.

Q And turned it back into the pipe again? A. Yes sir.

Q When I say turned it back in, of course, you shut down the gate, couldn't turn this water, could you?

A No, that has gone into the river after it is measured.

Q There is no mistake about this now, then this water was in the pipes, you took it out of the pipe? A. Yes sir.

Q And measured it? A. Yes sir.

Q And at those times so then it is a certainty the water was in the pipes? A. Yes sir.

Q Now, from head to its termination, what is the size of the largest pipe, diameter?

A 27 inch.

Q 27 inch; how many feet of 27 inch pipe?

A I don't remember.

Q You don't know? A. NO sir.

Q Then you don't know the capacity of your pipe, its carrying capacity, if you don't know its length?

A I know approximately.

Q Just answer my question. If you don't its length you don't know its containing capacity, do you? That is a factor that must be used to get at its containing capacity, is it not?

A yes sir.

Q That you don't know?

A Not absolutely, no.

Q You never measured it?

A The length of it?

Q Yes.

A Not all of it, no.

Q Well, that is what I asked you. Now then, if you don't know its length, you not only don't know what its containing capacity is, but you don't know what its discharge capacity is, do you, you can't tell?

A Not absolutely.

MR. WEDGEWOOD: I would like to get some data in regard to this if we can now.

THE COURT: Let me understand, Mr. Stewart's answers would indicate that he knows those matters, but not to a degree of certainty that amounts to absolute correctness, is that what you mean?

A That is what he seems to be asking.

THE COURT: No, his questions don't indicate it at all, Mr. Stewart, but your answers do. Now, if you know the carrying capacity or discharge capacity, that doesn't mean you know it to a demonstration to the fraction of a gallon, and if you know just say so, and give us the benefit of it. The court wants the benefit of it. This is not technical. If you had made a computation and have the factors from which you may make the computation, you, I take it, can give us exactly technically the carrying capacity of a variable coefficient of friction and within limits, but if you had the factors from which you could make these calculations substantially correct, I wish you would answer them so that I may have the benefit of the result of your computation.

MR. WEDGEWOOD: Your Honor will permit me, I will try and get it.

THE COURT: I merely thought you answered General Wedgewood's question in a way that he was asking from an absolutely technical standpoint, and I didn't so understand it. What we want is the substantial information you have got, not from a technical position at all.

Q I will try and get it quick. Answer me without reserve at all, all I want is to get at what the Judge indicates, the substantial proposition, not splitting hairs. Now, is this same pipe, as far as it went that was put in originally 1900, 1901 or '91, this 27 inch pipe?

A I am not familiar with that, Judge.

Q Did you ever look up the record to see how long that pipe was,

the record in the engineer's office here?

A If you will permit me to explain.

Q Yes.

A The 27 inch --

MR. A. C. HATCH: Just a moment.

MR. C. C. RICHARDS: The 27 inch pipe was the old system.

MR. A. C. HATCH: '90 and '91, the pipe only relates to the mouth of the canyon.

MR. WEDGEWOOD: As far as it went.

MR. A. C. HATCH: What he is testifying now, I understand, is way up the canyon where the system is extended to Spring Dell.

MR. WEDGEWOOD: I will try and get it from him.

Q Commence at the pipe; where does the pipe commence, the intake pipe?

A At the Spring Dell weir where the waters are collected together. I took these measurements of the water up to that point, flowed through.

Q Above that point.

A Above that point it flowed through a number of laterals of vitrified pipe.

Q Below that point?

A A collecting basin, something of that kind.

Q The pipes come together a little above the Spring Dell weir and at the Spring Dell weir, a 21 inch wood stave pipe begins?

A 21 inch.

Q How long is that pipe?

A I can get it from here.

Q All right, give it to me in feet, if you can.

A 12,448.1 feet. Now, I will make a little correction of that, I will have to add to that 808 feet.

THE COURT: The 21 inch pipe?

A Yes sir.

Q I didn't get your first.

THE COURT: 12,448.1.

THE WITNESS: Add to that 808 feet that gives the length of the 21 inch woodstave pipe.

Q That would be 2,065 feet in round numbers, we will call it, 2,060 feet?

A No, 12,000.

Q That would leave 20,000.

THE COURT: 13,246.

Q 13,246. Now then, what comes below that?

A From there to the -- just above town here, 27 inch concrete pipe.

Q 27 inch concrete; how long is that?

A This other map, I think, will give the length.

Q Give it to me.

A I am not sure though., 18,186.4.

Q About three miles? A. Yes.

Q Then does it go into city distributive mains?

A Then it goes into a woodstave pipe, called a pressure pipe.

Q How large is that in diameter?

A 24 inch woodstave.

Q How long?

A I don't know just where that enters the cast iron pipe.

Q Give us the best estimate you have got from the data?

A It goes, the 25,168 -- 18,186 from that would give the distance.

THE COURT: 6,983.

THE WITNESS: It may go a little farther than that before it enters --

Q Suppose we call it 7,000, would that be ample?

A Very close to it.

Q Now, what is your largest distributing pipe?

A Why, I am not as familiar with that, but I think it is 14 inches.

Q Don't this city know what it has got in that line?

A I am not the city engineer. I have only been a short time, probably trying to get information from me you should get from others.

Q I don't want what you don't know, and don't want to examine you on what you don't know?

A I was only city engineer for six months.

Q I would like to get someone that does know about these things.

MR. C. C. RICHARDS: I didn't call him for that purpose. Just called him for the measurements and asked if it went into the system. Didn't go into this-- I opened the door, it is true.

MR. WEDGEWOOD: I don't want to pursue it beyond what is proper.

Q Where did that 7.81 cubic feet of water go in January, if you know?

A As far as I know it went through the city mains.

Q There was no street sprinkling that time?

A I think not.

Q And no lawn sprinkling?

A I would hardly think so.

Q Anything of that kind? A. No sir.

Q Now, of course, there is a capacity to these pipes, you know that as an engineer? A. Yes sir.

Q Now, when that capacity is filled, then water cannot flow into the pipes, can it? A. No sir.

Q Now, it has got to find an opening or outlet and discharge somewhere else? A. Yes sir.

Q Where does it finally discharge in that case?

A At the beginning of the pressure pipe at the end of the concrete pipe up here, beginning at the end of the concrete pipe and beginning of this 24 inch.

Q That is at those vents or openings?

A Yes sir.

Q That is what I was trying to get at before. Now, what is the

nature of that?

A Well, it is so arranged that when the pipe is full to that point it will overflow.

Q Kindly give me the design of it in a general way?

A It has been some time since I was there, there are other witnesses here could give it better.

Q Can you suggest a man?

A Mr. Jacob, the man who designed it and built it, and he will probably be on the witness stand.

MR. WEDGEWOOD: Probably that is as far as I have a license to go on cross examination with this witness.

THE WITNESS: He is familiar with it.

MR. WEDGEWOOD: Of course we can recall.

GEORGE C. SWAN, recalled.

DIRECT EXAMINATION By Mr. C. C. Richards.

Q You have been sworn?

A I have.

Q You are the city engineer? A. Yes sir.

Q Did you make measurements of the water flowing from the springs up in Provo Canyon that are the source of supply of the city's water for the water works?

A On the Spring Dell weir house.

Q That is the point testified to by Mr. Stewart, the witness who just left the stand? A. Yes sir.

Q What date did you make those measurements; first of them as you have a record?

A On February-- just a moment, first measurement I made was on June 11, 1912.

Q And what quantity of water did you find there?

MR. JACOB EVANS: Just a moment, may I ask a question here? Mr. Swan, you testified in the hearing of this case

for the city, didn't you?

A Yes sir.

MR. JACOB EVANS: You are now the city engineer, and was at that time?

A Yes sir.

MR. JACOB EVANS: Did you give these measurements you are now about to give, in your evidence at that time?

A I gave the measurements in a general way. I was then asked to furnish a list of those measurements and understood those measurements had been placed in evidence, but I did not give them in detail as they are here listed and as I prepared the list, and I understand that list never was entered as was intended, and ^{as} was promised at that time.

MR. A. C. HATCH: Promised by whom?

A What reason it was overlooked, I don't know.

MR. A. C. HATCH: Who made the promise it would be done?

A I was asked to prepare this list and prepared it in accordance with the request, and gave it to the attorneys.

THE COURT: Mr. Tucker?

A Mr. Corfman, Mr. Tucker.

MR. JACOB EVANS: Whether it was introduced in evidence or not, you don't know?

A I don't know, I wasn't in the court room all the time, but I have understood it was never introduced in evidence.

MR. JACOB EVANS: Examination of the record does not disclose it.

MR. A. C. HATCH: Probably in the files.

MR. JACOB EVANS: Probably put in the files as an exhibit.

MR. C. C. RICHARDS: Perhaps so, but be of no use to us, great big mass, we can do it here in a short time. You may go into that list and cross examine on it.

THE COURT: Answer the question; there is no objection made to it.

A 9.65 second feet. *June 11/12*

Q Did you make another measurement? If you made other measurements, state the amount.

MR. JACOB EVANS: Can I get the date?

MR. WEDGEWOOD: June 11, 1912.

A 7/20/12.

Q That would be July 20th.

A 11.725.

Q The next?

A 9/17/12.

Q September?

A 17.

Q What does the 9 stand for, the month?

MR. WEDGEWOOD: Are you talking about September?

A Yes sir, the 9th, the 17th.

MR. C. C. RICHARDS: Kindly give the month instead of your figures. That is September 17th, is it?

A September 17, 1912.

Q How much?

A 12.295.

Q The next?

A October 8th, 10.07.

Q The next?

A January 29, 1913, 8.82.

Q The next?

A March the 28th, 1913, 7.34; April 30th, 1913, 10.39; June 4, 1913, 10.28.

Q What is the next measurement you made?

A The next measurement I made was on September 17, 1913.

Q There was a measurement you are just passing over made by Mr. Snow, was it?

A Made by Mr. Snow, and he gave me the depth and I figured the quantity. He gave me the depth over the weir.

MR. C. C. RICHARDS: Do you want Mr. Swan to give that

or call Mr. Snow?

MR. WEDGEWOOD: Give it now, if there is any question we will call him.

A That was on July 12, 1913.

Q How much there?

A 9.48.

Q All right.

A And on September 7, 1913, 10 $\frac{1}{2}$ -practically. On October 24, 1913, 9.12; on January the 3rd, 1914, 7.92; on February 28, 1914, 7.44; on April 24th, 1914, 10.06; on January 5th, 1915, measurement made by Mr. Snow, same as the others, 11.12; on July 29th --

Q Just a moment, those were all made at the Spring Dell weir, were they?

A All made at Spring Dell.

Q What waters did they include, or included in that measurement?

A That is all the water taken through the distributing system or through the collection system and turned into the water system.

Q And they were turned into the city water works, were they, water system? A. Yes sir.

Q Now, the next measurement was taken by Mr. Goddard, was it?

A Yes sir.

Q At what point?

A That was taken at a point on the aqueduct where new weir was built.

Q What date was that?

A On the Gillespie property. That was July 29, 1914.

Q The quantity?

A Was 12.88 second feet.

Q All right.

A The next measurement was taken --

MR. JACOB EVANS: Now, if the court please, we would like to have an opportunity to cross examine Mr. Goddard concerning these particular measurements, because he is not

an engineer, and want to inquire how this measurement was made.

MR. C. C. RICHARDS: You may do that, he is here.

Q The next was where?

A Next measurement was taken by Mr. Snow at the Spring Dell weir house.

Q What date?

A October 29, 1914.

Q Quantity?

A 7.47.

Q The next?

A On November the 19th, 1914, taken by Mr. Snow at Spring Dell, 8.02.

Q The next?

A On December 12, 1914, measurement taken by me was 9.62.

Q Now, these measurements that are -- you are calling now until otherwise noted, are all at Spring Dell?

A Until otherwise noted.

Q In fact there is quite a number here at Spring Dell, the last one is 9.62?

A Was 9.625.

Q What is the next?

A Next is June 7, 1915.

Q Yes.

A 8.9.

Q Yes.

A And on July 26, 1915 --

MR. JACOB EVANS: Last measurement taken by you, Mr. Swan?

A Yes sir, and also this one, 10.2 second feet; the next one was taken by Mr. Goddard on December 21, 1915, 8.62.

Q Yes.

A Next one taken by Mr. Snow.

Q May 4th?

A May 5th -- May 4, 1916.

Q How much?

A 6.75 second feet. I had one out of order here, it was taken March 22nd.

Q That is all right, give it to us now.

A 9.84 taken by Mr. Goddard.

Q That is March 22nd, 1916, 9.84?

A 9.84, and on May 25th, 1916, measurement taken by Mr. Snow, 9.35 second feet.

MR. JACOB EVANS: Who is Mr. Snow?

A Rod Snow.

MR. JACOB EVANS: Is he the city engineer.

A City water works.

MR. JACOB EVANS: Is he the city engineer?

A No sir, he measured the depth over the weir.

MR. JACOB EVANS: I just asked if he was an engineer?

A No sir.

Q Now, the next measurement?

A The next measurement was taken in 1917, on June 27th, that was taken since the date I was on the stand.

Q That is at Spring Dell?

A At Spring Dell.

Q How much?

A 11.16 second feet.

Q What date was that?

A By Rod Snow.

MR. JACOB EVANS: What date was that?

A 27th of June.

MR. JACOB EVANS: What was the measurement?

MR. C. C. RICHARDS: 11.16.

Q The next one?

A March 3, 1918, taken at the Gillespie weir by myself, 5.28 second feet. On June 12, 1918, measured at the Gillespie weir, 6.6, by Rod Snow. On June 28, 1918, measured by Mr. Bostaph and myself, I think that is the day-- no, that was

measured by Mr. Bostaph, 5.16.

MR. JACOB EVANS: How much?

A 5.16 second feet.

MR. JACOB EVANS: Where?

A At the Gillespie weir. The rest are all measured at the Gillespie weir.

MR. A. C. HATCH: Where is that?

A It is on the Gillespie property just below the upper end of the aqueduct, concrete aqueduct.

MR. A. C. HATCH: Settling tank commencement of the system?

A No sir, it is not a settling tank, it is a weir built of concrete just below the gate house.

MR. A. C. HATCH: That is on the new pipe line?

A It is on the concrete adqueduct.

MR. WEDGEWOOD: What I was trying to find out.

Q Let us have the next one.

A Last one we had was in June.

MR. WEDGEWOOD: June 28th.

A Now, July 6, 1918, measurement taken by Mr. Snow, 7.46 second feet and on the 25th of July, 1918, measurement taken by Mr. Snow, 7.62, and this one taken on September 22nd, or August 27th, was taken by Mr. Stewart, I suppose he testified to that.

Q No, he didn't.

MR. WEDGEWOOD: Give it, let's have it.

A 10.52 second feet.

MR. JACOB EVANS: That taken at the Gillespie weir?

A That was taken at the Gillespie weir.

Q Now, I understood you to say as to some of these measurements, I don't know whether you intend to apply to all of them, made by Mr. Snow, who reported the depth of water to you and you made the computation?

A Yes sir.

Q From the report he made to you of the depth was your computation correct so that these figures were reliable and accurate?

A Yes sir.

Q If he gave you the correct depth?

A If he gave me the correct depth.

MR. C. C. RICHARDS: Is there any question about the accuracy of the depth?

MR. WEDGEWOOD: If there is we will raise it.

MR. C. C. RICHARDS: I was going to say this, if so I will call Mr. Snow, if not, I will pass it.

MR. WEDGEWOOD: Pass it.

MR. C. C. RICHARDS: I understand it is my duty not to pass it if you are going to raise the objection.

MR. WEDGEWOOD: We are not going to raise the objection.

MR. JACOB EVANS: Like to have Stewart verify this last measurement, 10.52.

MR. F. S. RICHARDS: We will do that.

Q This water, I understand you, was all above part of the city measuring weir, and was so it would flow into the distributing system of the city?

A Yes sir.

Q And did do? A. Yes sir.

Q Was it used for municipal purposes, or city water works purposes? A. Yes sir.

CROSS EXAMINATION By Mr. Wedgewood.

Q Now, do you know what the distribution pipe in this city is?

A There are a number of distributing pipes after it gets to the end of the 24 inch wood stave pipe --

Q Yes, what is the size?

A There is a wood stave pipe runs down 7th East and 1st North street.

Q I am asking you, you are city engineer?

A Yes sir.

Q I don't care whether wood stave or what they are, what is the largest sized pipe you have got?

A 21 inch, running down from 7th North to --

Q All right, 21 inch? A. Yes sir.

Q I will put that down so we will have it, how long is it?

A It is --

Q Pardon me a minute, let me ask a question. I would like to know how much pipe there is in this city of the various size, can you give it to me here?

A I can by going down stairs to my record, but I haven't that in mind.

Q I know, but I say you can give it to me?

A I can get it.

Q But not here? A. No.

Q Then I won't ask you about it, but ask you to get it and bring it here the first opportunity.

A All right.

Q Now, are you familiar with the point where the concrete 27 inch conduit, whatever it may be, and the 24 inch wood pipe come together?

A I know where the point is.

Q Are you familiar with it, I don't want to ask you about anything you are not familiar with?

A I am not familiar with the internal construction, I know what the operation of it is.

Q Can you tell me who is familiar?

A Mr. Jacobs is the man under whose supervision it was constructed, and Mr. Snow has handled it all the time, and knows just exactly what the conditions are.

Q Now, you say this water was all used for municipal purposes?

A Yes sir.

Q Do you know any more about that than, farther than the fact that it went into the pipe?

A I know it went into the pipe, and I know from the pressure

gauge down stairs about how it was being maintained in the pipe leading from that down to the city.

Q I will try to get something on top of that pressure gauge and see what it rests on; that is the object of my question.

A All right.

Q So we will leave out the pressure gauge at the present time. Now, did you follow the pipe line down from where you measured it here at all?

A I followed it down until it reached the concrete aqueduct .

Q Until it reached the concrete aqueduct?

A Yes sir.

Q Now, do you know what that concrete aqueduct is?

A Yes sir.

Q Personally? A. Yes sir.

Q What is it?

A It is a half circle 27 inches in diameter, with the walls built up until the total depth from the bottom to the top is 35 inches, and over the top is an arched reinforced concrete covering it in.

Q Covering it in? A. Yes sir.

Q Does it contain water under pressure, that is what I want to get at? A. No sir.

Q It does not?

A Water is not under pressure. Water goes through it by gravity.

Q In other words, there is a segment of a circle there substantially half? A. Yes sir.

Q And it is how wide, 27 inches?

A 27 inch radius.

Q Like that?

A I was mistaken when I said 27 inches diameter, 27 inches radius.

Q So then the water does go under pressure until it reaches the 7,000 foot 24 inch wood pipe?

A No sir, does not.

Q Now, is there any outlet, overflow or seep between the Spring Dell weir and the 24 inch wood pipe?

A There is no spillway, no sir.

Q No spillway on this concrete aqueduct?

A There is a valve placed in the low point in the pipe which valve is kept shut except in case we wish to flush the pipe, and that is maintained shut all the time.

Q Shut by a screw? A. Yes sir.

Q Isn't there a spillway at the Rawlins farm?

A I don't know exactly where Mr. Rawlins's farm is, but this side of the head of the concrete aqueduct, what you asked me was between Spring Dell weir house and concrete aqueduct. There is no spill way in there.

Q What I mean --

MR. JACOB EVANS: Asked you if there were any on the pipe line.

Q You understand the first pipe is 21 inch wood pipe?

A Yes sir.

Q Then you get to this concrete aqueduct?

A Yes sir.

Q Now, is there any spillway in that pipe, 21 inch?

A No sir, except the valve I spoke about.

Q Now, is there any spillway where the wood pipe 21 inch and concrete comences?

A No sir.

Q None at all?

A No spillway there.

Q Is there any spillway along the concrete aqueduct?

A Not until you get to the end of the concrete.

THE COURT: Mr. Stewart referred to 27 inch concrete pipe, is that what you are referring to now as the 27 inch radius aqueduct?

A Yes sir.

Q When you strike the 27, or the 24 inch pipe there is no spill-

way in there, or valve, whatever you call it?

A No spillway in that pipe, no.

Q Now let me ask you this. 27 inch radius in that aqueduct that would make 54 inches across it? A. Yes.

Q In diameter?

A Besides extends upwards so that it is 35 inches deep from the low point to the top, top of the wall.

Q 35 up here, and that would be 54 across I got it?

A Just so you understand it.

Q That is it, is it?

MR. C. C. RICHARDS: Would you permit me a question. I think there is a misapprehension, and it will perhaps save time clearing up.

MR. WEDGEWOOD: Go ahead.

MR. C. C. RICHARDS: Do you mean that is 27 inch diameter?

MR. WEDGEWOOD: No, he said radius.

MR. C. C. RICHARDS: He said both, I just want to get it.

A It is a little deeper than 27 inches, because of the pipe extending up. It has a semi circular bottom and 27 inches from the center to the side, and then measured from the low point in the bottom up here to the height of the top of the wall it is 35 inches. That is if my recollection serves me. I will look it up.

MR. A. C. HATCH: Another point, gentlemen, just a moment. You said there was no spillway in either the wood or concrete, you didn't ask about the --

MR. WEDGEWOOD: He said he don't know anything about it and I asked who did know about it, and he told me the man.

THE COURT: The court will take a short recess, and in the meantime probably Mr. Swan can get that.

MR. WEDGEWOOD: May I ask one question, because he may want this.

Q Then, as I understand you, the pressure commences at the highest point or thereabouts; this is not technical so you will get it, of the 24 inch wood pipe at the end of the concrete aqueduct.

A The pressure is due to the water --

Q No, no, no; the water goes under pressure in the pipe at that point?

A It does if it is backed up to that point, not otherwise.

Q We will give you all the chance in the world, that is the first place the water is confined, is it not?

A Yes sir.

Q Now, have you the present knowledge as to the difference in elevation between whatever receptacle there may be from which 24 inch wood pipe goes out, difference in elevation between that point and any point in Provo City?

A I can get that.

Q I wish you would get it, and it will save time.

3:30 P.M. Recess to 5:30 P. M.

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

MR JACOB EVANS: If the court please, after a conference between the plaintiff and the defendant Provo City, the following agreement has been entered into:

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

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

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

Third, That the defendant Provo City withdraws and waives its objections to the classification of the waters of the Blue Cliff right in the proposed decision of the court.

MR. C. C. RICHARDS: That is correct, your Honor .

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

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

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

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

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

MR. C. C. RICHARDS: And we do not expect to raise those objections or renew those objections. We use the word waive there for that purpose to cover it.

THE COURT: That seems to be broad enough.

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

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

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

MR. JACOB EVANS: That was intended, if the court

please to substitute the figures.

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

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

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

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

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

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

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

MR. F. S. RICHARDS: No, we have not made any objection or expressed any opinion on it at all. That matter don't come up, I understand, until the next time.

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

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

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

MR. A. C. HATCH: Not necessarily.

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

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

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

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

MR. A. C. HATCH: But that, if the court please, might be as set forth in our original complaint. We are now before the court proposing to amend.

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

THE COURT: You withdraw that?

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

THE COURT: It seems so to the court.

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

THE COURT: The court will not hear you upon the

application to withdraw this stipulation, neither will I hear them upon any objection to the Blue Cliff.

MR. C. C. RICHARDS: Let us be frank, this was written and read and read by you so that we all knew the identical language, what it meant. It is not our purpose to change it.

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

MR. C. CL RICHARDS: We are not here to play loose with our language.

THE COURT: Now gentlemen, is there something you want to present in the morning?

MR. F. S. RICHARDS: Yes, I suggest we desire to offer some formal proof to support our claim and findings and decree that may be entered along the lines of this stipulation, and we would desire very much if we may be permitted to do that before the court finally adjourns, because we have witnesses here we don't want to bring back. The other matter can be taken up later on when it suits the convenience of the court and parties.

THE COURT: I think we can finish that in the morning in an hour. We will adjourn until nine o'clock. I take it your object is to bind all parties that did not join in the stipulation.

MR. F. S. RICHARDS: And it will be just as formal and brief as we feel we dare offer.

6:00 P.M., Recess to 9:00 A.M., September 5, 1918.

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LEROY DIXON called by the defendant Provo City, being first duly sworn, testifies as follows:

DIRECT EXAMINATION By Mr. C. C. Richards.

Q State your full name, will you?

A Leroy Dixon.

Q You are the mayor of Provo City?

A. Yes sir.

Q Have been since about the first of January this year?

A Yes sir.

Q Have you been connected with the city service prior to that time? A. Yes sir.

Q During what period?

A From January, 1912.

Q In what capacity?

A As City Commissioner.

Q So you have been in the continuous service of the city for the past six and a half years?

A Yes sir.

Q Now, I will ask you if you are acquainted with the water system of the city? A. Yes sir.

Q In its details? A. Yes sir.

Q From the piping at the head of the system in the canyon down to the distributive system in the city here?

A Yes sir.

Q And during your service as commissioner and as mayor, you have had occasion to go over it a good many times?

A Yes sir.

Q So that you know the ins and outs of the entire business?

A Yes sir.

Q And that applies to the supply of water also, does it?

A Yes.

Q What did the system cost, Mr. Mayor?

A I think approximately somewhere near three hundred and fifty thousand, probably a little short of that.

Q Close to three hundred and fifty thousand dollars?

A Yes sir.

Q Do you know whether all the water that is taken from the springs which was testified of yesterday by the engineers is taken into the distributive system of the city?

A Yes sir.

Q Do you know whether it is all used?

A Yes sir.

Q Is it all used for municipal and city purposes?

A Yes sir.

Q and use of the citizens of the city ?

A Yes sir.

Q And do you know whether it is beneficially used or wastefully used?

A It is as beneficially used as we can possibly make it.

Q You may state what provisions by ordinance and rules, if any, in a brief way you have made to conserve the water and secure the greatest possible economy in the use of it?

A We have an ordinance that compels the use of water as directed by the city authorities, placing them on turns, part of the town water at one period and part at another. We also so regulate the sprinkling of the streets that it is done at the best time to take the water, when the residents are not using it for lawn purposes and so forth; and during this year we have found it necessary to put the majority of our sprinkling at night. We have put as much sprinkling during the night period as possible. Our city water works department have men who are continually working, policing the system and watching the waste of water. In fact, every city official is detailed to report any leaks or infractions of the ordinance or waste of the water, open hose, watering out of turn, or any of the things that are usually curtailed with ordinary water systems.

Q In case of leaks what provisions are made for the correction?

A We have two men who are detailed continuously, three men in fact, to watch the wood stave pipe line we have had some trouble with, and they go up the line as often as it is necessary; and we have a leak detector which is attached to the top of a steel rod that they run on the pipe at intervals and different distances, and if there is a leak they can detect it and they report it. In some of the system the

ground is so water logged the water comes to the surface, and those leaks are immediately apparent, and that force is kept on that work continuously, it is their first duty to see that the pipe line is kept tight.

Q And so far as your observation goes has there been any waste for overflow or otherwise of any of the water taken into the system?

A For a number of years past there has been no overflow to my knowledge, except when we have had to keep men working in the canyon. Our first system when put in was put in with open joints, and filled with roots and fibers of the roots, and we have had to reconstruct that, put in a solid cement pipe with cement galleries, and we have had to clean them out to allow the water to get in our collecting system. When we have been making those changes and cleaning the roots there has been little fibers out out, we have used a screen in those galleries to protect it at the head of our pressure, and forming a solid mass like a burlap sack, put over the screen. When that happens of course it shuts practically all of the water out of the system.

Q Then you are detecting promptly there is an obstruction?

A We detect it on our pressure gauge, on the fire department, also here in the court house. I have gone up occasionally during this and last summer and relieved that, and other men do the same. °

Q Do you know of any other obstructions or overflows except those that have been occasioned in those rare instances?

A I don't expect it would be possible at rare periods-- I had one man tell me the other day he had noticed an overflow during the middle of the night at a time during rainy period when we were not using the sprinklers. Those are the only occasions I know anything of.

Q Your effort is to secure the greatest and most economical use of the water?

A. Yes sir.

Q Have you any more, and have you had any more water in the city than you have had use for?

A We have been forced to every means possible to conserve the water because of the necessity. We have had complaints from citizens especially during this year that-- in fact, we were unable during a large part of the season when our system got down as low as 5.16 second feet to give anything like service. The toilets on the second floor of the residences on some streets were unable to be flushed, and the State mental service was absolutely out of commission.

Q State Mental Hospital? A. Yes.
how

Q Now, about the population of the city, is it increasing or decreasing?

A Our population has been increasing very rapidly for the last four years. There never has been a time in the history of the city when we have had all the houses so nearly rented and occupied as we have them today. The coming of the Utah Coal Road and all their force has stimulated the population wonderfully.

Q How about the increase of industries, establishment of industries last two or three years?

A We are making a special effort to get industries. The thing that Provo has lacked has been a pay roll, and we have secured the Goddard Packing Company, the Utah Coal road and other industries that are taking large quantities of water. We have recently had application from the Rio Grande Western, which we believe it is our duty to supply. Their flowing wells have gone dry, or are going dry, to supply their tank. The Utah Coal Road has made application for water for round house, and they estimate they will use something near a million gallons of water, I think they stated, a day to provide their needs. We are not able under the present circumstances to supply it, have not been this summer.

Q Under the distribution of the past season you have not been

able to do that?

A No sir, we could not have taken on any of those new services.

Q And the increase that you have been having and have had the past year or two has been a material increase, and is calling for more water than you have had up to this year?

A Yes sir.

Q And more water than you have had in the system this present year?

A Yes sir. I might state there is another use we are increasing all the time.

Q State anything further?

A That is our parking. We have given the citizens the privilege-- we have a weed condition that is very hard to cope with, and have given the citizens the privilege of putting in parking strips in front of their property, lawns from the side walk to the ditch line, and given them free use of water for that, and expect to stimulate that because it is a necessity to avoid the ill kept places. We are also advocating the parking of the center of the streets. State Mental have already run down half a mile from their property, and city expects to join them.

Q With a view of removing the weed condition and substituting grass and flowers? A. Yes sir.

Q I take it these police observations you have testified of includes looking out for open faucets and running of hose without nozzles, all that sort of thing?

A Yes sir, we quite frequently have had to make arrests and convictions of our citizens for the running of open hose and open taps, and fines, as well as special fines for turning on the water.

Q Do you think of anything further, Mr. Mayor?

A I think that generally is the condition.

THOMAS E. THOMPSON, recalled, testifies as follows:

DIRECT EXAMINATION By Mr. C. C. Richards.

Q How long have you been Commissioner of Provo City?

A Since January 1st.

Q Of this year? A. Yes sir.

Q Were you in the service or employment of the city before that?

A Four years.

Q Immediately previous?

A Four years previous.

Q What department were you connected with.

A Irrigation and also water works; working under the same Commissioner that was Superintendent of the water works and irrigation.

Q Have you a knowledge of the water system?

A Yes sir.

Q Did you hear Mayor Dixon testify in regard to it just now?

A Yes.

Q I don't know, in view of the time, whether the court would feel it proper for me to put the general question, but I will put it and see. In regard to the character of the system and the supply of water for it and cost of it, are you familiar with those facts? A. Yes sir.

Q Are they substantially as testified to by him?

A Yes sir.

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

A They have been this summer. I guess before that, but this summer I have watched it very carefully.

Q That is--

A Not before this summer.

Q You have not a personal knowledge before this year?

A No.

Q But this year, it has been while you were in the service of the city as watermaster you were riding throughout the city a great deal, were you not? A. Yes sir.

Q Back and forth attending to the distribution of the water in the different lots in the city here and city lots?

A Yes sir.

Q And right by the side of the gardens that you were irrigating or having irrigated, or furnishing water to irrigate were lawns, so that you had a great opportunity to observe whether or not the rules and ordinances of the city relative to the sprinkling--

A Yes.

Q And use of the water was observed?

A I was instructed to guard against mis-use of the water.

Q State how the water was used in that respect, whether there was a waste and extravagant use of it from your observation?

A No sir, it was not wasted.

Q You may also state whether all of the water that came into the city was used economically and beneficially, if you know?

A It was used economically and beneficially what was down here through the four years I was watermaster.

Q Now, you hears the Mayor testify as to the rules and ordinances of the city, fixing sprinkling hours, also the hours for street sprinkling? A. Yes sir.

Q You may state if that was substantially correct?

A That is the fact.

Q And whether those rules and ordinances have been enforced?

A Yes sir, we have had quite a number pay penalty for mis-use of the ordinance.

Q You had had riders employed, and have had them employed to make observations on the violation of these rules?

A We have in the summer from three to five men on the service here.

Q And what have you had in the way of employes to detect leaks and repair them?

A I hadn't anything to do about that, anymore than I saw them

repairing leaks.

Q You heard the Mayor's testimony as to the new establishments of business here? A. Yes sir.

Q And increase of population? A. Yes sir.

Q And increased necessity for water?

A Yes sir.

Q Our necessity for increased water supply?

A Yes sir.

Q You may state whether that is in conformity with your understanding of the facts?

A Yes sir, I know we have applications here now, we cannot accept them because we haven't the water.

Q So that up to the present time you have been beneficially using all the water you have?

A Yes sir.

Q And need more rather than less? A. Yes sir.

ARTHUR SNOW, called by the defendant Provo City, being first duly sworn, testifies as follows:

DIRECT EXAMINATION By Mr. C. C. Richards.

Q What is your name?

A Arthur Snow.

Q Where do you live?

A 649 East, 3rd North.

Q In this city? A. Yes sir.

Q How long have you lived here?

A Thirty-six years.

Q Are you an employe of Provo City? A. Yes sir.

Q How long have you been?

A Between ten and eleven years.

Q What doing?

A Working on the leaks and riding the town.

Q On the water system? A. Yes sir.

Q What has been your principal business or duty, has it been to watch out for leaks, has that been your first duty?

A Yes sir.

Q Have there been any others employed with you?

A Yes.

Q How many?

A From five to six.

Q And you were employed to search for leaks?

A Yes sir.

Q In the system? A. Yes sir.

Q And wherever found to repair them?

A Yes sir.

Q Did you do other things besides that?

A Yes sir.

Q Which had your preference at all times?

A Well, riding the town.

Q In case you discovered a leak did you lay your other work aside to repair your leak, or go on with your work and repair leaks when convenient?

A Always took the leaks first.

Q It was your business to ride the town for what purpose?

A To catch violations of the law.

Q Violating the ordinance and rules regulating sprinkling and use of water? A. Yes sir.

Q In case you discovered them what did you do?

A We turned them off and fined them.

Q Do you know whether there were overflows and waste water, or whether the water was always used?

A No, there was no overflows, only in case working in the canyon, few roots get on the screen.

Q Then was it soon discovered or not?

A Yes, we soon found them.

Q Then what did you do?

A Cleaned the screen.

Q That removed the roots from them and water came into the city?

A Yes sir.

JAMES DUGDALE called by the defendant Provo City,
being first duly sworn, testifies as follows:

DIRECT EXAMINATION By Mr. C. C. Richards.

Q Your name is Robert Dugdale?

A James Dugdale.

Q You live in Provo? A. Yes sir.

Q How long have you lived here?

A Thirty years.

Q You are an employe of Provo City? A. Yes sir.

Q How long have you been?

A Nine to ten years.

Q What doing?

A Well, fixing leaks and riding the town.

Q You work on the water works system?

A Yes sir.

Q Riding the town; what have you been riding it for?

A Why, catching these fellows using water out of their turn.

Q In case you discover them then what?

A Shut them off.

Q And has that been the practice each year since you have been
in the service of the city? A. Yes sir.

Q How many riders did you have, people engaged in repairing
leaks and riding?

A Generally from three to four of us.

Q During the summer time?

A Yes.

Q And it has been your business to ride the town to discover if
people were using water out of hours?

A Yes sir.

Q Or using with an open hose instead of a nozzle?

A Yes sir.

Q And if they were to shut them off? A. Yes sir.

Q And to discover leaks in the system if there were leaks?

A Yes sir.

Q And if there were leaks what did you do, repair them?

A We went right ahead and repaired the leaks.

Q Did the repair of leaks have preference over all the other work you had?

A We would have to go right ahead and fix the leak, or it would get bigger.

Q So you give that first attention? A. Yes sir.

Q Do you know whether with the supervision that was given it by the three or four of you there was much water wasted or lost to the system? A. No sir.

Q That was not beneficially used? A. No sir.

Q You say you don't know or there was not, which?

A There wasn't any water wasted.

MR. C. C. RICHARDS: Gentlemen, we have got a bunch here of notices of appropriation, I guess we had better introduce them.

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

MR. C. RICHARDS: we claim for nothing else.

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

MR. C. C. RICHARDS: Oh no. We are introducing these as a foundation for a decree.

MR. WEDGEWOOD: And as the Maple spring has been taken in they claim nothing for that.

MR. JACOB EVANS: That is in the stipulation.

MR. C. C. RICHARDS: I would like to have these marked and leave to substitute compared copies. These are original documents.

THE COURT: That may be done.

MR. C. C. RICHARDS: I understand the admission of counsel yesterday covered the point of proper posting of notices.

MR. WEDGEWOOD: Yes.

MR. C. C. RICHARDS: We have the record, but I wanted something to predicate the decree on.

MR. WEDGEWOOD: Everything is conceded to final appropriation on those springs.

MR. JACOB EVANS: That are now being used.

MR. C. C. RICHARDS: Now, your Honor please, that is all we have to offer at this time, closing up this branch of the case.

(Papers marked Exhibits 305 to 311 inclusive)

9:30 A. M., Recess to 10:00 A. M., September 10, 1918.

THE COURT: Gentlemen, what do you desire to present first this morning. There are several matters, I understand.

MR. RAY: May it please the court, it is suggested by Judge MacLane this hearing for the Telluride Company that the matter of the proposed amendment of plaintiff's complaint be taken up first.

MR. C. C. RICHARDS: We have no objection, your Honor, waiting until that is disposed of.

THE COURT: That may be presented first.

MR. A. C. HATCH: If the court please, we had expected General Wedgwood to be here when this motion was presented, and presume he will be here.

THE COURT: He intended to come, did he?

MR. A. C. HATCH: I think so, that was my understanding he would be here, and Mr. Evans has just gone to phone to the office. If he was not coming he would have reported, we think.

THE COURT: Then you may take up some other matter.

MR. C. C. RICHARDS: If you are going to wait ten or fifteen minutes, we can put on some short witnesses.

MR. WILLIS: If the court please, perhaps I might present the matter of the Timpanogos Irrigation Company. Like to offer a little testimony at this time.

THE COURT: What is it?

MR. WILLIS: It is in relation to their reservoir rights in Beaver and Shingle Creek. There has been an adjustment made of it, and like to have it so that when the decree is entered-- I don't think there will be any contest as to the matter.

MR. RAY: Is there any order reopening the case with reference to those?

MR. WILLIS: I filed an application with the court and asked at the former session, in May, I think it was, to be privileged to introduce testimony so that a decree might be entered fixing their rights in the reservoir, and their

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rights to flood water down the Provo River, also as to Shingle and Beaver Creek. They were overlooked, evidently, by Judge Thurman when the matter was up.

MR. A. C. HATCH: Filings were introduced.

MR. WILLIS: Yes, filings were introduced, it is simply making a record as to the interests they have, and I donot think there is any contest as to the matter.

THE COURT: Call your witnesses.

JOSEPH R. MURDOCK recalled.

DIRECT EXAMINATION by Mr. Willis.

- Q You have been sworn before? A Yes sir.
- Q Are you familiar with the interests of the Timpanogos Irrigation Company of Wasatch county, as to their rights in the reservoirs at the head of Provo River?
- A Yes sir.
- Q Will you kindly state what interest the Timpanogos Irrigation Company has in the reservoir at the head of the river?
- A They own a one-fourth interest in the Wall, Trial and Washington Lakes and tributaries to those lacks.
- Q Do you know whether or not the application for appropriation and the certificate have been filed here in the court heret-fore?
- A It has.
- Q And as to the interest of the Timpanogos Irrigation Company in the Beaver and Shingle Creek, are you familiar with their interest there?
- A Yes sir.
- Q Will you kindly state what that interest is?
- A The Timpanogos Irrigation Company made the first application upon the upper waters of Beaver Creek, a stream which flows close to the divide between Beaver Creek and Provo River, and in connection I will say that the stream which comes right down on the divide called Shingle Creek and at the time that the application was made the stream was flowing-- this stream

on the divide had not been diverted, and was flowing down Beaver Creek, and after flowing that way for a number of years, except when there was excessive high water that stream at times would carry a hundred to one hundred and twenty-five second feet of water, that is Shingle Creek branch, and they made application for 150 second feet on the two streams, intending to divert the Beaver Creek into Shingle Creek and turn the Shingle Creek down Provo River. Later they assigned one-half of that to the Provo Reservoir Company.

Q And the Timpanogos Irrigation Company would be interested in having one-half of that amount of water?

A Yes sir.

Q What is the Shingle Creek, what is it naturally a tributary of?

A Provo River. Pardon me, I will say indications appear that stream has flowed-- stream in ages past -- into Beaver Creek, sometimes into Provo River, but at the time that application was made it was practically all flowing into Beaver.

Q And what is Beaver Creek a natural tributary of?

A Of Weber River.

Q For what length of time has the water been diverted from Shingle Creek and Beaver Creek?

A Into Provo River?

Q Yes.

Q None of the water of Beaver Creek has been diverted into Provo River. It is situated about a mile west of Shingle Creek, and will require some construction to convert it into Shingle Creek, but Shingle Creek has been diverted three or four years since the application was made, into Provo River, in the early part of the season.

Q What period of time has that water been diverted to the Provo River system?

A From sometime in April until the latter part of May.

Q Do you know whether or not the application and certificate of approval in the case of the Shingle Creek and Beaver Creek have been filed in this court?

A I did not understand the first part of your question.

Q Do you know whether or not the application to appropriate and the certificate of the engineer allowing the appropriation of the Shingle Creek and Beaver Creek have been filed in this court?

A They have.

CROSS EXAMINATION by Mr. Ray.

Q Mr. Murdock, you say in ages past Shingle Creek was a tributary to Provo River. That has been during your memory that Shingle Creek was a tributary to Provo River, has it not?

A No sir.

Q During certain seasons of the year it has been, has it not?

A Only when there has been, I should say the excess of 125 second feet, when it would flow over its banks, and some would flow over, but I never saw more than five or ten second feet of water flowing from Shingle Creek into Provo since I first made application on the waters of Provo River, about 1895 or '96, during which time I have been acquainted with it.

MR. WILLIS: Do you mean 1895?

A Yes, I mean 1895, about that time we made application on the Provo River for reservoir purposes.

Q Was Shingle Creek diverted to the Weber River by artificial means?

A Yes sir.

Q And of course that has been since irrigation has been in this state?

A I would think so.

MR. WILLIS: Now, in connection with that, I ask the name of Elizabeth Hamilton be substituted to the interest of the estate of John Koomer, deceased, to the amount of water that was decreed by your Honor; that is, for six acres of water right through the Midway lower town ditch, Mrs. Hamilton having purchased all the rights of the Koomer estate to the land and water. Ask she be substituted in place of Emma Koomer

Bond, administratrix.

MR. RAY: I don't see any purpose in that if there is a record title running from the decreed right to the plaintiff.

THE COURT: As the record now stands you would have nothing to base that decree upon.

MR. WILLIS: In the evidence in the findings or in the opinion of the court that was rendered heretofore John Kummer was awarded water from the Midway lower ditch, or through the Midway lower ditch, for six acres of land, but Mrs. Hamilton having bought the interests--

THE COURT: When did she buy the interest?

MR. WILLIS: Since the time the court rendered its decision.

THE COURT: I cannot change the decision. You have got nothing to base the change upon. There would be nothing in the record to support such an entry.

MR. JACOB EVANS: Your client will succeed to the interest, won't she?

MR. WILLIS: Yes.

THE COURT: If you desire, you can make substitution by making the proper application.

MR. WILLIS: I filed that, or sent it by mail to your Honor shortly after you were here in the May term.

THE COURT: At some time before we close, I will permit you to introduce your evidence if you desire to do that. It is encumbering the record with something that is to my mind entirely unnecessary, but I would have to have something on which to make the order. I think it is in better shape as it now stands than to encumber the record in this way.

MR. WILLIS: That will be all.

"That as heretofore stated in paragraph 27 thereof the flow of said river varies in volume season by season, and at different times in the same season, and plaintiff alleges upon information and belief, which information is derived from records of the flow of said Provo River for many years past, that the normal flow from said river during the low period of each irrigation season is not less than substantially 305 cubic feet per second".

The evidence in this case which supports that allegation is based upon the hydrographic survey which was made and introduced in evidence. I cannot at this time state the number that was given to this exhibit, but it shows that for a period of some twelve or thirteen years the normal flow of Provo River, that is the low water flow of Provo River has never been less than approximately 305 second feet, and we assume that the court in making its finding as to what constituted primary water, based its finding upon this exhibit which I have referred to, and that was the object of that amendment.

Now I think the balance of the amendment is in effect the same as the original complaint. I will read it and your Honor may compare it.

MR. RAY: I think it is.

MR. JACOB EVANS: That plaintiff is the owner by acquisition and by purchase from prior appropriators thereof of the right to the use of the following quantities of the waters of Provo River, etc. (Reading).

That last paragraph is to cover the finding of the Blue Cliff Canal Company of a primary right.

MR. McCLAIN: And that, Mr. Evans, differs.

MR. JACOB EVANS: That differs from the original complaint. These facts came out during the evidence and made it clear that the volume of water now flowing in Provo River is very much in excess of what it formerly was.

in other words, it is a developing river, a growing river, because of the irrigation in Wasatch County, and we did not know at the time of the preparation of the complaint just what the facts would show with respect to that matter, and since the facts have been introduced and shows a larger river than had ever existed prior to this time, we thought it proper to ask this amendment be made so that it might conform to the proof in this case, and thereby form a basis for the findings and the decree to be made in conformity with the tentative decision of the court. I don't think there is any question as to the law, being permissible to make your pleadings, to amend your pleadings to conform to the proof. In fact, it is elementary and is usually done as a matter of course. We think this is of vital interest to us, and we respectfully request this amendment be permitted at this time

MR. RAY: May it please your Honor, we resist the making of the amendment at this time and apropos of Mr. Evans observation that ordinarily the party is permitted to amend his pleading to conform to the proof, that is a rule of course permissible in many cases, but the situation here is not one of them which brings the plaintiff within the rule at all. They are asking here for an amendment which is directly contrary to the theory upon which they pleaded their case originally, and upon which they tried their case to this court. If the pleader in an equity case states a set of facts which entitles him to relief other than the relief for which he prays, certainly if it is not an injustice to the opposing party there may be an amendment; but in this case they pled the Blue Cliff right as a secondary right. One of the first things that is done in the case is to put Mr. Wents upon the stand and introduce the survey, what he has found the normal average low water of Provo River to be during a series of years.

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(Argument.)

Now, we object to the amendment as not being timely, as not being a proper exercise of the discretion of the court, as not supported by the evidence in this case, and that the evidence in this case under the Constitution of the State of Utah shows that the right of the Provo Reservoir Company to the use of the quantity of water awarded by the court had vested prior to the adoption of the Constitution, and that it cannot by any statute be pro rated with a right vesting at a later date.

MR. WEDGEWOOD: I don't quite catch--

MR. RAY: Our right was a vested right, General, and I think the mere statement of it ought to make it clear, when the Constitution was adopted, and it was a vested right to the use of a sufficient quantity of water to irrigate forty-three hundred acres of land. I understand in this case reliance is placed upon the statute which takes the minimum mean flow of the river, not the actual minimum, but it is the average minimum flow, making it 305 second feet; and with that vested it could not be divested by a statute which made use subject to averages. It will be contended in this case if that is done Provo City will have a primary right and somebody else will have a secondary right and Provo Bench will have a right subsequent to somebody else. We are willing to bear the burden of that contention and counsel need not worry about our being secondary to Provo City, because we are satisfied the quantity of water is sufficient at its very minimum flow to satisfy Provo City and our appropriation, and out of the chances which we may take in that respect counsel ought not to be able to extract the right of getting their secondary and later appropriation upon an equal basis with our appropriation.

MR. JACOB EVANS: Isn't it a fact that under this tentative decision you have been awarded primary water largely

in excess of that water that was awarded to you under the old decree, and isn't that true of practically all the bench canals?

MR. RAY: I am not able to say whether it is in excess of the quantity of water found in the old decree, and not concerned about that at all. I have never argued the validity of the old decree here. I am perfectly ^{willing} the decree of this court put the priorities in this case in the order of the filing and perfection of the water rights.

MR. JACOB EVANS: In other words you want to have your priority and make it greater than it was in the past.

MR. RAY: Oh no, I don't want to make it any greater than it was in the past, nor any different than it was in the past.

MR. A. C. HATCH: Pardon me, the 4300 acres you are claiming as a vested right, some of it was first irrigated in 1916.

MR. RAY: Oh no, that is a bald statement not supported by any record. It has been irrigated ever since the appropriation was completed in about 1886, or along there, the 4300 acres, and the evidence so shows.

MR. A. C. HATCH: Let me call your attention to the evidence as to the shares, supposed to irrigate two acres and some irrigated as high as four acres in a manner with a share. Every acre that has had water upon it under your canal is within the 4300 acres.

MR. RAY: Oh yes.

MR. A. C. HATCH: And there is a difference between two acres to the share and four.

MR. RAY: It is admitted by the plaintiff under their own surveys to be 4,332 acres of land which were irrigated, and to which we had a right of water prior to any of their filings. That is admitted by counsel, there was no controversy upon it, stipulated the acreage which we

had, and fact we were entitled to water for it.

MR. McCLAIN: If the court please, the defendant Utah Power & Light Company objects to the allowance of the amendment to the complaint tendered on behalf of the plaintiff Provo Reservoir Company, on the ground, first, that the amendment is not presented in time, that an amendment such as this is should be tendered at the earliest possible time during the progress of the trial when the state of the alleged proof is developed to such an extent as to justify the amendment, so as to give the adverse party opportunity to meet upon the trial the allegations of the complaint as amended.

Second, that the amendment does not conform to any proof in this case, but is in direct contravention of the proof submitted, not only on behalf of all the parties, but specifically on behalf of the plaintiff who tenders the amendment, in that the plaintiff during the course of the trial tendered the decree which is alleged in paragraph 29-D of the complaint that is to be stricken by this proposed amendment and stated expressly in tendering such decree that he relied upon the decree in so far as it fixed the rights of the parties to that decree.

Third, that the amendment interjects an entirely new and different cause of action into the controversy here upon an entirely different class of right than that which was alleged in the complaint, and upon which the trial was had, which cause of action the defendants in this case and particularly the defendant Utah Power & Light Company has had no opportunity whatsoever to meet.

Fourth, that to allow the amendment at this time, and to enter a decree upon the complaint as amended it would deny the defendant, the Utah Power & Light Company, or rather deprive the defendant, Utah Power & Light Company of

its property without due process of law in contravention to the provisions of the Constitution of the State of Utah, and 14th amendment to the Constitution of the United States.

The first essential in law, if I recall correctly, is that the party whose property is -- the right to allege property is brought in controversy shall have notice that his property rights are being attacked, and such notice takes the form under our practice here of an allegation in the complaint, or paper filed. The complaint as filed here alleged as plainly as could be alleged in the English language, that a right was claimed subordinate to the right of the then Telluride Power Company, the now Utah Power & Light Company, and it is sought not only without proof, but also without notice and any opportunity to the Utah Power & Light Company to be heard, to transmute or transform that right into a right which is equal to, in seasons of low water, and therefore directly an infringement of the right of the Utah Power & Light Company. Such condition, as Mr. Ray suggested, occurred this year, when the flow of the river was less than the primary right of the Utah Power & Light Company as decreed in this court, to say nothing of the right of the Blue Cliff Canal Company; and the effect of the administration of this tentative decision of the court this past summer was to deprive the Utah Power & Light Company of water, the ownership of which was never questioned at all. The foregoing states, I think, the objections which we formally make to this amendment. I would like to repeat briefly what I said before when this question was incidentally discussed, which perhaps is unnecessary, as the court may recall it, but it is so pertinent to this phase of the situation it won't take but a minute to recall it to the court's attention. The Chidester decree was rendered in 1907, I think. At that time the Olmstead developments of the Utah Power & Light Company had been completed, and the

rights there involved were adjudicated in the decree, whether properly so or not is not before the court at this time, whether it may be at some other time or not. For ten years, or until and including the season of 1917, the watermasters of Provo River distributed the waters of that river as between the defendant Utah Power & Light Company and the plaintiff Provo Reservoir Company on the basis of the Chidester decree. This complaint was filed some three or four years ago alleging a secondary right in behalf of the Provo Reservoir Company in this Blue Cliff right, and during the course of the trial, the defendant, Utah Power & Light Company, relying on such allegation and also knowing what was being done by the watermasters in the distribution of the waters of the river paid no attention to the proof, if any, which was offered in support of the Blue Cliff right. It was not until the season of shortage this year that the officials of the company, the operating officials of the company, or myself, as its consulting attorney, had the slightest idea that the Blue Cliff right had been subject to the adjudication, or adjudicated in a way contradictory to that prescribed in the old decree, and the concrete result of this decision as now rendered and of a decree as it would be rendered, as it would stand were it rendered upon this decision as it now stands, and upon this proposed amended complaint, would be to take from the Utah Power & Light Company water that it has had with the consent and acquiescence of the party now taking this water, for ten years last past, in a proceeding where we were never given the slightest notice whatsoever that our right to that water was being questioned.

THE COURT: Judge McClain, do you understand that would be so, if the court should conclude to grant the amendment do you understand that would be the result, to preclude you from meeting it?

MR. McCLAIN: Of course, if the court grants it we would apply for leave to amend our answer.

THE COURT: Certainly, it will be granted without any question.

MR. McCLAIN: I have no question but it would be granted and we would have a trial on that question.

THE COURT: That is the reason I asked that question. Do you anticipate if the court should grant this amendment the court would cut you off without any permission to be heard at all?

MR. McCLAIN: I certainly do not.

THE COURT: Then your argument would be without any foundation, I mean that part of your argument.

MR. McCLAIN: This amendment has been tendered after the case is closed, and there was no opportunity for us to offer evidence on it, and the first objection was the amendment was not offered in time.

THE COURT: I am not referring to that at all. That is very cogent, and strikes the court as being a very strong argument against this amendment, but I was merely suggesting to your argument your property would be taken without due process of law and without permission to introduce any evidence. I was wondering if you thought the court would take such a position.

MR. McCLAIN: No, I don't think the court would take such a position, I think it would be very unreasonable, but I think in stating my reasons, I think I should state everything to protect myself against such a contingency however remote it would be.

(Argument.)

MR. WEDGEWOOD: If your Honor please, as I listened

to the gentlemen, both Mr. Ray and the Power Company's representatives, it seemed to me that they were outside of the issue, and the question asked by the court I think clears it up very materially. A case of this character to my mind, and, I think as shown by the ordinary practise and decisions of the higher courts is a case far separate and apart from the ordinary law case or case pertaining to real property, either in law or in equity, etc.

(Argument.)

MR. RAY: May I ask you a question, that is whether or not it is not admitted that the introduction of the survey, hydrographic survey there was prior to the introduction of testimony as to the Blue Cliff right.

MR. WEDGEWOOD: I would assume if you suggested it that it was.

MR. RAY: And that you pleaded the Chidester decree setting forth a mean river of three hundred second feet?

MR. WEDGEWOOD: We recited the Chidester decree--

MR. RAY: And claimed under it.

MR. WEDGEWOOD: I don't think the prayer will justify that statement but even if we had --

MR. RAY: I have not finished my question -- and with those facts all before you, is it not a further fact that I and other counsel announced in open court we would not contest the Blue Cliff right because it was a secondary right .

MR. WEDGEWOOD: Even if that was true--

MR. RAY: And we waived our right to put in testimony and you permitted us to.

MR. WEDGEWOOD: Even if that were true, that does not change this situation at all as has been recited by Judge Hatch.

(Argument)

MR. C. C. RICHARDS: May it please the court, I don't want to join in either side of this argument, because, as I understand the position of Provo City we are out of it by our stipulation, but just want to call attention to this fact that by reason of being out of it we do not understand this amendment is going to in anyway undo or impair or prejudice us on the terms of the stipulation. In other words, that so far as the plaintiff is concerned and the defendant Provo City is concerned, that it will be considered as though the amendment as to us had been made prior to the stipulation. The stipulation will be effective and this will not undo it or affect it in any way.

THE COURT: no.

MR. F. S. RICHARDS: We just wanted the record to show so that there would be no misunderstanding about it. Mr. Evans called attention to it at the time.

THE COURT: I will say, gentlemen, ever since this matter has been called to the attention of the court by the objections and subsequent proceedings I felt that the court was a little to blame, possibly for not examining the pleadings. If the court had examined the pleadings and the court's attention been called to what has now been called to the attention of the court again, the fact that the others waived any opposition because it was treated as a second class right, the court would not have felt at liberty to award it as a first class right; but without those matters in mind, the court examined very carefully the evidence to determine the quantity of water that should be regarded as first class right and I was impelled to the conclusion that there was in the river as first class or primary water sufficient to include all the rights, including the Blue Cliff Canal right. Some matters have occurred since to cause the court to hesitate a little whether the court came to a correct conclusion in relation to that. I speak now of the experience of the

distribution of the water of this year, but however that may be, whether the court reached a correct conclusion or not, it seems to me that the issue in this case ought to be so framed as to include that question, and I think it can only be done by permitting the amendment, and that would of course follow as a matter of course that the parties interested would be permitted to answer this amendment, answer the complaint as amended, and to introduce such proof as they cared to in opposition to the proof that was introduced upon which the court based the findings that there was in the river at its low stages sufficient primary water to include this right. It has not been suggested to the court by either Mr. Ray or Judge McClain that any situation as so changed that this evidence is not now available as it would have been then. That would have appealed very strongly to the court if that was shown, and the court would deny the amendment.

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MR. A. C. HATCH: I did not understand that remark of the court.

THE COURT: I said it has not been suggested by Judge McClain or Mr. Ray that the situation had so changed that the evidence they would have offered in opposition to the evidence of the plaintiff was not now as available as it was then. If it had been shown that was the case the court would have denied the application as coming too late, but in view of the general situation and the desire of the court to be right upon the final conclusion with reference to this, I will permit the amendment, and give such time as the parties affected by it -- and I think only the two, Provo Bench Canal and Utah power & Light Company-- give them such time to answer it as they feel they require, and I will fix a time giving them an opportunity to introduce such evidence as they may have in opposition to the evidence upon which the court based the conclusion that the primary

river, the river of primary water had increased and was sufficient to include the Blue Cliff right. Now, I refer to the evidence, and considerable of the evidence, to the effect that the river since-- well, particularly since ^{the} 1902 decree, and very largely since the 1907 decree had increased, the mean flow of the river, at the low stages, had increased a hundred second feet. Now, I call the attention of the counsel to these features so that you may know what the court had in mind and what you may direct your evidence to.

MR. RAY: I ask your Honor whether evidence will be received upon the question of the fact that the Blue Cliff Company had never perfected a right to the use of the quantity of water equal to that distributed to it.

THE COURT: What do you mean, 46 second feet?

MR. RAY: Yes, or anything approaching it.

THE COURT: Yes, I think so.

MR. RAY: We will claim the capacity--

THE COURT: I think you are entitled to show any of those matters that are affected by the placing of this right in the first class with you.

MR. McCLAIN: If the court please, so that this may be all before us, we should be permitted, or the plaintiff should be required upon request to recall for cross examination any of the witnesses offered by them in support of their right .

THE COURT: Yes, I think that will be true, those witnesses that testified to any of the situations, there are very few of them.

MR. McCLAIN: On behalf of the Utah power & Light Company while it is not necessary, we will take a formal exception to the ruling, and will ask until October first to answer, that is twenty days.

THE COURT: I think that is very reasonable time.

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MR. RAY: May the Provo Bench Canal Company have an exception to the ruling of the court, and the Timpanogos Canal Company have an exception to the ruling of the court, and may we have until October first?

MR. McCLAIN: I shall be occupied and Mr. Story will too, probably in connection with a water suit on the Bear River pretty continually during the balance of this month and also during the month of October.

THE COURT: I could not hear it in October. It will be later than October, must necessarily be account of my engagements, and engagements I know of of some of the other counsel.

MR. McCLAIN: We hope very much this case may be disposed of this winter.

THE COURT: It would have been something of a satisfaction to me to say that I would not hear anything further than just close the matter and deny this application because of the hardship it is going to be upon me to find the time to hear it, but I grant it because I think justice requires this matter be gone into again, especially in view of the fact the court came to the conclusion there was that quantity of primary water; and I dislike very much to have to hear it, and I hope that counsel can condense the matter so that it won't take a great length of time. I will find a time this year, if I possibly can, and dispose of it and get it out of the way before the end of the year, and surely before the winter is over. That disposes of all the matters except the provo City town lots or acreage, does it? I want to hear and dispose of everything this session except the matter that is included within this amendment, and the issues raised by it, I want to round up everything else that we can.

MR. WEDGEWOOD: I have one matter in my mind, if I can have a chance to talk with Mr. Evans, Judge Hatch, and

the others for three or four minutes, I might want to suggest it before Mr. McClain goes.

THE COURT: I will take a recess for five minutes.

(Recess.)

MR. WEDGEWOOD: The point I have had in mind for sometime, and which cropped out in the prior hearing in this way, I think possibly at my intimation to the effect that some of these questions would settle themselves quite readily, or the situation would be very apparent when the court determined the amount of water that the Power Company was entitled to as a matter of right. I think I said at the time I could see how that would affect the question and I believe the court will see now that the quantity of water to which the Power Company is entitled has considerable bearing and influence on the questions which are now before us. They were before us as much heretofore as they are now. They are before us now as a fact, now they come before us in a proper legal way. My associates agree with me that pending the time of the next session of the court if the court could determine that question, I believe everything is in.

THE COURT: I have the briefs, I haven't had an opportunity to examine them, but the briefs are in.

MR. WEDGEWOOD: There is a datum point to which other things under certain conditions have all got to conform. Of course that question don't change our plans, but at the same time there is a situation there.

THE COURT: Yes, I can understand. It always seemed to me more material to the people below than it was to your people above, that is more effect.

MR. WEDGEWOOD: More material to us than to them by far.

MR. RAY: May it please your Honor, I would like

to ask the court to direct the Commissioner to make up an average natural Provo River for all the years of which he has the data. He has made a plat from 1905 to 1916, and we would like to have it carefully worked out for the years 1889 to 1918. I understand from the Commissioner's report for 1915 they have data for all those years and we would like to have that worked out for all those years.

THE COURT: Can you do that, Mr. Wentz?

MR. WENTZ: The only reason I began in 1905 is because that is ~~because~~ that is the present gauging station, before 1905 the gauging station was down near the Utah Power & Light Company, and the measurements were unreliable, and for that reason I began with 1905 and continued to the present, because those measurements are reliable. I would be glad to include up to the present time with that, but I don't think it is advisable to base too much reliance on those measurements.

THE COURT: The amount of reliance to be placed on it is a different thing. You have the data from which you can make such curve; although you suggest it is not reliable, you have the data?

MR. WENTZ: Yes.

MR. RAY: We would of course want to examine Mr. Wentz on that and not take his conclusion on that.

MR. WEDGEWOOD: May he make two gaugings in two pieces prior to 1905 in one part and this on the other?

MR. RAY: No, I have no objection to his making one from '89 to 1905 and one from 1905 to 1918, and then a composite one.

MR. WEDGEWOOD: He can do that.

THE COURT: Mr. Wentz, do you understand from this talk what they want?

MR. WENTZ: Yes.

THE COURT: You can have that for us at the time we

need it?

MR. WENTZ: Yes.

THE COURT: Can you indicate, Mr. Richards, about what length the evidence is going to take in relation to the city?

MR. C. C. RICHARDS: Unless there is much difficulty on the part of the cross examination, we will get through very quickly. I think this afternoon ought to be sufficient. I will say frankly my idea would be this, to make the direct examination just as brief as possible and leave to the defense such cross examination as they may desire. They will have all the data before them so they can go into any part or all of it.

12:00 Noon, Recess to 1:30 P. M.

MR. JOHN E. BOOTH: If the court please, a little matter I presented a week ago today I should be very glad to be heard on it for a few moments at your convenience. I don't care to break in.

MR. C. C. RICHARDS: That is all right with us.

MR. JOHN E. BOOTH: I could call the court's attention to it at this time, of course it will be phenomenal if a matter of this character and importance, that the varied interests there are here should escape without some little errors-- I think your Honor will agree with me on that,-- and when a person is itching he scratches, don't he?, and he tries to find out what is the matter with him. We have been itching a little in our East River Bottoms Company and scratching also, and found out what is the difficulty. The Upper East Union Canal Company has a credit in their acreage for twenty acres that don't belong to them, and it belongs to us, and that is the twenty. I didn't know of it at the

time, and it will make no difference to anybody except to the Upper East Union if the twenty is taken away from them. Now, the Upper East Union, I don't know who represents them, they have had so many attorneys, and I have ^{not} been able to consult with them. If they agree to it there will be no difficulty about it.

THE COURT: No difficulty whatever.

MR. JOHN E. BOOTH: If they do not, we will ask to put on witnesses.

THE COURT: You can be ready to do that this afternoon?

MR. JOHN E. BOOTH: If we can get the attorneys, I don't know who represents them.

MR. A. L. BOOTH: Parker and Robinson represented them at the last hearing.

MR. JOHN E. BOOTH: I will endeavor to see if I can get them

WILLIAM M. BOSTAPH, called by the defendant Provo City, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. G. C. Richards.

Q Your name is William M. Bostaph?

A William M. Bostaph.

Q Where do you reside?

A In Salt Lake City.

Q What is your profession?

A I am a civil engineer.

Q How long have you been practicing your profession?

A Over thirty-five years.

Q Where?

MR. WEDGEWOOD: We will waive qualification if you desire us to. If you want to put them in for some

purpose---

MR. C. C. RICHARDS: I will be very brief on that line then.

Q You have been practising your profession in Utah for how many years?

A Twenty-nine years in Utah.

Q Have you had to do with measurement of water?

A Yes sir, for the last-- well, practically for twenty-nine years dealing with irrigation and water supplies of various kinds has been the principal part of my work.

Q Application of water to the soil?

A Yes sir.

Q Now, I will ask you if you have been engaged here in Provo in making an examination and survey of the properties testified to in this action as the city lots that are subject to irrigation from the waters furnished the city for irrigation purposes?

A Yes sir, I made determination of some of the lots in Provo.

Q Now about when was that done, you may tell us approximately.

A It was in May and early June.

Q Of this year?

A Of this year, yes.

Q Can you tell the blocks that you examined?

A Yes sir, I have a map with them marked at the time I examined them, that give the number of all the blocks and the date on which it was done.

MR. C. C. RICHARDS: I don't know whether there will be objection to the form of this question, it might save time, whether Mr. Bostaph knows whether he examined all those lots except those examined by Mr. Stewart, otherwise it will save listing the lots. He has the blocks there and we can put them in the record as well as not. Otherwise it would save time.

Q Did you have the immediate supervision of the making of this

A I didn't hear.

Q Did you have the immediate supervision of the making of this survey, and direction of the doing of this work?

A Yes, general supervision was under my direction.

Q Who was associated with you?

A Mr. Stewart and Mr. Paulson accompanied me part of the time, and Mr. Goddard the balance of the time, one or the other was always with me.

Q Do you know whether you examined all of the blocks and lots that Mr. Stewart did not examine, have you checked up with him?

A Yes sir, I examined all the blocks that Mr. Stewart did not examine, and some of the blocks that Mr. Stewart examined.

Q Do you know whether Mr. Stewart examined some that you examined?

A Yes, he examined some that I examined, I am so advised.

Q But you don't know that directly. Now, Mr. Bostaph, in the making of the examination by you, you may state if it was made for the purpose of ascertaining and determining the quantity of each lot or part of a lot that was owned and cultivated separately, or separate tracts whether owned separately or not, with a view of ascertaining the exact amount for each tract, and the consequent amount as a total of the acreage that were subject to irrigation under the city irrigation system ?

A Yes sir, that was the object of my examination.

Q Now, did you make a detail statement, have you, showing the amount that was allowed for each tract of land?

A Yes sir, there is a statement here, a list of the tracts owned by the several parties in each block that I examined, and on that statement is marked the number of acres or the number of square rods that I excluded from irrigation.

Q So that for the purposes of cross examination you could answer

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IN DIST. COURT
UTAH CO., UTAH
FILED

M. M. Hale
E. B. Saxtrup

Clerk
Deputy